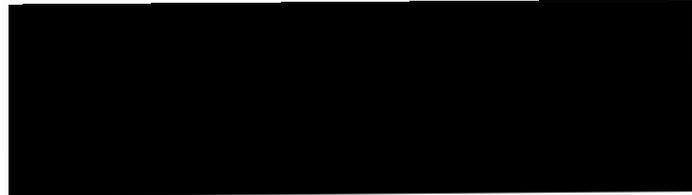




U.S. Citizenship
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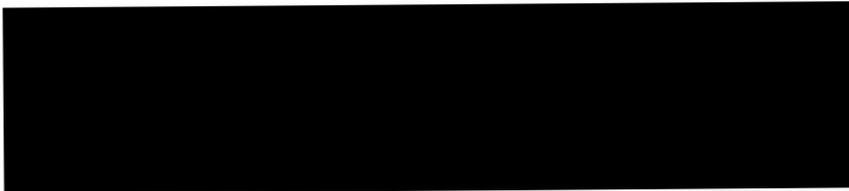
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tailor and dry cleaner. It seeks to employ the beneficiary permanently in the United States as a tailor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and that the beneficiary failed to establish that he possessed the minimum requirements for this classification. The director denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 20, 2005 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the beneficiary possessed the minimum requirements for the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 10, 2001. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour (\$33,280 per year). The Form ETA 750 states that the position requires three (3) years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence in the record includes Form 1040, U.S. Individual Income Tax Return, filed by [REDACTED] (Mr. [REDACTED]) for 2003, bank statement for Mr. [REDACTED] checking account covering the period July 19 through August 18, 2005 and an appraisal and relevant documents for the house owned by Mr. [REDACTED]. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$150,000, to have a net annual income of \$90,000, and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that both the balance reflected on the bank statement and the equity of the house exceed the yearly proffered wage of \$33,280.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit any evidence showing the petitioner hired and paid the beneficiary any compensation during the relevant years. Therefore, the petitioner failed to establish its ability to pay the proffered wage from the priority date in 2001 onwards through wage paid to the beneficiary.

As previously noted, the evidence indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33², Adjusted Gross Income, of the sole proprietor's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2003, which demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage:

In 2003, the Form 1040 stated adjustable gross income of \$23,382.

Counsel did not submit a statement for living expenses of the sole proprietor's household. However, in 2003 the sole proprietor's adjusted gross income was not sufficient to pay the proffered wage even without consideration of the sole proprietor's household living expenses. Therefore, the petitioner failed to establish its ability to pay the proffered wage as well as the sole proprietor's living expenses for 2003.

The record does not contain any copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001, the year of the priority date, and 2002 or any other regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage for these two years. The petitioner failed to establish its ability to pay the proffered wage in 2001 and 2002 because it failed to submit regulatory-prescribed evidence of the ability to pay for these two years. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2001 and 2002. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding contains the bank statement for the sole proprietor's checking for a period from July 19, 2005 to August 18, 2005. The bank account appears to be a personal checking account and the statement indicates that the sole proprietor had the balance of \$33,330.95 as of July 19, 2005 and \$31,275.41 as of August 18, 2005. The petitioner did not submit the bank statement for the end of the year 2005, therefore, it is not clear whether or not the sole proprietor would have sufficient balance to pay the proffered wage at the end of the year with balance decreasing \$2,055.54 every month. Without the living expenses of the sole proprietor's household, it is also not clear whether the current balance of \$33,330.95 would be sufficient for the sole proprietor to pay the proffered wage and to

² The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 35 for 2002 and Line 34 for 2003.

cover his household living expenses. In addition, the balance in July 2005 cannot establish the petitioner's ability to pay the proffered wage in 2001 through the present.

Counsel also asserts that the sole proprietor's real property can establish the petitioner's ability to pay the proffered wage. However, while CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay, the AAO does not generally accept a claim that the sole proprietor relies on the value of his/her residential real property to show their ability to pay because it is not likely that the petitioner will liquidate or encumber such assets in order to pay a wage. Therefore, counsel's reliance on the sole proprietor's real properties to demonstrate the petitioner's ability to pay is misplaced.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2001 through the present.

The second issue is whether or not the beneficiary possessed the minimum requirements for the proffered position.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). As previously noted, the priority date in the instant case is April 10, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of tailor. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|---------|
| 14. | Experience | |
| | Job Offered | 3 years |
| | Related Occupation | Blank |

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A reflects special requirements as follows: "[s]tarts, stops, and controls speed of machines, using pedal and knee lever. Sewing machine repairs[sic] when defects are caused[sic] by machine malfunction."

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 5, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for a tailoring business named [REDACTED] Men's Wear in Syria from 1978 to 2000. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The relevant evidence in the record includes Occupational Certificate issued by Syrian Federation of Trade Association, Certificate of Membership for 2001 issued by Syrian Arab Republic Damascus Countryside Chamber of Commerce and Certificate of Registration issued by Syrian Arab Republic Ministry of Industry.

The record shows that the beneficiary ran his own business in Syria. It appears that a letter from a former employer as generally required by the above regulation is unavailable. Per the regulation, other documentation relating to the alien's experience or training must be considered. The Occupational Certificate issued by Syrian Federation of Trade Association on July 6, 1982 certifies that the beneficiary "has been since 1976 practising as a men's and kids readymade tailor in his shop in [REDACTED] and is registered with our association under No. [REDACTED]" Certificate of Membership issued by Syrian Arab Republic Damascus Countryside Chamber of Commerce to the beneficiary on January 20, 2001 indicates that "this certificate is valid until the end of 2001." Certificate of Registration issued on July 17, 1982 by Syrian Arab Republic Ministry of Industry shows that the beneficiary started his business in readymade men's wear in 1978. Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires other documentation meet certain evidence standard and include the basic information required for the letter from current or former employer(s). The documents submitted in the instant case do not verify that the beneficiary was employed or self-employed as a full time tailor, nor do they provide any descriptions of the duties he performed. They do not provide the specific starting and ending dates for the beneficiary's self-employment in the tailoring industry. The beneficiary's membership with Syrian Arab Republic Damascus Countryside Chamber of Commerce for 2001 while he has been in the United States since 1999 cannot establish the beneficiary's three years of qualifying experience in Syria. Registering a business and having a membership for a certain year cannot automatically establish that the beneficiary ran a tailoring business and/or was self-employed as a full time tailor for at least three years.

These documents provide inconsistent information regarding the beneficiary's self-employment which casts a doubt of reliability of these documents. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Counsel asserts on appeal that there is no inconsistencies between the documents. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the petitioner did not submit any objective evidence to support the contents of these documents, such as the beneficiary's business operation records or tax returns to resolve inconsistencies. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts

to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO is not convinced with these documents that the petitioner submitted sufficient evidence to demonstrate that the beneficiary worked as a full time tailor for more than three years prior to the priority date.

For the reasons discussed above, the AAO finds that the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage and met its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2001 through the present, and that the petitioner has not established with regulatory-prescribed evidence the beneficiary's prior three years of experience as a full time tailor, and further failed to establish that the beneficiary is qualified for the proffered position. Counsel's assertions on appeal fail to overcome the ground of denial in the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.