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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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 15 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 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 dismissed.

The petitioner is a painting and decorating 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 (the DOL). The director determined that the petitioner had provided conflicting and inconsistent evidence of the beneficiary's experience, and therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position as required by the labor certification. 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 denial, at issue in this case is whether or not, (1) the petitioner has provided sufficient credible evidence of the beneficiary's experience, and, (2) the petitioner demonstrated that the beneficiary is qualified to perform the duties of the offered position as required by the labor certification.

An additional issue, beyond the decision of the director, is whether the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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).

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 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 August 25, 2003. The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.[1]

The Form ETA 750A, Item 13, describes the job duties of painter as follows:

> Apply coats of paint, varnish, stain, enamel, or lacquer to decorate and protect interior or exterior surface, trimming and fixtures of building and other structures. Read work order or receive instructions from supervisor or customer regarding painting. Smooth surfaces, using sandpaper, brushes, or steel wool, and remove old paint from surfaces, using paint remover, scraper, wire brush, or blowtorch to prepare surfaces for painting. Fill nail holes, cracks, and joints with coulk [sic], putty, plaster, or other filler, using caulking gun and putty knife. Select premixed paints, or mixes required portions of pigment, oil, thinning and drying substances to prepare paint that matches specified colors. Remove fixtures, such as pictures and electric switch covers, from walls prior to painting, using screwdriver. Spread drop cloths over floors and room furnishings, and cover surfaces, such as baseboards, door frames, and windows with masking tape and paper to protect surfaces during painting. Paint surfaces, using brushes, spray gun, or paint rollers. Simulates wood grain, marble, brick, or tile effects.

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

> (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.

According to the labor certification, the beneficiary under penalty of perjury stated that he was self employed as a real estate agent from March 2003 to "present" (i.e. July 18, 2003) working 20-40 hours each week. From September 2002, to March 2003, the beneficiary stated he was unemployed with no further information provided. From January 2001, to September 2002, the beneficiary stated he was the owner/manager of a restaurant, the [redacted], located in Scottsdale, Arizona where he worked 40 hours each week. From July 1997, to August 2000, the beneficiary stated he was employed as a

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

painter fulltime by (a construction company) of Phoenix, Arizona. Therefore, the beneficiary stated he has prior employment experience as a painter through his reputed employment with commencing approximately 13 years ago.

Accompanying the petition and labor certification, counsel submitted, *inter alia,* an undated statement from , purportedly of of Phoenix, Arizona. According to the statement, the beneficiary was employed fulltime from July 1997, to August 2000, performing the same painting and decorating duties exactly as the beneficiary stated in the labor certification. The petitioner submitted no further evidence to substantiate this reputed employment.

The director sent a notice of intent to deny (NOID) dated March 18, 2008, to the petitioner, and provided the following adverse information pursuant to the regulation at 8 C.F.R. § 103.2(b)(16):[2]

The director stated that on January 26, 1998, the beneficiary and his spouse filed an I-130, Petition for Alien Relative, with the U.S. Citizenship and Immigration Services (USCIS) as identified by number and submitted with this petition was a Form G-325A, Biographic Information, [sic] page that had no work listed fror the beneficiary for the last five years.

On appeal, counsel asserts that "[T]he G-325-A was incomplete. The work section was left blank. If the beneficiary had not worked at all during that time, the employment section should have stated "NONE" or "N/A. The form was, therefore, incomplete."

Therefore, counsel is implying on appeal that although the beneficiary reputedly was working as a painter for of Phoenix, Arizona, in 1998, the beneficiary declined to provide that information to USCIS when he completed and submitted the Form G-325-A. The AAO notes that, despite the beneficiary's allegation of employment with counsel asserts that the beneficiary should have stated none or not applicable in the section of the Form G-325-A requiring employment history. However, according to counsel, the beneficiary worked as an independent contractor with from July 1997, to August 2000. The petitioner has failed to provide sufficient evidence for the AAO to review or analyze the above inconsistent statements to determine where the truth lies.

The above mentioned evidence and statements are not credible and will not be given any weight in this proceeding. 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,

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[2] The petitioner never submitted a response to the director's NOID dated March 18, 2008. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence 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). The director denied the petitioner on June 2, 2008. The petitioner appealed the denial on June 30, 2008.

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). Moreover, the petitioner's submission of a fraudulent document brings into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988).

No explanation was provided by counsel for these inconsistencies. 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. *See Id.*

The director stated on June 15th, 2000, that the beneficiary's representative, [redacted] submitted a letter to the USCIS. In this letter [redacted] declared, "[The beneficiary] has been in this country for several years without being able to work."

The director's NOID put the petitioner on notice of this adverse information to the petitioner's evidence and provided the petitioner an opportunity to respond to that deficiency. On appeal, counsel has not submitted evidence, nor attempted to refute [redacted] statement that several years prior to June 15, 2000, the beneficiary was not employed. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence 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).

Additionally, the director stated that on March 34d [sic], 1999, the beneficiary, and his spouse, submitted a joint letter to USCIS. In this letter the couple declared, "My husband [the beneficiary] has not been able to finish school or find work."

On appeal, counsel contends that "The gist of the statement is that [sic] without legal status or employment authorization, [the beneficiary] could not attend school or work." Counsel's unsupported assertion is not consistent with the beneficiary's statement in the labor certification that he was employed as a painter by [redacted] from July 1997, to August 2000.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, Supra.*

On appeal, counsel submitted a 1998 federal income tax (Form 1040NR) return for the beneficiary. According to that tax form, the beneficiary resided in Scottsdale, Arizona in 1998. The Form 1040NR was submitted without Wage and Tax or 1099-MISC Statements, or a Schedule C. The 1998 tax return states that the beneficiary's adjusted gross income was a negative -$25,000.00 that was derived, not from wages/salary or compensation earned as an independent contractor for ., but from . There is no other information in the record concerning this LLC or its business purpose. The 1998 Form 1040NR does not support the beneficiary's contention that he was employed as a painter by . from July 1997, to August 2000.

On appeal, counsel also submits two IRS transcripts (Forms 1040) for 1999 and 2000. The 1999 transcript stated that the beneficiary and his spouse, "married, filing jointly," stated adjusted gross income of $52,521.00. The 2000 tax transcript stated that the beneficiary, "married, filing separately," stated adjusted gross income of a negative -$64,152.00. The tax transcripts were submitted without any evidence where the income and loss were derived. Acceptable evidence would be Wage and Tax statements (W-2) or 1099-MISC statements, the beneficiary's Social Security Administration Earnings Record Information, cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay checks, or the beneficiary's personal tax returns with W-2/1099-MISC statements, or Employers Quarterly Federal Tax Forms (Form-941). However no such evidence was submitted. The two IRS transcripts for 1999 and 2000 do not support the beneficiary's contention that he was employed as a painter by from July 1997, to August 2000.

No other evidence was submitted of the beneficiary's employment experience.

The petitioner has not provided sufficient credible evidence of the beneficiary's experience as a painter, and has not demonstrated that the beneficiary is qualified to perform the duties of the offered position as required by the labor certification.

Furthermore, the undated letter from is defective on its face and could not serve to carry the petitioner's burden of persuasion even if it were not inconsistent with other evidence in the record. Although required by the regulations, the letter does not identify s title or role with the employer. It is not clear that he was an owner, officer, or even an employee. See 8 C.F.R. § 204.5(g)(i).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, an additional issue is whether the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Here, the Form ETA 750 was accepted on August 25, 2003. The proffered wage as stated on the Form ETA 750 is $23.82 per hour ($49,545.60 per year). 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).

Accompanying the petition and labor certification, counsel submitted, *inter alia,* bank checking account statements dated September 5, 2003, February 3, 2004, and March 9, through April 6, 2005; and spousal[3] personal federal income tax returns (Forms 1040) for 2003, 2004, and 2005.

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 1976 and to currently employ one worker.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application 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, 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 Sonegawa*, 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards.

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); *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

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[3] and husband and wife, who are the petitioner and his wife.

(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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his 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.

Although there is no statement of the sole proprietor's' personal recurring household expenses in the record, there are Schedules A included with the Forms 1040 submitted that state some of these recurring expenses.[4] Total itemized deductions found on the Form 1040, Schedules A were in 2003-($20,354.00); 2004-($20,552.00); and 2005-($15,021.00).

In the instant case, the sole proprietor supports a family of two. The proprietor's tax returns reflect the following information for the following years:

	2003	2004
Proprietor's adjusted gross income (Form 1040)	<$5,017.00>[5]	$33,885.00

[4] The I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, according to *Ubeda,* a statement of recurring household expenses for the petitioner's family allows this determination. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

[5] The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

	2005
Proprietor's adjusted gross income (Form 1040)	$45,406.00

In 2003, 2004, and 2005, the sole proprietor's adjusted gross income fails to cover the proffered wage of $49,545.60 and the sole proprietor's personal expenses stated in the Forms 1040, Schedules A. Even without consideration of the amounts stated in Schedules A, it is improbable that the sole proprietor could support himself on deficits, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Counsel has submitted bank checking account statements dated September 5, 2003, February 3, 2004,[6] and March 9, through April 6, 2005, as evidence of the petitioner's ability to pay the proffered wage. The AAO notes the checking account statements are in the spousal names, the name of the sole proprietorship, and "DEC." It is not clear if the bank statements are listing funds over which the sole proprietor has control. Assuming that the checking accounts are relevant, counsel's reliance on the balances in the accounts is misplaced. 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.

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 Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. 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

[6] On the 2004 bank statement, an investment CD and a savings account are listed, but they are not found on the 2003 and 2005 bank statements.

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 was established in 1976, and currently employs one worker. The sole proprietor stated on Schedules C gross receipts of 2003-$42,443.00, and a net profit of $6,571.00; 2004-$46,000.00 and a net profit of $8,662.00; and 2005-$36,000.00 and a net profit of <$5,280.00>. In the instant case, there is a paucity of information concerning the sole proprietor's finances, reputation in its business sector, its assets or liabilities or anything meaningful to review or analyze the petitioner's business prospects. There is no assertion that there was an occurrence of any uncharacteristic business expenditures or losses. There is insufficient evidence in the record to conclude that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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 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.