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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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FILE:

Office: NEBRASKA SERVICE CENTER

NOV 08 2010

Date:

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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,

Perry 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 summarily dismissed.

The petitioner claims to be a restaurant and meat market. On December 18, 2006, the petitioner filed a petition seeking to permanently employ the beneficiary<sup>1</sup> as a cook. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (the DOL).<sup>2</sup>

As set forth in the director's denial, the primary 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)(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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

<sup>1</sup> U.S. Citizenship and Immigration Services (USCIS) has also issued an additional alien number to the beneficiary which is [REDACTED]. The beneficiary is also known as [REDACTED]. The beneficiary stated in the Form ETA 750, Part B that he was employed by the petitioner from April 1996, to May 2004, however, he was apprehended by USCIS attempting to illegally enter the United States on December 11, 1999, as [REDACTED]. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

<sup>2</sup> The priority date is June 14, 2004.

Here, the Form ETA 750 was accepted on June 14, 2004. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Accompanying the petition, counsel submitted a letter dated December 8, 2006 and the Schedule C from the petitioner's 2005 (Form 1040) federal tax return.

On November 26, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit additional evidence of its ability to pay the proffered wage starting from June 14, 2004 priority date according to regulation 8 C.F.R. § 204.5(g)(2) including the petitioner's annual report, its latest federal tax return, or audited financial statements.

In response, counsel submitted Schedule C from the petitioner's 2004 (Form 1040) federal tax return; and the petitioner's complete 2005 and 2006 personal federal tax returns (Forms 1040). With the documentary evidence, counsel stated in a cover letter dated December 24, 2007, "We were not able to obtain the full tax papers for 2004 and 2006 at this time. At the present time, the restaurant and market are undergoing a change of ownership, and the full tax papers for 2004 and 2006 cannot be located." Counsel requested "a little extra time" to respond to the director. In his decision, the director found that no extension of time to respond would be granted.

The director denied the petition on February 21, 2008. The decision stated that the petitioner failed to submit sufficient documentary evidence to demonstrate its ability to pay the proffered wage.

Counsel filed the instant appeal on March 21, 2008. On Part 3 of Form I-290B, Notice of Appeal or Motion, counsel states the following as the basis for the appeal in pertinent part:

[The petitioner failed to respond to the RFE] because the petitioner is a sole proprietorship without a management [sic] hierarchy to provide the personal tax papers of [the] petitioner, [and as the sole proprietor was on vacation and "unreachable"], an extension could have and should have been granted.

Counsel has not submitted evidence that the petitioner was undergoing a change of ownership in 2007,<sup>3</sup> why the sole proprietor was "unreachable" for 30 days, or why these reputed impediments prevent counsel from obtaining copies of the sole proprietor's tax returns and W-2 statements.<sup>4</sup>

<sup>3</sup> If the ownership of the business owned and operated by the petitioner who is sole proprietorship has changed, then in that case, evidence of transfer of ownership must show that a successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. *See Matter of* [REDACTED] (Comm. 1986).

<sup>4</sup> The AAO notes that the tax returns were prepared by an accountant maintaining a business address in Los Angeles California.

Also, the director requested the petitioner submit evidence that it has already been remunerating the beneficiary at a rate equal to or greater than the proffered wage. However, no such evidence was submitted.

According to the labor certification, the petitioner has reputedly employed the beneficiary commencing in April 1996. According to a USCIS Form G-325, the beneficiary stated under penalty of perjury that he was employed by the petitioner in the United States from April 1996 through May 2004 as a cook, but there is evidence in the record that the beneficiary attempted to enter the United States from the Republic of Mexico on December 11, 1999. 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).

On appeal, counsel submitted a legal brief and Form 1040 personal tax returns for 2004 to 2006 prepared by an accountant. The 2004 Form 1040 tax return was submitted with Form 1040, Lines 35 and 36 not copied. The adjusted gross income portion of the 2004 tax return was not copied and was blank. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The purpose of the RFE 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 in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence (Form 1040 personal tax returns for 2004 to 2006) submitted on appeal.<sup>5</sup>

<sup>5</sup> 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). 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 (7<sup>th</sup> Cir. 1983). Notwithstanding the above, the sole proprietor did not submit sufficient evidence of its ability to pay the proffered wage from the priority date. As stated above, the sole proprietor did not submit evidence of its adjusted gross income for 2004, or its recurring personal household expenses in any year. The sole proprietor's adjusted gross income was \$53,762.900 in 2005 and \$51,802.00 in 2006. It is not reasonable to assume that the sole proprietor could support

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states that the AAO "shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." Inasmuch as the petitioner has also failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed.<sup>6</sup>

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. The petitioner has not met this burden.

**ORDER:** The appeal is summarily dismissed.

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he and his spouse on what remains after paying the proffered wage for the beneficiary and the one additional beneficiary it is also sponsoring (i.e. USCIS [REDACTED]) and pay his recurring household expenses. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2).

<sup>6</sup> The petitioner must establish its ability to pay the proffered wage from the priority date to the present. A petitioner must establish the elements for the approval of the petition at the time of filing, and must cooperate with the director and produce evidence requested by the RFE that is material to the case. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), and *Matter of Soriano*, 19 I & N Dec. 764.