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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

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[Redacted]

[Redacted]

LANCASTER, CA 93535

FILE: [Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

AUG 10 2010

IN RE: Petitioner:
Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) (3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b) (3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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 your 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.

[Redacted]

Chief, Administrative Appeals Office

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

The petitioner is a tobacco store. It seeks to employ the beneficiary permanently in the United States as the store manager. As required by statute, an ETA 750, Application for Alien Employment Certification¹ approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying experience as of the visa priority date, and had failed to establish that the job offer was realistic or *bona fide*, and denied the petition accordingly.²

The appeal was filed on February 26, 2010. On Part 2, B, of the Form I-290B, Notice of Appeal or Motion, counsel requested an additional 30 days to submit a brief and/or additional evidence.

Pursuant to 8 C.F.R. § 103.3(a)(2)(vii) and (viii), an affected party shall submit the brief directly to the AAO. Therefore the brief was due on Monday, March 28, 2010. As of this date, the AAO has received nothing further. As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

In this matter, counsel has provided no substantive argument or additional evidence that specifically addresses any erroneous conclusion of law or fact in the decision being appealed. Counsel merely states that the beneficiary has the required managerial experience and that the certified job was *bona fide* and realistic. Counsel has not specifically addressed the reasons stated for denial and has not provided any additional evidence or argument to overcome the basis for denial. The appeal must therefore be summarily dismissed.

Notwithstanding the above determination, the AAO also concurs with the director's denial of the petition for the reasons cited below. The AAO conducts appellate review on a *de novo* basis. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (*de novo* authority recognized by federal courts).

At the outset, it is noted that to determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

² The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

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.

Relevant to a beneficiary's qualifying work experience, 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 petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the Form 750 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter*

of *Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 750 was accepted for processing on February 28, 2002.³

As noted by the director, 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. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2).

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on November 24, 2004, indicates that the petitioner was established in 1994, claims an annual gross income of \$101,343 and states that it currently employs two workers.

Item 14 of Part A of the Form ETA 750 describes the minimum education, training and experience that an applicant for the certified position must have. In this matter, item 14 requires minimum education of three years of high school, as well as a minimum of two years work experience in the job offered as a store manager. The job duties are described in item 13 of the ETA 750. They include supervising and training workers, ordering and inspecting merchandise, preparation of sales and inventory reports, and customer service.

Part B of Form ETA 750 was signed by the beneficiary under the penalty of perjury on February 6, 2002. It requests information related to an applicant's education, special qualifications and skills, as well as employment history. In item 15, the beneficiary has made two entries. On the first entry, he claims that he has been unemployed from 1987 to the present (date of signing), which amounts to approximately seventeen years. On the second entry, the beneficiary indicates that he worked as a manager at a tobacco store for Hussein Anka and Sons, at the Bakaa Commercial Center, Taanayel (Lebanon) from January 1984 to December 1987.

In support of this job experience, the petitioner submitted a copy of an English translation of a letter, dated April 12, 2001, [REDACTED]

[REDACTED] The letter states that:

. . . [the beneficiary] worked in our Establishment in the Tobacco Sales Department from the year 1984 till the year 1987, he had a huge capability in his work, knowing that our Establishment deals the sales of Tobacco by a permission

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage, is clear.

issued by the Lebanese Administration of Tobacco & Persian Tobacco Monopoly under no. 1083.”

As noted by the director, this letter does not corroborate that the beneficiary had two years of work experience in the job offered as a store manager as required by the Form ETA 750, because; (1) the letter fails to identify the beneficiary’s job title; (2) the letter does not describe the beneficiary’s job duties performed so as to confirm that he performed the job duties described in the Form ETA 750; (3) the letter does not indicate whether the job was full-time or part-time so as to determine whether the beneficiary accrued two full-time years of experience; (4) the letter does not indicate the month and date for the relevant year that the employment started and ended in order to determine the total length of the experience; and (5) there is no specific physical address given for the employer or the author of the letter.

The AAO further notes that the original of the letter was not submitted with the English translation and the English translation did not comply with the terms of 8 C.F.R. § 103.2(b)(3).⁴ Given the above deficiencies, the employment verification letter submitted by the petitioner failed to confirm that the beneficiary had two years of work experience in the job offered of store manager as required by the terms of the labor certification and failed to satisfy the requirements of the regulation at 8 C.F.R. § 204.5(1)(3)(ii).

It is also noted that no educational credentials have been submitted to support that the beneficiary has completed three years of high school as required by the labor certification.

The director also questioned whether the petitioner had established that a *bona fide* job offer existed as the beneficiary’s family name of “Elmoughrabi” is virtually identical to that of the owner of the petitioner as shown on the tax returns for 2001, 2002, and 2003 that were submitted in support of the petitioner’s ability to pay the proffered wage. The sole proprietor’s name is given on the tax returns as [REDACTED]. The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361. A relationship invalidating a bona fide job offer may also 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, 2000-INA-93 (BALCA May 15, 2000). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons.

⁴ *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.

Authority to conduct investigations into fraud or material misrepresentation relevant to alien labor certification applications is conveyed to the [REDACTED] and by inference to [REDACTED] in accordance with 20 C.F.R. Part 656.⁵ The law of materiality will control the agency's determination that the application should be invalidated. Under *Matter of S & B-C*, 9 I&N Dec. 436 (A.G. 1961), a misrepresentation is material where it shuts off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she is inadmissible. An alien's misrepresentation of his or her relationship to a company's owner during the labor certification process would close off a line of relevant inquiry which might have revealed that the labor certification process was flawed. As noted above, the petitioner has provided no additional evidence or argument on appeal establishing whether the petitioner and the beneficiary have a familial relationship and whether DOL was cognizant of such a relationship during the labor certification process. As such, the current record does not clearly establish that a *bona fide* job offer was made.

Additionally, the director determined that the petitioner had not demonstrated that the job offer was realistic as of the priority date of February 28, 2002, when the petitioner submitted the labor certification application to DOL. Part 17 of Part A of the ETA 750 indicates that the beneficiary will supervise two workers. The director observed that the petitioner's tax returns showed on Schedule C, Profit or Loss from Business, that the petitioner reported paying wages of only \$12,420 in 2002 and \$12,660 in 2001,⁶ which the director concluded cast doubt upon whether the petitioner had a legitimate need to hire a manager to supervise two workers or that it was likely that the petitioner had never employed two employees since 2002.

The AAO cannot conclude, based on payment of wages alone, that the job offer was not realistic. Further, there is no documentation in the record such as wage or unemployment reports specifying the number or identities of the petitioner's employees, which might address this issue. However, it is noted that the petitioner has not demonstrated that it has had the financial resources to pay the proffered wage of \$21.50 per hour to the beneficiary as well as cover his monthly recurring household expenses.

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

⁵ The regulation at 29 C.F.R. § 656.30(d) states in relevant part:

[A]fter issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

⁶ [REDACTED] were reported in 2003.

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'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 overall 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).

Here, as stated above, the ETA 750 established the priority date as February 28, 2002, and the proffered wage as \$21.50 per hour, which amounts to \$44,720 per year. As indicated above, evidence in the underlying record reflects that the petitioner was operated as a sole proprietorship, or 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. [REDACTED] N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For that reason, sole proprietors provide evidence of pertinent household expenses that are considered as part of the calculation of their continuing financial ability to pay the proffered wage. Such evidence should include, but not be limited to mortgage or rent, food, utilities, taxes, insurance and other monthly recurring expenses. In the instant case, the petitioner failed to provide such evidence. 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)).

[REDACTED] 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 this case, the petitioner provided copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001, 2002, and 2003. The returns indicate that he filed the returns jointly with his spouse and claimed two dependents in each year. The returns contain the following:

Year	2001	2002	2003
Wages	[REDACTED]		
Taxable Interest			
Business Income			
Adjusted Gross Income ⁷			

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, no evidence has been submitted indicating that the petitioner has employed the beneficiary.

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), [REDACTED]. Here, where a sole proprietorship is present, as stated above, unlike a corporation, the assets and liabilities of a sole proprietor are indistinguishable from that of the petitioning business so the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay.

In this case, although the sole proprietor has fewer dependents than [REDACTED] even without considering any household expenses, which were not provided, the proffered wage of [REDACTED] represents approximately 85% of the sole proprietor's reported adjusted gross income in 2002, the year covering the priority date. In 2003, it represents approximately 66% of the sole proprietor's adjusted gross income. The evidence fails to demonstrate that the petitioner had the continuing ability to pay the certified wage of [REDACTED] in these years. In the absence of the sole proprietor's personal expenses, the petitioner has not demonstrated that it had the *continuing*

⁷ Adjusted gross income is shown on line 32 in 2001; line 33 of the Form 1040 in 2002; and on line 34 in 2003.

financial ability to pay the proffered wage and pay the sole proprietor's personal expenses as of the priority date of February 28, 2002, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), and *Ubeda*.

In some cases, 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). That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within 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 [REDACTED] was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Although the petitioner may have been in business for a number of years, net profits reflected as business income on the respective tax returns, set forth above, has declined from over \$100,000 in 2001 to \$64,543 in 2003. Moreover, the sole proprietor's adjusted gross income declined from approximately \$[REDACTED] in 2001 to approximately [REDACTED] in 2003. This evidence does not establish a framework of profitability as in [REDACTED]. Unlike the *Sonogawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonogawa* are persuasive in this matter. The record contains no evidence of the sole proprietor's recurring monthly expenses to allow the AAO to conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage in this matter or demonstrated that the petitioner's job offer is realistic.

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.