

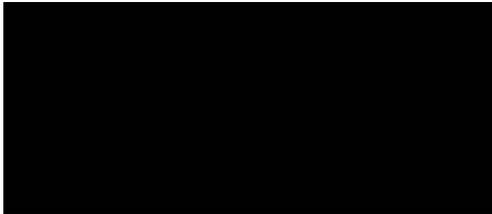
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U.S. Department of Homeland Security  
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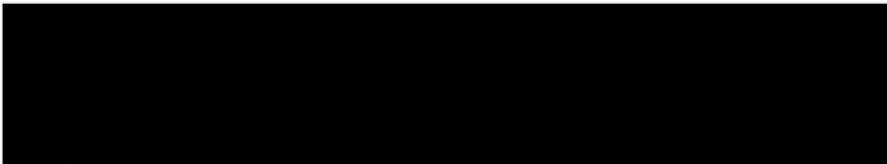
**MAY 26 2009**

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electrical installation company. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of construction trades and extraction workers (lead electrician/electrician supervisor). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 8, 2007 denial, the single 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.

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 was accepted for processing by any office within the DOL employment system. *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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 17, 2003. The proffered wage as stated on the Form ETA 750 is \$31.35 per hour (\$65,208 per year). The Form ETA 750 states that the position requires high school completion, four (4) years of certified journeyman or equivalent training and three (3) years of experience in the job offered.

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<sup>1</sup>.

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1985, to have a gross annual income of \$808,765, to have a net annual income of \$47,659, and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on March 20, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's payment to GM Price, Inc., which the beneficiary owns, for subcontractor services should be counted as compensation the petitioner paid to the beneficiary and therefore, the petitioner has established its 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 a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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 circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any W-2 forms, 1099

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<sup>1</sup> 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).

forms or other documentary evidence showing that the petitioner employed and paid the beneficiary the proffered wage from the priority date in 2003 onwards.

On appeal counsel submits the petitioner's tax returns and documents listing compensation paid to GM Price, Inc. and other companies for subcontractor services in 2003 through 2007. These documents show that the petitioner paid out to subcontractors \$135,641 (\$103,128.74 to GM Price, Inc.) in 2003, \$233,805.55 (\$193,389.93 to GM Price, Inc.) in 2004, \$261,690.77 (\$230,052.31 to GM Price, Inc.) in 2005, and \$195,094.93 (\$124,087.19 to GM Price, Inc.) in 2006. Counsel asserts that since the beneficiary owns GM Price, Inc. and the petitioner paid GM Price, Inc. for its subcontractor services, the payment paid by the petitioner to GM Price, Inc. should be counted as compensation the petitioner paid to the beneficiary.

However, counsel's assertion is misplaced. The record does not contain any evidence showing that the beneficiary was paid directly by the petitioner. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Nor does the record document what portion of the payments paid by the petitioner to GM Price, Inc. was paid to the beneficiary for performing the duties of the proffered position. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, there is no evidence that the positions of those employees or subcontractors involve the same duties as those set forth in the Form ETA 750. Instead, the record shows that the beneficiary worked for GM Price, Inc. as the executive manager and president of the company while GM Price, Inc. was doing business with the petitioner as a subcontractor.

Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for the relevant years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2003 to the present with his income and assets.

As previously noted, the evidence indicates that the petitioner in the instant case 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 (7<sup>th</sup> 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, USCIS considers net income to be the figure shown on line 34<sup>2</sup>, 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 2003 and 2004. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

In 2003, the Form 1040 stated adjusted gross income of \$7,489.  
In 2004, the Form 1040 stated adjusted gross income of \$25,598.  
In 2005, the Form 1040 stated adjusted gross income of \$32,478.

The record contains a list of the sole proprietor's household monthly expenses, which includes primary mortgage of \$3,347, secondary mortgage of \$500, home owner association fee of \$260, utilities of \$35 and Cox cable of \$119, totaling \$4,261 or about \$51,132 a year.

The record contains the petitioner's financial statements for 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In conclusion, the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the full proffered wage of \$65,208 per year in 2003 through 2005 even without taking into account the sole proprietor's household living expenses. The petitioner did not submit regulatory-required documentary evidence of its financial information for 2006. Therefore, the petitioner has failed to establish its ability to pay the proffered wage and the sole proprietor's household living expenses for 2003 through 2006.

USCIS 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 contains bank statements from Wells Fargo Bank covering 2003 through 2006 and January 2007. These bank statements show that the petitioner had a year-end balance of \$5,563.85 in 2003, \$26,405.21 in 2004, \$64,002.94 in 2005 and \$5,030.00 in 2006. The year ending balances for these years are not sufficient enough to cover the proffered wage and the sole proprietor's household yearly living expenses. Furthermore, these bank statements are for a checking account under the name of [REDACTED]. It appears that the checking account is the sole proprietor's business checking account. 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. However, if the accounts represent 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. Therefore, the petitioner failed to

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<sup>2</sup> The line for adjusted gross income on Form 1040 is Line 34 for 2003 and Line 36 for 2004.

demonstrate that the sole proprietor had sufficient funds to pay the proffered wage as well as his household's living expenses.

Although USCIS 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 Sonogawa*, 12 I&N Dec. 612.

*Matter of Sonogawa* 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.

In the present case, the petitioner is an electrical installation firm with six employees, and had a gross annual income of \$808,765 and a net annual income of \$47,659. The AAO notes that the sole proprietor in the instant case had adjusted gross income of \$7,489 in 2003, \$25,598 in 2004 and \$32,478 in 2005. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2003 through 2005 were uncharacteristically unprofitable years for the petitioner in a framework of profitable or successful years. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and that it has the ability to pay the proffered wage.

Finally, the Immigrant Petition for Alien Worker (Form I-140) indicated that the proffered position was not a new position, thereby implying that the beneficiary would be replacing a previously hired employee. Although counsel asserts and documents that the petitioner paid substantial amount to subcontractors including the beneficiary's owned company, the record does not name these workers or subcontractors, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the subcontractors involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker or subcontractors who performed the duties of the proffered position. If those employees or subcontractors performed other kinds of work, then the beneficiary could not have replaced them.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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 2003 through 2006.

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's job offer to the beneficiary is a realistic one. 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).

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.

Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In the present matter, no direct evidence shows that the beneficiary and the petitioner have a relationship invalidating a *bona fide* job offer. However, the record shows that the beneficiary owns GM Price, Inc. which earns \$100,000 to \$230,000 per year from the petitioner as a subcontractor. The record does not document whether the petitioner would terminate the subcontracting relationship with the beneficiary's corporation and whether the beneficiary would no longer own GM Price, Inc. upon the approval of the instant petition. The AAO finds that there is a relationship between the petitioner and the beneficiary which may arise invalidating a *bona fide* job offer by financial or business interest. It is also noted that the beneficiary was admitted as a transferee in a position of a top executive with GM Price, Inc. under a L-1A status while the petitioner petitioned him in a position of lead electrician/electrician supervisor as a first

**line supervisor or manager.** While further investigation into whether there were willful misrepresentation on the beneficiary's L-1A petition will be beyond the jurisdiction of the instant appeal, it is doubtful that the beneficiary would fill the proffered position and perform the duties as an electrician supervisor upon the approval of the petition. Therefore, the petitioner failed to establish that its job offer to the beneficiary is a realistic one.

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.