U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 2 9 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a coater/waterproof paint business. It seeks to permanently employ the beneficiary in the United States as a painter/waterproof coater. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1] The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, counsel submits a brief and affidavits of employment for the beneficiary.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983);

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[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 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).

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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: None.
High School: None.
College: None.
College Degree Required: Blank.
Major Field of Study: Blank.
TRAINING: None Required.
EXPERIENCE: Four (4) years in the job offered.
OTHER SPECIAL REQUIREMENTS: None.

The labor certification fails to state any experience based on which the beneficiary qualifies for the offered position. No experience is listed in Section 15 of the ETA 750B. The beneficiary signed the labor certification on April 25, 2001 under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the

credibility of the evidence and facts asserted. In a request for evidence (RFE) and Notice of Intent to Deny (NOID) issued by the director, the petitioner was informed of the need for independent, objective evidence to support the beneficiary's claimed qualifying experience that was not listed on the ETA 750B and certified by the DOL.

The record contains an experience letter dated June 3, 2001, from general manager, on letterhead stating that the company employed the beneficiary as a painter-coater from April 1993 until September 1998 in California. However, no independent, objective evidence of this employment has been submitted. Further, the letter is inconsistent with a written statement given by the beneficiary as to his dates and place of employment. In correspondence dated May 13, 2009, the beneficiary stated that he had worked for the petitioner for more than twenty (20) years (since at least May 1989). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record contains an experience letter dated June 20, 2001, from on personal letterhead stating that he employed the beneficiary as a painter from August 1978 until January 1980 in Mexico. However, the letter does not provide the name and address of the employer or the title of the signatory. No independent, objective evidence has been submitted to establish the beneficiary's qualifying employment.[3]

The record contains an experience letter, dated January 8, 2013, from owner, on letterhead stating that the company employed the beneficiary as a painter/coater from January 1983 until September 1989 in Mexico.

To support the beneficiary's claimed experience, on appeal counsel submits two affidavits, dated February 22, 2013 and February 21, 2013, from respectively. The wording of the affidavits is identical and states that the respective affiants personally witnessed the beneficiary's employment by as a painter/coater from January 1983 until September 1989.

Counsel also submits an affidavit dated January 15, 2013, from the beneficiary, stating that he was employed as a painter/coater by from January 1983 until September 1998 in Mexico. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. at 591-592 (BIA 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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[3] Even if the evidence met all the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), it would only account for one (1) year and five (5) months of relevant experience.

The letter from the affidavits from and and the beneficiary's affidavit are inconsistent with the labor certification, the Form I-140 immigrant petition and the beneficiary's written statement regarding the dates and place of employment, as well as residence. *Matter of Ho*, 19 I&N Dec. at 591-92. The labor certification and the Form I-140 immigrant petition state that the beneficiary entered the United States in February 1980 and could not, therefore, have been employed by in Mexico during the claimed duration. Additionally, the beneficiary's written statement indicates that he has been employed in the United States by the petitioner since at least May 1989. The additional evidence submitted is not independent, objective evidence of where the truth lies and is insufficient to overcome the above-noted inconsistencies.

On appeal, counsel contends that the evidence is sufficient to establish that the beneficiary had the requisite experience for the proffered position. Counsel also contends that USCIS improperly denied the Form I-140 immigrant petition as there was no evidence that the petitioner or beneficiary willfully misrepresented a material fact or committed fraud in filing the labor certification. As discussed above, there are inconsistencies and a lack of independent, objective evidence as to where the truth lies. The director did not make any findings of willful misrepresentation or fraud in his decision. The director denied the Form I-140 immigrant petition on the basis that the petitioner has failed to establish that the beneficiary has the requisite experience for the proffered position.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director,[4] the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2). The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in May 1986 and to currently employ 11 workers.

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'l

[4] 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 during any relevant timeframe including the period from the priority date in 2001 or subsequently. While the petitioner submits copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for 2001 through 2012 reflecting payments from the petitioner, the Forms W-2 contain a Social Security Number (SSN) that does not appear to belong to any individual and we are unable to verify that these funds were actually paid to the beneficiary.[5] Without independent, objective evidence of the beneficiary's correct SSN, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of $12.97 per hour ($26,977.60 based on a 40-hour work week) from the priority date of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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

[5] Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution. If the petitioner wishes to use the Forms W-2 to establish payment of the proffered wage in any further filings, the petitioner must establish that the IRS issued the SSN listed on the Forms W-2 to the beneficiary.

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'r 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 (AGI) or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See 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 petitioner 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.

In the instant case, the sole proprietor supports a family of four to five (4-5).[6] The proprietor's tax returns reflect the following information for the following years:

- In 2001, the proprietor's adjusted gross income (Form 1040, line 33) was $85,120.00.
- In 2002, the proprietor's adjusted gross income (Form 1040, line 35) was $96,356.00.
- In 2003, the proprietor's adjusted gross income (Form 1040, line 34) was $91,720.00.
- In 2004, the proprietor's adjusted gross income (Form 1040, line 36) was $96,387.00.
- In 2005, the proprietor's adjusted gross income (Form 1040, line 37) was $94,788.00.
- In 2006, the proprietor's adjusted gross income (Form 1040, line 37) was $102,390.00.
- In 2007, the proprietor's adjusted gross income (Form 1040, line 37) was $108,575.00.
- In 2008, the proprietor's adjusted gross income (Form 1040, line 37) was $103,370.00.
- In 2009 the proprietor's adjusted gross income (Form 1040, line 37) was $135,961.00.
- In 2010, the proprietor's adjusted gross income (Form 1040, line 37) was $168,401.00
- In 2011, the proprietor's adjusted gross income (Form 1040, line 37) was $162,626.00.

The sole proprietor's adjusted gross income exceeds the proffered wage of $26,977.60 from 2001 through 2011; however, the proprietor's monthly household expenses must be considered in determining whether or not the proprietor has the ability to pay the proffered wage. The proprietor failed to provide a list of his monthly household expenses in 2001, 2002, 2010 and 2011, and therefore the AAO cannot conclude that he had the ability to pay the proffered wage in those years. The proprietor did submit a list of his monthly household expenses reflecting annualized household expenses and resulting deficits reflected in the table below:

Tax Year	Annualized Household expenses	AGI-household expenses

[6] Tax records reflect that the proprietor's son was no longer claimed as a dependent as of 2004.

2001	unknown	unknown
2002	unknown	unknown
2003	$77,448	$14,272
2004	$94,716	$1,671
2005	$141,780	($46,992)
2006	$119,520	($17,130)
2007	$106,284	$2,321
2008	$116,052	($12,682)
2009	$105,852	$30,109
2010	unknown	unknown
2011	unknown	unknown
2012	$88,848	unknown

Additionally, USCIS electronic records show that the petitioner filed three (3) other I-140 immigrant petitions which have been pending and/or approved during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries; however, USCIS records indicate that one of the three of the approved beneficiaries became a lawful permanent resident in March 2010. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Even in 2009, a year in which a deficit would not have occurred, the difference between the adjusted gross income less household expenses would not have left sufficient funds to pay the proffered wage for the beneficiary and for the beneficiaries of other Form I-140 immigrant petitions filed by the petitioner.

The petitioner states that the magnitude of the petitioner's business is reflected by its payment of wages averaging $350,732.63 per year. As discussed above, the petitioner is a sole proprietor and the business' gross income, assets and personal liabilities are considered as part of the proprietor's adjusted gross income in analyzing the petitioner's ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612

(Reg'l Comm'r 1967). 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the proprietor failed to submit a list of his monthly household expenses for 2001, 2002, 2010 and 2011, precluding the AAO from making a determination as to whether he has the ability to pay the proffered wage for those years. Further, the proprietor did not submit evidence to establish that he had the ability to pay the proffered wages to three (3) other beneficiaries of Form I-140 immigrant petitions he had filed. There is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the proprietor's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.