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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B1

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2006
WAC-03-265-54011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[redacted]

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[1] 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 jewelry manufacturer and wholesaler. It seeks to employ the beneficiary permanently in the United States as a jeweler. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 petitioner failed to provide evidence to prove the beneficiary's qualifying experience. The director denied the petition accordingly.

On appeal, counsel submits a brief statement and evidence.[2]

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.

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. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications

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[1] The instant petitioner filed an identical petition (CIS Receipt Number: WAC-02-284-54644) on September 20, 2002. The petition was based on the same approved labor certification in the same proffered position on behalf of the instant beneficiary. That petition was denied on May 28, 2003 because the director determined that the petitioner failed to establish its ability to pay the proffered wage.
In addition, while the instant petition was pending another petitioning entity filed an I-140 immigrant petition (WAC-06-037-50895) on behalf of the instant beneficiary on November 14, 2005. The petition was based on another labor certification but in the same position and was approved by the California Service Center on April 28, 2006.

[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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor 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 August 21, 2000. The proffered wage as stated on the Form ETA 750 is $11.50 per hour ($23,920 per year). The Form ETA 750 states that the position requires four (4) years of experience in the job offered.

On the petition, the petitioner claimed to have been established in 1985, to have a gross annual income of $174,056, to have a net annual income of $60,160, and to currently employ 2 workers. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

The petitioner submitted the following documents as supporting documentation regarding ability to pay with the initial filing: Form 1040 Individual Income Tax Return filed by the owner of the petitioner for 2000 and 2001, documentation pertinent to the owner's real estate properties and reference letters from other owners in the industry regarding the petitioner's business. Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 7, 2004, the director issued a request for evidence (RFE) pertinent to that ability. The director specifically requested the tax return for 2002 and 2003 with all schedules and attachments, Form DE-6 Quarterly Wage and Withholding Report for the last four quarters, and a statement of monthly expenses for the sole proprietor's family. In response, the petitioner submitted the tax returns for 2002 and 2003, Form DE-6 for the third and fourth quarters of 2003 and the first and second quarters of 2004 and a statement regarding the sole proprietor's monthly expenses. On December 14, 2004 the director denied the petition, finding that the petitioner did not establish that it had the ability to pay the proffered wage beginning on the priority date.

On appeal counsel assets that the tax returns and documents on the sole proprietor's real estate properties establish the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 W-2 forms or any other compensation documents for the beneficiary and did not claim that it hired and paid the beneficiary the proffered wage.

The evidence indicates that the petitioner 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 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 33,[3] Adjusted Gross Income, of the owner'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 2000 through 2003. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $23,920 per year.

In 2000, the Form 1040 stated adjustable gross income of $46,920.
In 2001, the Form 1040 stated adjustable gross income of $48,691.
In 2002, the Form 1040 stated adjustable gross income of $50,799.
In 2003, the Form 1040 stated adjustable gross income of $71,184.

The petitioner's adjusted gross income on Form 1040 was $19,000 in 2000, $24,771 in 2001, $26,879 in 2002 and $47,264 in 2003 more than the beneficiary's proffered wage each year. Therefore, the petitioner had sufficient income to pay the proffered wage to the beneficiary for years 2000 through 2003. However, the petitioner submitted a statement of monthly expenses for the sole proprietor's household. The statement indicates that the monthly expenses of the sole proprietor's household were $3,577 (or $42,924 per year). Taking the living expenses into account the sole proprietor could not meet his four member household's living expenses of $42,924 per year with $19,000 in 2000, $24,771 in 2001 and $26,879 in 2002 while only for 2003 the sole proprietor had sufficient income both to pay the proffered wage and to sustain himself and his three dependents.

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.[4] In the instant case, the record of proceeding does not contain any documents showing the petitioner's liquid assets. Instead, counsel submitted documents concerning the sole proprietor's owned real estates including the residential house and apartment units as evidence of the petitioner's ability to pay the proffered wage. However, the AAO does not generally accept a claim that a business relies on the value of homes and other real estate properties to show ability to pay because it is not likely that a petitioner would liquidate such assets in order to pay a wage. Therefore, counsel's reliance on the sole proprietor's real properties to demonstrate his ability to pay is misplaced.

Counsel also misconstrues the use of the Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the INA as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding. At the I-140 immigrant visa filing state of proceeding, evidence is required of a sponsoring employer's ability to pay a proffered wage as of the priority date, not its guarantee to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee or Affidavit of Support to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, the Affidavit of Support is a future pledge of

[3] 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.

[4] These may include, but are not limited to, sole proprietor's savings accounts, money market accounts, certificates of deposits, or other similar accounts.

payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has demonstrated that it had the ability to pay the proffered wage as well as to cover existing business and personal expenses in 2003, however, failed to demonstrate its ability to pay the proffered wage as well as to cover existing business and personal expenses in the years 2000 through 2002. The adjusted gross income in each year of 2000 through 2002 reported in tax returns demonstrated the ability to pay the proffered wage, however, failed to establish that the surplus would cover the sole proprietor's living expenses in these years.

In his initial submission letter, counsel referred to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2000, 2001 and 2002 were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date. Thus, the portion of the director's decision regarding the petitioner's continuing ability to pay the proffered wage beginning on the priority date is affirmed.

The director also denied the petition because the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position. A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date in the instant petition is August 21, 2000.

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).

The certified Form ETA 750 in the instant case states that the position of jeweler requires four (4) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on July 27, 2000, he set forth his education and work experience. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he was attending [redacted] Los Angeles, California, USA in the field of "ESL" from July 1999, and attende[redacted] in Seoul, Korea in the field of "General" from March 1988 to February 1991. On Part 15, listing all jobs held during the last three (3) years and any other jobs related to the occupation, he listed his experience as unemployed from February 1999 to the present, a "Jeweler" [redacted] in Seoul, Korea from May 1997 to January 1999, a "Jeweler" at Glory in Seoul, Korea from January 1996 to May 1997, and a "Jeweler" [redacted] in Seoul, Korea from February 1988 to July 1993. He provides no further information concerning his educational background and work experience on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

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) or 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.

In corroboration of the Form ETA-750B, the instant I-140 petition was submitted on September 24, 2003 with a certificate of experience from [redacted] dated February 21, 2003, a certificate of experience from [redacted] dated February 17, 2003, and a certificate of experience from [redacted] dated February 17, 2003 pertinent to the beneficiary's qualification as required by the above regulation. In response to the director's RFE requesting evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750, counsel did not submit any additional evidence to establish the beneficiary's requisite experience. On appeal counsel submits a letter of acknowledgement dated December 30, 2004 from [redacted] and a copy of notarial certificate of work experience issued by [redacted] January 11, 1999.

The petitioner submitted a certificate of experience from [redacted] dated February 21, 2003, a certificate of experience from [redacted] dated February 17, 2003, and a certificate of experience from Geobosa dated February 17, 2003 with the initial filing. However, the report of investigation from the Officer in Charge at USCIS in Seoul, Korea revealed that the Executive Manager of [redacted] indicated that [redacted] February 21, 2003 experience certificate is a fraudulent document and provided a letter confirmed tha[redacted] never issued the February 21, 2003 certificate. The owner o[redacted] provided conflicting information on the beneficiary's employment with [redacted] the interview with the investigator at [redacted] Seoul, Korea. The owner indicated that the beneficiary was employed from 1993 until he left for the United States in 1998 while his February 17, 2003 certificate of experience stated the employment dates of January 1996 through May 1997. The owner indicated that the certificate of experience was issued to the beneficiary's father and not to the beneficiary. The owner refused to verify the content of the certificate of experience and claimed that he does not have any employment document or record of the beneficiary. The officer also found tha[redacted] as no longer at the [redacted] The owner o[redacted] indicated that [redacted] was in the mall from 1992 until the business closed about 1998. However, the certificate of experience alleged from Geobosa and dated February 17, 2003 was still using the address at

[redacted] five years after the business was closed. Counsel did not submit any further documents except assertion of previous submission of the experience verification letters from the past employers with current contact information despite the director expressly requesting the petitioner to provide letters, contracts and pay statements to verify that the beneficiary worked for the listed employers, and to include a current point of contact, current address and current phone number at which CIS or other U.S. Government agency can contact the foreign employer. Because of these defects, the certificates from [redacted] Glory and [redacted] will be given no weight in these proceedings.

On appeal counsel does not submit any evidence to rebut these defects. Instead, counsel provides a letter dated December 30, 2004 from [redacted] ts official letterhead confirming that [redacted] ssued the Certificate of Working Experience (Certificate No. [redacted] to the beneficiary under [redacted] the Chairman (ex-chief director) on January 11, 1999. Counsel also submits a copy of the notarial certificate of experience issued by [redacted] January 11, 1999 to establish the beneficiary's requisite four years experience in the job offered in the instant case.

This notarial certificate of experience states that the beneficiary obtained the following experience in the occupation of Gold & Silver Smith in pertinent part:

From Feb. 1998 to Jul. 1993
Feb. 1991
From Aug. 1993 to Dec. 1995
From Jan. 1996 to May 1997
From May 1997 to Present [redacted]

First of all, as counsel claims on appeal this notarial certificate of experience dated January 11, 1999 from KJMA was initially submitted with the petitioner's previous petition (WAC-02-284-54644) filed on behalf of the beneficiary on September 20, 2002. Counsel submits the certificate on appeal for the first time for this matter. The petitioner did not submit this certificate with the instant petition or responsively despite the director requesting the petitioner to submit evidence to establish the beneficiary's experience in his RFE dated September 7, 2004. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Secondly, the regulation requires the petitioner to submit evidence relating to qualifying experience or training in the form of letter(s) from current or former employer(s) or trainer(s) and such a letter 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. The regulation allows consideration of other documentation but only in the circumstance that such a letter is unavailable. *See* 8 C.F.R. § 204.5(g)(1). Here [redacted] a private industry association, it did not hire or train the beneficiary and the beneficiary never worked for or obtained training from [redacted] he certificate of experience from [redacted] not a regulatory-prescribed letter from a current or former employer or trainer. The certificate does not include a specific description of the duties performed by

the beneficiary or of the training received as required by the regulation. The certificate does not explain why the experience letters from the beneficiary's former employers are not available and does not have objective evidence to support the contents of the certificate. Therefore, the notarial certificate of employment dated January 11, 1999 from [redacted] cannot be considered as primary regulatory-prescribed evidence to establish that the beneficiary had worked as a jeweler for at least four years as required by the ETA 750.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least four years of experience as a jeweler.

The assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director. 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.