U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 10 2007

EAC-05-177-50606

IN RE: Petitioner: [redacted]
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:

[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 was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail variety store. It seeks to employ the beneficiary permanently in the United States as an alteration 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). As set forth in the director's March 27, 2006 denial, 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, 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.

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 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).

The instant petition is for a substituted beneficiary.[1] Here, the original Form ETA 750 was accepted on April 17, 2001. The proffered wage as stated on the Form ETA 750 is $12.75 per hour ($26,520 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or in a related occupation of tailor. The I-140 petition was submitted on June 3, 2005. On the petition, the petitioner

[1] An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. 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).

claimed to have been established in 1992, to have gross annual income of $99,744, to have net annual income of $41,919, and to currently employ one worker. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on April 23, 2005, the beneficiary did not claim to have worked for the petitioner.

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 appeal[2]. Relevant evidence in the record includes [redacted] and [redacted] Form 1040 U.S. Individual Income Tax Return for 2001 through 2005, and bank statements of their checking account covering the months from July 2001 to September 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the director should have considered bank statements in determining the petitioner's ability to pay the proffered wage.

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 Sonegawa*, 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 beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any W-2 forms, 1099 forms or other documentary evidence showing that the petitioner employed and paid the beneficiary the proffered wage from the priority date in 2001 onwards. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for these years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2001 to the present.

The evidence in the record of proceeding shows 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

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[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).

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. Reliance on gross income and depreciation reported on Schedule C is misplaced. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2005. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

In 2001, the Form 1040 stated adjusted gross income of $15,788.
In 2002, the Form 1040 stated adjusted gross income of $19,506.
In 2003, the Form 1040 stated adjusted gross income of $19,828.
In 2004, the Form 1040 stated adjusted gross income of $37,534.
In 2005, the Form 1040 stated adjusted gross income of $47,695.

In the instant case, the sole proprietor supports himself and his wife. The record does not contain any statement of the sole proprietor's household monthly expenses. Without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietorship established its ability to pay the proffered wage as well as to sustain his family's living expenses.

In 2001 the adjusted gross income was not sufficient to pay the beneficiary the full proffered wage that year even without taking into account the sole proprietor's family living expenses. The petitioner would need $10,732 in addition to the adjusted gross income to pay the beneficiary the proffered wage.

In 2002 the adjusted gross income was not sufficient to pay the beneficiary the full proffered wage that year even without taking into account the sole proprietor's family living expenses. The petitioner would need $7,014 in addition to the adjusted gross income to pay the beneficiary the proffered wage.

In 2003 the adjusted gross income was not sufficient to pay the beneficiary the full proffered wage that year even without taking into account the sole proprietor's family living expenses. The petitioner would need $6,692 in addition to the adjusted gross income to pay the beneficiary the proffered wage.

In 2004 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage in that year. The petitioner did not submit any statement of the sole proprietor's household monthly expenses. However, it is unlikely that the balance of $11,014 after paying the beneficiary the proffered wage from the adjusted gross income would be sufficient to support the sole proprietor's family of two in that year.

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[3] The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002, Line 34 for 2003, Line 36 for 2004 and Line 37 for 2005.

In 2005 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage in that year. The petitioner did not submit any statement of the sole proprietor's household monthly expenses. Therefore, it is not clear whether or not the balance of $21,175 after paying the beneficiary the proffered wage from the adjusted gross income would be sufficient to support the sole proprietor's family of two in that year.

In conclusion, the tax returns show that the sole proprietor's adjusted gross income was insufficient to pay the beneficiary the proffered wage as well as to cover the sole proprietor's household living expenses in 2001 through 2005. Therefore, the petitioner failed to establish its ability to pay the proffered wage in these relevant years with the sole proprietor's adjusted gross income.

CIS will consider the sole proprietor's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. However, the record of proceeding contains monthly bank statements from the petitioner's checking account covering the period July 2001 through September 2005. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. If the account represents what appears to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Even if the petitioner had proven that the bank account was the sole proprietor's personal account and that the balance could be used as extra available funds to pay the proffered wage and personal expenses, the bank account balance could not establish the sole proprietor's ability to pay the proffered wage and his family's living expenses. For 2001, the bank statements show that sole proprietor had a year ending balance of $26,311.94, which would leave the sole proprietor $15,579.94 for his family's living expenses that year after paying the shortage of $10,732 for the proffered wage with the adjusted gross income that year. However, as discussed previously, the petitioner did not submit any statements of monthly living expenses for the sole proprietor's family of two. Without such statements, the AAO cannot determine whether or not the balance of $15,579.94 was sufficient to cover the living expenses of the sole proprietor's household, and further, cannot determining whether or not the petitioner established its ability to pay that year.

For 2002, the bank statements show that sole proprietor had a year ending balance of $16,195.67, which would leave the sole proprietor $9,181.67 for his family's living expenses that year after paying the shortage of $7,014 for the proffered wage with the adjusted gross income that year. As discussed previously, the petitioner did not submit any statements of monthly living expenses for the sole proprietor's family of two. However, it is unlikely that the balance of $9,181.67 would be sufficient to support the sole proprietor's family of two in that year.

For 2003, the bank statements show that sole proprietor had a year ending balance of $34,683.28, which would leave the sole proprietor $27,991.28 for his family's living expenses that year after paying the shortage of $6,692 for the proffered wage with the adjusted gross income that year. Although it appears likely that the

balance of $27,991.28 would be sufficient to support the sole proprietor's family of two in that year, without the statements of monthly living expenses for the sole proprietor's family the AAO cannot determine whether or not the petitioner established its ability to pay that year.

For 2004, the bank statements show that sole proprietor had a year ending balance of $2,513.61, which would leave the sole proprietor $13,527.61 for his family's living expenses that year since the sole proprietor's adjusted gross income was $11,014 more than the proffered wage that year. However, without statements of monthly living expenses for the sole proprietor's family, the AAO cannot determine whether or not the balance of $13,527.61 was sufficient to cover the living expenses of the sole proprietor's household, and further, cannot determine whether or not the petitioner established its ability to pay that year.

For 2005, the petitioner did not provide the sole proprietor's year ending bank balance information.

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 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 2005.

Counsel's assertions cannot overcome the director's decision and the evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience prior to the priority date. 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*, 299 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).

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 alteration tailor requires two (2) years of experience in the job offered or as a tailor. On the Form ETA 750B, signed by the beneficiary on April 23, 2005, the beneficiary set forth her work experience as an "Alteration Tailor" at S.A.R.L., P.O.M.I from February 1995 to February 1996; as an "Alteration Tailor" at S.A.R.L., Blue Sky "B" from April 1993 to October 1993; and as an "Alteration Tailor" at S.A.R.L., Sasa France from December 1990 to May 1991.

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. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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.

The record of proceeding contains three experience letters from [redacted] and [redacted] as the beneficiary's former employers pertinent to the beneficiary's qualification as required by the above regulation. The regulation at 8 C.F.R. § 103.2(b)(3) states in pertinent part:

> *Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

However, all the three experience letters are in French and the petitioner did not submit their English translations. The experience letters do not comply with the terms set forth by the regulation quoted above, and therefore, they cannot be considered as primary evidence to establish the beneficiary's qualifications.

In addition, the letter from [redacted] verifies that the beneficiary worked from December 1, 1990 to May 31, 1991 for 6 months; the letter from [redacted] verifies the beneficiary's employment from April 1, 1993 to October 31, 1993 for 7 months; and the letter from [redacted] verifies that the beneficiary was employed from May 2, 1995 to February 29, 1996 for 10 months. The three experience letters verify the beneficiary's 23 months of experience which does not meet the minimum requirements of 24-month experience for the proffered position.

Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as an alteration tailor or a tailor prior to the priority date, and thus, the petition cannot be approved.

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.

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.