

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**
PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B6



AUG 04 2010

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

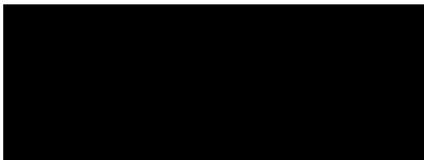
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

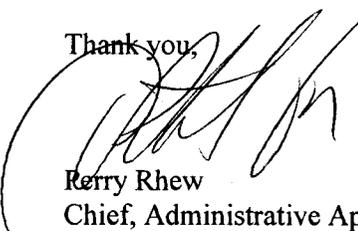


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Kerry Rhew
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 custom powder coating business. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 and that the petitioner failed to demonstrate that the beneficiary had the experience required for the position offered. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 June 8, 2008 denial, the issues in this case are 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, and whether the beneficiary had the necessary experience for the position prior to the priority date of the Form ETA 750 (March 20, 2001).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 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 the 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 on March 20, 2001. The proffered wage as stated on the Form ETA 750 is \$34,340.80 per year based on the hourly rate of \$16.51 per hour.¹ The Form ETA 750 states that the position requires one year of experience in the proffered position or the related occupation of powder coating painting.

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

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 1999 and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on March 16, 2001, the beneficiary claimed to work for the petitioner since September of 2000.³

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, United States 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

¹ The labor certification states an overtime pay rate of \$24.76 per hour but does not state an overtime hour requirement.

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).

³ The beneficiary partially shares the same surname as the sole proprietor. Thus, it is unclear whether the beneficiary is related. 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).

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 from the priority date in 2001 onwards. The petitioner submitted W-2 Forms asserting that it paid the beneficiary the following wages:

- 2001 - \$14,000.00.
- 2002 - \$21,150.00.
- 2003 - \$21,200.00.
- 2004 - \$23,000.00.
- 2005 - \$26,421.20.
- 2006 - \$30,581.00.
- 2007 - \$32,591.00.

While the petitioner did pay wages to the beneficiary from 2001 to 2007, it did not pay to the beneficiary the full proffered wage in any relevant year. Thus, the petitioner must establish that it had the ability to pay to the beneficiary the difference between the wages actually paid to the beneficiary and the proffered wage. Those sums are set forth as follows:

- 2001 - \$20,340.80.
- 2002 - \$13,190.80.
- 2003 - \$13,140.80.
- 2004 - \$11,340.80.
- 2005 - \$7,919.60.
- 2006 - \$3,759.80.
- 2007 - \$1,749.80.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income.

The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

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. 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 or other available funds. In addition, sole proprietors 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 or approximately thirty percent (30%) of the petitioner’s gross income.

In the instant case, the sole proprietor supported a family of five in 2001, and a family of four from 2002 through 2007. The petitioner reported annual living expenses⁴ for himself and his dependents as follows:

- 2007 - \$24,563.93
- 2006 - \$24,013.50.
- 2005 - \$23,737.06.
- 2004 - \$22,664.62.
- 2003 - \$21,414.33.
- 2002 – The petitioner did not report annual living expenses for this year.
- 2001 – The petitioner did not report annual living expenses for this year.

Thus, it is necessary to show that the petitioner had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage, plus the annual living expenses of the petitioner and his dependents. Those sums are set forth below:

- It cannot be determined from the record that the petitioner had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage, plus the annual living expenses of the petitioner and his dependents for the years 2001 and 2002 because the petitioner did not submit his annual living expenses for those years.
- 2003 - \$34,555.13.
- 2004 - \$34,005.42.
- 2005 - \$31,656.66.
- 2006 - \$27,773.30.
- 2007 - \$26,313.73.

The proprietor's tax returns reflect the following information for the following years:

- Proprietor's adjusted gross income (Form 1040, line 33) for 2001 was \$30,353.00.
- Proprietor's adjusted gross income (Form 1040, line 35) for 2002 was \$34,462.00.
- Proprietor's adjusted gross income (Form 1040, line 34) for 2003 was \$24,385.00.
- Proprietor's adjusted gross income (Form 1040, line 36) for 2004 was \$31,738.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2005 was \$31,078.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2006 was \$31,992.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2007 was \$41,173.00.

The record does not establish that the beneficiary had the ability to pay the proffered wage plus family living expenses in 2001, 2002, 2003, 2004 or 2005. The petitioner did have sufficient income to pay the proffered wage plus family living expenses in 2006 and 2007.

⁴ The sole proprietor provided a self estimate of expenses. In any further filings the petitioner should submit documentation to verify such expenses.

On appeal, counsel asserts that the record establishes that the petitioner had the ability to pay the proffered wage in each year of the requisite period, and that the beneficiary had the experience required of the position as of the priority date of the Form ETA 750.

The proprietor asserts that its personal and business bank accounts and a line of credit establish its ability to pay the proffered wage. The AAO does not agree. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. While the sole proprietor's personal bank statements in later years show higher amounts, in some months in 2006 and 2007, and might warrant a finding in 2003, 2004 and 2005 that the petitioner could pay the difference between the proffered wage, wages paid and family expenses, the bank statements for 2001 particularly, and in 2002 show lower amounts. In 2001, the personal bank statements in most months reflect holdings of around \$1,000.00, and in the absence of the sole proprietor's personal expenses, would not support a finding the sole proprietor could pay the difference between wages paid and household expenses, likely at least \$40,000 between the remaining wage and personal expenses. Finally, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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 *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 petitioner states that it has been in business since 1999. The income of the proprietor is almost exclusively derived from the business operations of the petitioner. The petitioner reports nominal net profits ranging from \$32,625 in 2001 to \$54,888 in 2007. The petitioner states that it employs five workers and paid wages of only \$124,019 in 2007, its most profitable year reported. While the sole proprietor can establish the ability to pay in later years, the record is insufficient, as the sole proprietor failed to submit its personal expenses in 2001 or 2002 to establish the sole proprietor could pay the difference in wages and support his family.

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 director further determined that the petitioner failed to establish that the beneficiary had obtained the one year of required job experience in the proffered position prior to the priority date. On appeal, the petitioner submitted a letter signed by ██████████ wherein ██████████ states that the beneficiary was employed by his organization from May 30, 1989 to September 2, 1999 as a powder coater earning \$7.60 per hour. The letter provided no additional information.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired one year of experience from the evidence submitted into this record of proceeding. As noted above, the petitioner must establish that the beneficiary meets the educational, training or experience requirements of the labor certification. To establish the claimed experience, a letter must be submitted from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or experience gained. The experience letter in this instance does not describe the duties performed by the beneficiary during his term of employment. Thus, it cannot be determined that the beneficiary has the requisite experience. In any further filings, the petitioner should submit an experience letter, which includes a description of experience gained to meet the regulatory requirement. The petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.