

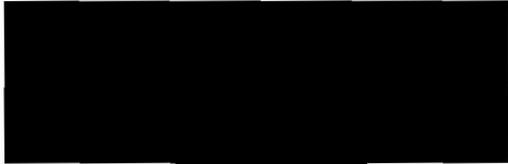
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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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Services

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DEC 04 2008

FILE: [Redacted]
LIN 07 204 50162

Office: NEBRASKA SERVICE CENTER

Date:

IN RE: 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The Director granted a subsequent Motion to Reopen and affirmed his decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a trainer of racehorses. It seeks to employ the beneficiary permanently in the United States as a thoroughbred racehorse groom. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 June 27, 2008 denial, the issue in this case is 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. Beyond the decision of the director, the AAO notes the additional issue of whether or not the petitioner has established that the beneficiary is qualified for the proffered position.¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.

¹ The director did not note this issue in his decision, nor did the petitioner address this issue on appeal.

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 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$21,736.00 per year. The Form ETA 750 states that the position requires six months of experience.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² Counsel submits a brief on appeal. Other relevant evidence in the record includes bank statements for the petitioner; a letter from [REDACTED] CPA, dated August 29, 2008; Forms W-2 for the beneficiary; and financial statements for the petitioner. 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 structured as a sole proprietorship. On the petition, the petitioner did not state the date it was established. The petitioner stated that it currently employs 15 workers. On the Form ETA 750B, signed by the beneficiary on June 14, 2007, the beneficiary claimed to work for the petitioner from November 1999 to the present time.³

² 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).

³ The AAO notes that the petitioner has substituted a beneficiary. An employer initiates the substitution process by filing a Form I-140 petition on behalf of the alien to be substituted. An employer must submit Part B of Form ETA 750, signed by the substituted alien. Memorandum from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). As the petitioner has submitted a signed Part B of Form ETA 750 for the substituted beneficiary and filed a Form I-140 on behalf of the alien to be substituted, the AAO will conduct its analysis with respect to the substituted beneficiary.

On appeal, counsel asserts that the sole proprietor's cash and ownership of thoroughbred horses demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 has not established that it employed and paid the beneficiary the full proffered wage of \$21,736.00 in 2001, 2002, 2004 and 2005.⁴ The petitioner established its ability to pay the proffered wage through wages actually paid in 2003 and 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d

⁴ The record includes copies of IRS Forms W-2 showing wages paid to the beneficiary for 2001 - 2006. In 2001, the petitioner paid the beneficiary wages in the amount of \$12,546.00; in 2002, the petitioner paid the beneficiary wages in the amount of \$14,034.00; in 2003, the petitioner paid the beneficiary wages in the amount of \$21,857.00; in 2004, the petitioner paid the beneficiary wages in the amount of \$16,855.00; in 2005, the petitioner paid the beneficiary wages in the amount of \$18,261.00; and in 2006, the petitioner paid the beneficiary wages in the amount of \$21,932.00. The petitioner is obligated to show it can pay the difference between wages actually paid to the beneficiary and the proffered wage. In the instant case, the petitioner is therefore obligated to show that it can pay the beneficiary the amount of \$9190.00 in 2001; the amount of \$7702.00 in 2002; the amount of \$4881.00 in 2004; and the amount of \$3475.00 in 2005.

1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, 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 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 or approximately thirty percent (30%) of the petitioner's gross income.

The record before the director closed on October 16, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The AAO notes that in the instant case, the petitioner has not submitted any tax returns. According to [REDACTED] CPA, the petitioner has not filed federal income taxes since the year 2000 because of his divorce proceedings. *Letter from [REDACTED] CPA*, dated August 29, 2008. Counsel asserts that according to 8 C.F.R. § 204.5(g)(2) the petitioner must be able to submit other documents which will show his ability to pay if the petitioner does not have the documents listed under 8 C.F.R. § 204.5(g)(2). While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

Counsel asserts that the petitioner's financial statements show its ability to pay. Counsel notes that an external check to assure the accuracy of financial statements is not required and that the financial statements submitted by the petitioner are not internally audited as stated in the director's decision. Counsel further states that the bookkeeper who audited the petitioner's financial statements is an independent contractor who does not work exclusively for the petitioner. The information provided by the bookkeeper is the information given to the accountant, which in turn places that information on the petitioner's taxes. Counsel further asserts that a bookkeeper is under an obligation to provide accurate information. The AAO observes that the record does not include any documentation to

support counsel's assertions regarding the bookkeeper. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel further asserts that the petitioner has the ability to pay the proffered wage as demonstrated by his bank statements. The record of proceeding contains bank statements from the petitioner's checking accounts covering the period from March 2001 through January 2005. As previously noted, while the petitioner has demonstrated through the beneficiary's Forms W-2 that it has the ability to pay the proffered wage for 2003 and 2006, he still must show that he has the ability to pay the proffered wage for the years 2001, 2002, 2004 and 2005. The AAO notes that the record fails to include bank statements covering 2005. It is unclear whether or not those funds belong to the sole proprietor as part of his personal funds or if those are the petitioner's funds which would be included in the represented gross receipts on Schedule C to the sole proprietor's individual income tax returns. As previously noted, the petitioner has not submitted any tax returns into the record. Additionally, there is no evidence in the record, apart from the unaudited financial statements, concerning the sole proprietor's expenses. The sole proprietor may have significant cash holdings, but the record does not illustrate what type of encumbrances and debts may limit the availability of those funds. Finally, the sole proprietor's thoroughbred racehorses in which he has sole or partial ownership are not evidence that weigh in the petitioner's favor since they are not the type of personal assets typically liquidated in order to pay employee wages.

As such, the AAO does not find that the bank statements submitted by the petitioner establish its ability to pay the proffered wage.

Additionally, the petitioner has not established that the beneficiary is qualified for the proffered position. Section 203(b)(3)(A)(i) of the Act 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. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification." (Emphasis added.) The certified Form ETA 750 labor certification only requires six months of experience. As the skilled worker category requires a labor certification with a minimum of two

years of experience, the Director erred in his adjudication of this case as a skilled worker.⁵ Furthermore, the record does not include evidence to support that the beneficiary has the six months of experience as required on the Form ETA 750.⁶ The record includes a letter from [REDACTED] President of the Horseman's Association of Progreso Regional stating that the beneficiary has been a member of the Association of Horseman of Progreso from 1995 through 1997. This letter makes no mention of the beneficiary's education, training or experience. The AAO notes that the record includes W-2 Forms for the beneficiary showing he has worked for the petitioner from 1999 – 2006; however, these W-2 Forms do not state the beneficiary's position and what type of education, training, or experience he has.

As such, the AAO does not find that the petitioner has established that the beneficiary is qualified for the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁵ Section 202(b)(3)(A)(iii) states the following:

(iii) Other workers.—Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The AAO notes that in his decision dated April 14, 2008, the Director correctly found the beneficiary's qualifications to be less than the two year requirement for a skilled worker set out by section 202(b)(3)(A)(i) of the Act. The AAO notes, however, that in his decision dated June 27, 2008, the Director erred in finding the beneficiary to be classified as a skilled worker.

⁶ As the record lacks this evidence, the AAO finds that had the beneficiary been adjudicated as an other worker, the result would have been the same. 8 C.F.R. § 204.5(l)(3)(ii)(A).