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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



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FILE:



Office: TEXAS SERVICE CENTER

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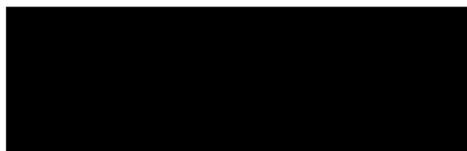
Petitioner:



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,

Elizabeth McCormack

Perry Rhew
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 in the business of making furniture. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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. 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 May 8, 2008 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 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). 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 for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage set by the DOL, as stated on the Form ETA 750, is \$14.54 per hour or \$30,243.20 per year. The Form ETA 750 further states that the prospective employee must have a minimum of 2 years experience in the job offered. The petitioner did not indicate on part B of the Form ETA 750 that he had worked for the petitioner.

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).

Since no evidence of ability to pay was originally submitted by the petitioner, the director sent the petitioner a request for evidence (RFE) on February 21, 2008, specifically instructing the petitioner to submit copies of its federal tax returns, audited financial statements, or annual reports for the years 2001 through 2006. The director also requested the petitioner to submit copies of any paystubs, W-2s, or 1099-MISCs that it issued to the beneficiary during the qualifying period and evidence that the beneficiary is qualified to perform the duties of the position.

In response to the director's RFE, the petitioner submitted copies of the following evidence:

- [REDACTED] individual tax returns filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2001 through 2006;
- The beneficiary's individual tax returns filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2002 through 2007;¹ and
- A letter from the petitioner indicating the beneficiary obtained qualifying work experience with Melrose Furniture Designs.

As the director has stated earlier in his decision, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period after the priority date in determining the petitioner's ability to pay the proffered wage during a given 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.

¹ The AAO notes that the beneficiary's tax returns are neither dated nor signed.

The director, based on the evidence submitted, concluded that the beneficiary was not employed and paid by the petitioner during the qualifying period. He indicated that the record contained no evidence such as copies of the beneficiary's paystubs, W-2s, or 1099-MISCs. The director also noted that the beneficiary's tax returns in and of themselves did not demonstrate that the beneficiary received wages from the petitioner.

The director further found that evidence of record – [REDACTED] tax returns – did not support that the petitioner had the ability to pay \$14.54/hour or \$30,243.20/year beginning on April 30, 2001.

On appeal, counsel for the petitioner maintains that the petitioner has the ability to pay the proffered wage. Specifically, counsel states that the beneficiary has been employed and paid by the petitioner since 2002, and since 2003, the petitioner has paid the beneficiary above the proffered wage. As evidence of her assertions, counsel submits copies of Forms 1099-MISC that the petitioner issued to the beneficiary in 2002 and 2003 and from 2005 to 2007.²

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

Upon review, we decline to accept the additional evidence provided on appeal. The petitioner in this case has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency. On February 21, 2008, the director sent an RFE to the petitioner, specifically informing the petitioner to submit, *inter alia*, copies of paystubs, W-2s, or 1099-MISC that the petitioner issued to the beneficiary during the qualifying period. No such evidence was submitted. The AAO, therefore, will not accept the additional evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 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 (RFE). *Id.* The appeal will be adjudicated based on the record of proceeding before the director.

Further, even though counsel claims on appeal that the beneficiary – through his individual tax returns and the Forms 1099-MISC submitted – has worked for and received compensation from the petitioner since 2002, the Form ETA 750B signed by the beneficiary on November 6, 2006 does not indicate that he worked for the petitioner. This inconsistency is not resolved on appeal merely by the submission of the Forms 1099-MISC indicating that the beneficiary earned most, if not all, of his income from the petitioner in 2002 and 2003 and from 2005 to 2007. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective

² According to the Forms 1099-MISC submitted, the beneficiary was paid as a nonemployee the following amounts: \$13,780 in 2002, \$36,892 in 2003, \$58,976 in 2005, \$61,283 in 2006, and \$64,851 in 2007. Except for 2005, each of the amounts paid to the beneficiary stated on the 1099-MISC matches the amount received as gross receipts or sales in schedule C of the beneficiary's tax returns.

evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record of proceeding shows that [REDACTED] or the petitioner is structured as a sole proprietorship. [REDACTED] is the sole proprietor of the business. On the petition, the petitioner claims to have established the business in 1980, to currently employ four workers, and to have gross annual income and net income of \$130,355 and \$44,294, respectively. No evidence of record before the director shows that the petitioner employed or paid the beneficiary during the qualifying period. Nor does the record contain any explanation by either the petitioner or the beneficiary concerning the beneficiary's employment with the petitioner.

When 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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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.

The petitioner, as noted earlier, 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 this case, the petitioner [REDACTED] filed his individual taxes as the head of household with one dependent child (daughter) for the years 2001 through 2004 and as single without any dependent for 2005 and 2006. A review of his individual tax returns reveals the following information:

Tax Year	Adjusted Gross Income (AGI)	Proffered Wage (PW)
2001 (line 33)	\$15,983	\$30,243.20
2002 (line 35)	\$17,257	\$30,243.20
2003 (line 34)	\$17,919	\$30,243.20
2004 (line 36)	\$6,398	\$30,243.20
2005 (line 37)	\$4,198	\$30,243.20
2006 (line 37)	\$333	\$30,243.20

Based on the table above, the AAO agrees with the director that the petitioner does not have the ability to pay the beneficiary's wage. The petitioner's AGI in each year from 2001 to 2006 is less than the proffered wage. Without further consideration, we find that it would be improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Finally, 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

Unlike *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the

business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner, especially between 2001 and 2006, had uncharacteristically substantial expenditures.

The AAO acknowledges that the petitioner runs a viable business. However, the issue here is whether the petitioner has the ability to pay \$14.54/hour or \$30,243.20/year as of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

Beyond the decision of the director, the AAO finds that this petition cannot be sustained because the petitioner has not established that the beneficiary qualifies as a skilled worker (requiring at least two years training or experience). As noted above, the petition is for a skilled worker, requiring at least two years training or experience. The DOL approved the Form ETA 750 labor certification based upon understanding that the beneficiary had two years experience in the job offered prior to April 30, 2001.

No credible evidence, however, is submitted to prove that the beneficiary has, at minimum, two years experience in the job offered. The petitioner [REDACTED], in response to the director's RFE, submitted a letter stating that the beneficiary worked at Melrose Furniture Designs as a carpenter from October 1995 to November 1997. The beneficiary did not list any employment on part B of the Form ETA 750 labor certification. He indicated on the Form G-325A, Biographic Information,³ that he was employed by the petitioner since December 1995. The inconsistent information in the record concerning the beneficiary's past employment casts serious doubt on the veracity of the petitioner's claim that the beneficiary worked as a carpenter for Melrose Furniture Designs between 1995 and 1997 and was a skilled worker (with at least two years training or experience) before April 30, 2001. Further, [REDACTED] letter does not meet the regulatory requirement that the beneficiary's prior work experience must be supported by a letter from the former employer giving the name, address, and title of the employer's representative and a specific description of the beneficiary's experience. 8 C.F.R. § 204.5(l)(3)(ii).

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

³ This Form G-325A was filed along with the Form I-485, Application to Register Permanent Residence or Adjust Status, and the Form I-140 petition.

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.