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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



FILE:



Office: NEBRASKA SERVICE CENTER

Date: **OCT 22 2010**

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an [REDACTED] It seeks to employ the beneficiary permanently in the United States as a painting supervisor and foreman. 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 submitted all the required initial evidence to establish the petitioner's continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary was qualified for the position offered. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 September 23, 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 is qualified for the position offered.

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 or seasonal 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, 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).

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.¹

The evidence in the record of proceeding shows that the petitioner is presently structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in October 1985 and to currently employ two workers. Its fiscal year is based on a calendar year. The Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$716.80 per week which equates to \$37,273.60 per year based on a 40-hour week. The Form ETA 750 states that the position requires one year of experience in the job offered or two years of experience in a related occupation.

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 petitioner's ability to pay the proffered wage. In the instant case, the beneficiary indicates on Form ETA 750, Part B, Statement of Qualifications of Alien, at item 15, that he was employed by the petitioner from February 2000 to present. However, the petitioner has not provided the beneficiary's Form W-2 or any other evidence of payment by the petitioner to the beneficiary. The petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date, April 27, 2001 and onwards.²

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).

² The petitioner submitted the beneficiary's 2007 W-2 statement on appeal, but this shows wages paid by a different employer and not the petitioner. Therefore, the wages paid by a separate entity would not demonstrate the petitioner's ability to pay. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of*

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 (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 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 supports a family of two. The proprietor's 2006 tax return reflects the following information:

- In 2006, the proprietor's Form 1040 stated adjusted gross income on line 38 of [REDACTED]

Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The petitioner did not provide any other financial evidence to establish his ability to pay the proffered wage from the priority date, April 27, 2001 through 2005. On appeal, the petitioner submitted only his Form 1040, 2006 U.S. Individual Income Tax Return, and states that his 2006 income tax return shows that he can pay the proffered wage. Absent the petitioner's yearly household expenses, and tax returns for 2001 through 2005, the AAO is unable to determine if the petitioner can support himself and family on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, the petitioner submitted the beneficiary's 2006 and 2007 Form 1040A, U.S. Individual Income Tax Returns, 2007 Forms W-2 for [REDACTED] located at different locations, specifically, [REDACTED] is not the petitioning entity. Therefore, this evidence does not establish the petitioner's ability to pay the beneficiary the proffered wage, as the beneficiary's tax returns for 2006 and 2007 are not accompanied by W-2 statements showing wages paid by the petitioner and the 2007 W-2 statement shows wages paid by an unrelated employer.

Additionally, USCIS records indicate that the petitioner filed one other Form I-140 petition. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until each beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). In the absence of the petitioner's 2001 through 2005 federal tax returns, and the sole proprietor's personal expenses, we cannot conclude that the petitioner is able to demonstrate his ability to pay the proffered wage for all of the sponsored workers from its adjusted gross income, and pay his personal expenses.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.

In the instant case, the petitioner states on Form I-140 that it was established in October 1985 and currently employs two individuals. In the instant case, the petitioner has not provided the relevant financial information from the priority date, including its 2001 through 2005 tax returns, or information related to the sole proprietor's personal expenses. Similarly, the petitioner has not established its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage. The petitioner has additionally sponsored one other worker and must establish that it can pay all its sponsored workers.

The petitioner has not provided sufficient evidence to establish its ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2). The petitioner has not provided all his federal tax returns and a list of his annual household and personal expenses to demonstrate his ability to pay the proffered wage and support his household. Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, April 27, 2001, through the present.

Additionally, the petitioner must establish that the beneficiary has the required experience for the position offered. The petitioner has not established that the beneficiary met the one year of experience in the job offered as a painting supervisor/foreman or two years experience in a related occupation, specifically, as an auto body painter and repair journeyman.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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, as noted above, the labor certification application was accepted on April 27, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany 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 of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have one year of experience in the job offered or two years of experience in a related occupation, specifically, as an auto body painter and repair journeyman.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed by the petitioner as a painting supervisor and foreman from February 2000 to the date the ETA 750 was accepted by the DOL. He also stated that he was employed by [REDACTED] Torrance, California, as an auto body repairman and painter from October 1997 to February 2000 and [REDACTED] Pico Rivera, California, as an auto body repairman and painter from September 1996 to October 1997.

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 (9 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).

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.

The petitioner must submit evidence in accordance with 8 C.F.R. § 204.5(g)(1) that the beneficiary obtained the required one year of experience in the job offered or two years of experience in a related occupation, specifically, as an auto body painter and repair journeyman before April 27, 2001.

The beneficiary claims on Form ETA 750, Part B, Qualifications of Alien, that he worked for the petitioning entity as a painting supervisor and foreman from February 2000 to June 5, 2007, which is the date he signed Form ETA 750B. However, the petitioner has not provided a letter or any other evidence verifying its employment of the beneficiary as a painting supervisor and foreman from February 2000 to the date the ETA 750 was accepted by the DOL on April 27, 2001.

The petitioner submitted a number of letters in attempt to establish the beneficiary had the required experience. [REDACTED] in his letter dated October 6, 2008 that the beneficiary worked for the company from December 1990 to August 1994 as a painter's helper. However, the beneficiary did not claim this employment on his Form ETA 750, Part B, Qualifications of Alien. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. In addition, "painter's helper" is not an acceptable related occupation on Form ETA 750.

The beneficiary claims on his Form ETA 750, Part B, Qualifications of Alien, that he was employed by [REDACTED] as an auto body repairman and painter from October 1997 to February 2000. However, in the letter dated October 3, 2008 signed by the [REDACTED], office manager of [REDACTED] she states that the beneficiary was employed as a painter's helper from October 1997 to February 2000. The beneficiary states again on Form ETA 750 that he was employed by [REDACTED] from September 1996 to October 1997. However, in the letter dated October 6, 2008 signed by [REDACTED] it states that the beneficiary was employed as a painter's helper from September 1994 to June 1997. The inconsistencies regarding the beneficiary's previously claimed occupation titles and the dates of employment with [REDACTED] are material to the petitioner's claim. It is incumbent upon the applicant 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. No evidence of record resolves these inconsistencies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not established that the beneficiary had the requisite one year of experience in the job offered or two years in a related occupation as of the priority date, April 27, 2001.

In conclusion, the petitioner has not established its continuing ability to pay the proffered wage and has not established that the beneficiary met the minimum requirements of the labor certification at the time the labor certification was accepted for processing, April 27, 2001. Therefore, the petition may not be approved.

Accordingly, 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.

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.