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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
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U.S. Citizenship
and Immigration
Services

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File:

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Office: NEBRASKA SERVICE CENTER

Date: JUL 02 2009

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, 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a cleaning business. It seeks to employ the beneficiary permanently in the United States as a supervisor, janitorial service. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. 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 demonstrated that the appeal was properly filed, timely and made 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 denial dated December 20, 2007, an 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, an additional issue in this case is whether the petitioner demonstrated by sufficient evidence that the beneficiary meets the experience requirements of the labor certification.

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 at 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 either 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 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 by DOL for processing on April 30, 2001, and was certified on July 1, 2005. The petitioner filed the Form I-140 on June 6, 2007, and the petitioner identified on that form is [REDACTED]. The proffered wage as stated on the Form ETA 750 is \$12.49 per hour¹ (\$22,731.80 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years in the related occupation of cleaner.

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, 1149 (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

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; partial copies of the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2001, 2002, 2003, 2004, 2005 and 2006; and, copies of documentation concerning the beneficiary's qualifications.

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, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the

¹ Based upon a 35 hour work week.

² The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services USCIS 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).

circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 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.

On the petition, the petitioner claimed to have been established in 1987, and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$229,740.00 and \$494,640.00 respectively. On the Form ETA 750, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner since April 2000.

However, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the relevant time period.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onwards.

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). 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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.

In *Ubeda v. Palmer*, 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.

On appeal, counsel asserts that that the Form 1040, Schedule C tax statements for 2001, 2002, 2003, 2004, 2005 and 2006 demonstrate that the petitioner's business expenses for each of those years deducted from the petitioner's gross incomes reflects the petitioner's ability to pay the proffered wage. Counsel cites a USCIS memorandum³ issued on May 4, 2004, that instructs adjudicators to make a positive ability to pay determination when the initial evidence submitted by the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date. We note that the initial evidence submitted by the petitioner was insufficient to demonstrate the petitioner's ability to pay the proffered wage from the priority date.

The AAO consistently adjudicates appeals in accordance with the May 4, 2004, memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and it does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the May 4, 2004, memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by the interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2001, but onward until the beneficiary receives permanent resident status.

In the instant case, the sole proprietor supports a family of four. The tax returns reflect the following information for the following years:

Tax Return for Year:	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Gross Income (Schedule C)	Petitioner's Cost of Labor (Schedule C)	Petitioner's Net Profit from Business (Schedule C)
2001	\$ 52,148.00	\$154,934.00	\$122,874.00	\$ 32,060.00	\$ 60,761.00
2002	\$ 40,654.00	\$111,029.00	\$ 88,399.00	\$ 22,630.00	\$ 50,205.00

³ U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

2003	\$ 37,151.00	\$ 99,424.00	\$ 85,160.00	\$ 14,264.00	\$ 48,952.00
2004	\$ 47,865.00	\$148,686.00	\$125,701.00	\$ 22,985.00	\$ 63,418.00
2005	\$235,930.00	\$501,235.00	\$385,765.00	\$115,470.00	\$298,791.00
2006	\$161,913.00	\$420,070.00	\$301,953.00	\$118,117.00	\$225,200.00

In the years for which tax returns were submitted, 2001, 2002, 2003, 2004, 2005, and 2006, the sole proprietorship's adjusted gross income exceeded the proffered wage of \$22,731.80 per year in each year without consideration of the sole proprietor's personal expenses. However, the petitioner failed to submit complete copies of its personal tax returns. No Schedule A was submitted for any year. Schedule A states the tax payer's personal expenses that are tax deductible. These deductible expenses include medical and mortgage expenses. The total of these deductible expenses can be included on Form 1040 in lieu of the tax payers' standard deduction. The petitioner has stated the total of Schedule A expenses on Line 36, 37, 39 or 40 (depending upon the year) of its Form 1040 returns for years 2001, 2002, 2003, 2004, 2005, and 2006. They were \$19,887.00, \$21,321.00, \$23,403.00, \$22,455.00, \$20,157.00, and \$33,732.00 respectively.

The petitioner also failed to submit a listing of its personal living expenses for the above years. The director requested this information on August 3, 2007, which concerned the sole proprietor's average monthly recurring household expenses. These items were identified as, but not limited to, mortgage or rents payments, automobile payments, installment loans, credit card payments and household expenses including utilities.

Presumably, the totals stated on Schedule A, are only a portion of the petitioner's personal yearly living expenses.⁴ Therefore, from the priority date to present, it is improbable that the sole proprietor could support herself and/or her family member on what remains after reducing the adjusted gross incomes for 2001, 2002, 2003, and 2004, by the amount required to pay the proffered wage and still pay their personal expenses.

In addition, the petitioner failed to adequately respond to the RFE. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. 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 stated, counsel asserts that the petitioner's "totality of circumstances," based upon the evidence submitted, is another way to determine the petitioner's ability to pay the proffered wage from the priority date. The petitioner's size, longevity, number of employees, and business reputation, cannot

⁴ This statement should indicate all of the family's household living expenses. Such items should include (but are not limited to) the following: food, car payments (whether leased or owned), insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, internet, etc.), student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

be overlooked. The petition states that the petitioner was established in 1987 and employs six individuals. The petitioner is a cleaning business that had been in business since 2001 according to counsel, and 1987, according to the petition. Between the years 2001, 2002, 2003, 2004, 2005, and 2006, the petitioner had gross receipts of \$154,934.00, \$111,029.00, \$99,424.00, \$148,686.00, \$501,235.00, and \$420,070.00, respectively. The costs of labor, during those same years, were \$32,060.00, \$22,630.00, \$14,264.00, \$ 22,985.00, \$115,470.00, and \$118,117.00. On average, the petitioner's gross receipts remained about the same for the four-year period, 2001 to 2004, along with its payroll costs, but then its payroll expense increased significantly in 2005 and 2006 along with its gross receipts.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As the petitioner operates as a sole proprietor, it is the petitioner's adjusted gross incomes that must be considered along with its personal living expenses. A review of the record confirms that the job offer is not realistic and cannot be satisfied by the petitioner since in only two year out of six did the petitioner have sufficient adjusted gross income to pay the proffered wage and its reasonable living expenses. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa* to establish that the period 2001, 2002, 2003, and 2004, was an uncharacteristically unprofitable period for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability for years 2001, 2002, 2003 and 2004, and does not have the ability to pay the proffered wage.

As already stated, beyond the decision of the director, an additional issue identified by the AAO issue in this case is whether the petitioner demonstrated by sufficient evidence that the beneficiary meets the experience requirements of the labor certification. 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).

The regulation 8 C.F.R § 204.5(l)(3)(ii) states in pertinent part:

(A) General. 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.

The labor certification requires that the beneficiary have two years of experience in the position offered or two years in the related occupation of cleaner.

According to the labor certification the job duties of supervisor, janitorial services are stated as:

Supervises and coordinates activities of workers at various locations, engaged in cleaning and maintaining premises of different establishments. Assigns workers their duties, and inspects work for conformance to prescribed standards of cleanliness. Inventories stock to ensure adequate supplies. Issues supplies and equipment to workers. Trains new workers, records hours worked and performs other personnel duties as required. May perform duties of workers supervised.

The petitioner, in an undated letter dated April 19, 2007, provides a description of the position's duties that are exactly as stated in the labor certification.

On the Form ETA 750, Part B, signed by the beneficiary on April 24, 2001, the beneficiary stated that he was self-employed in several sites in the State of Virginia working as a supervisor, janitorial services in the cleaning business from December 2000 to present (i.e. April 24, 2001). The beneficiary described his job duties exactly as stated in the labor certification.

On the USCIS Form G-325 prepared and signed by the beneficiary under penalty of perjury on May 17, 2007, the beneficiary stated he was employed by the petitioner as a supervisor, janitorial services from April 2000 to December 2002. 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).

Prior to the above, the beneficiary stated he was employed as a cleaner with Carnival Cruise Lines, Miami, Florida from July 1993 to January 1996.

There is one statement found in the record submitted by the petitioner to demonstrate the beneficiary's prior employment experience. A statement dated April 10, 2007, was submitted by [REDACTED] (no title stated) of Aluminios VIDELPRO of El Progreso,

Jutiapa, Guatemala. According to [REDACTED], the beneficiary worked as the person in charge of cleaning with the company from January 1997 to March 1999. Since [REDACTED]'s job title or position with Aluminios VIDELPRO is not stated, the statement submitted can not be considered to be from a prior employer or trainer, and as the beneficiary's duties are not described, the statement has slight probative value in this matter. Also, the beneficiary failed to list this experience on Form ETA 750. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the decision'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.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The above statement from [REDACTED] is insufficient evidence to demonstrate that the beneficiary has the requisite two-year of prior experience as a supervisor, janitorial services or two years experience as a cleaner. No correlated documentation such as pay statements was submitted by the petitioner to show that the beneficiary was employed by Aluminios VIDELPRO, Carnival Cruise Lines, or the petitioner. The petitioner has failed to demonstrate by independent objective evidence that the beneficiary meets any experience and other requirements of the labor certification in the offered job.

Also, as already stated, the evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.