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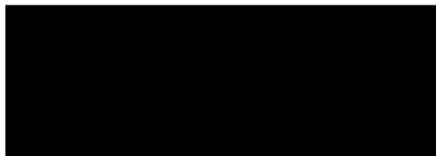
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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OCT 28 2010

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:



Beneficiary:

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

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 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. 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 frame and unibody repair firm. It seeks to employ the beneficiary permanently in the United States as a body man. The petition was accompanied by an approved Form ETA 750, Application for Alien Employment Certification.¹ 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 also determined that the petitioner failed to establish that the beneficiary met the position's experience requirements. The director denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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

¹ The original labor certification was not provided as required. *See* 8 C.F.R. §§ 204.5(a)(2) and (g)(1) (2007). If the original labor certification is not submitted, the regulation at 20 C.F.R. § 656.30 (2007), advised that a duplicate could be obtained:

The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.

In this matter, the record indicates that a duplicate was requested and received because there is a Form ETA 750 that is identified in the record with a sticker at the bottom of Part A indicating that it is a "certified duplicate copy by the [REDACTED]" Compared with a copy of the original ETA 750 that was provided with the initial filing and on appeal, however, the certified duplicate copy: 1) omitted a description of the job duties in item 13; 2) omitted a reference to overtime wages in item 10, b; and 3) omitted the special requirement in item 15 that requires "[P]ast experience on fiberglass buff."

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.

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 other 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.

Beyond the decision of the director, it is noted at the outset that this petition was not eligible for approvable because the labor certification did not support the visa category designated on the Immigrant Petition for Alien Worker (Form I-140), which was filed on October 24, 2007.

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).

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

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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

(ii) *Other documentation—*

(D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act.

Item 14 of the Form ETA 750, however, provides that the minimum requirements for the certified job as a body man is two (2) years of experience in the job offered and past experience on fiberglass buff.

In order to classify the alien as an unskilled worker under section 203(b)(3)(A)(iii) of the Act, the certified position as set forth on the Form ETA 750 must require less than two years of training or experience. *See* 8 C.F.R. § 204.5(l)(4). As Item 14 of the labor certification establishes that the certified

position's minimum requirements exceed the minimum requirements of the unskilled worker visa designation by requiring two years of work experience in the job offered, the labor certification does not support the visa classification sought on the I-140 petition. The petition is not approvable on this basis because the petitioner did not demonstrate that the position required less than two years training or experience.

Because the director's denial rested on his determination that the petitioner had not established its continuing financial ability to pay the proffered wage, and that the beneficiary did not possess the required work experience, this office will also review the merits of that decision.

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, 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); 8 C.F.R. 204.5(g)(2). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, 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 ETA 750 was accepted on April 5, 2002, which establishes the priority date. The proffered wage as stated on the labor certification is [REDACTED] per week, which amounts to [REDACTED] per year. As discussed above, the Form ETA 750 also states that the position requires two years in the job offered as a body man.

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 1985 and to currently employ three workers. On Part B of the ETA 750, signed by the beneficiary on April 1, 2002, the beneficiary claims to have worked for the petitioner since 1996.

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 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).

In support of its ability to pay the proffered wage of [REDACTED] the petitioner submitted copies of its bank statements for September 2007 and February 2009, as well as copies of its checks issued in February 2009. It has further submitted a letter, dated January 23, 2009, from the sole proprietor. He states that he pays [REDACTED] per week to the beneficiary for "autobody repair prep. paint," whereby the beneficiary dismantles and assembles auto parts. The petitioner has additionally supplied copies of the sole proprietor's individual Form 1040 federal income tax returns for 2004, 2005, and 2008. The petitioner provided a copy of a state sales and use tax return for 2006,² but has not provided any federal income tax returns or audited financial statements or annual reports for 2002 (the year of the priority date), 2003, 2006 or 2007.

With respect to the petitioning business' checking account statements, it is noted that while the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material such as bank statements to be submitted "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) consisting of federal tax returns, audited financial statements or annual reports is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements generally reflect only a portion of a petitioner's financial profile and are not indicative of other encumbrances affecting its position and are not an acceptable substitute for the required evidence over a prolonged period. Therefore, the sole proprietor's selected 2007 and 2009 bank statements are not persuasive evidence of the petitioner's continuing ability to pay the proffered salary.

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. As indicated above, the record reflects that the petitioner may have employed the beneficiary, but no documentation of wages paid to him was submitted with the petition or submitted on appeal. The sole proprietor's statement in 2009 letter, standing alone, is not sufficiently probative of actual compensation paid absent credible documentary evidence such as copies of payroll records and negotiated checks showing amount of wages, hours worked and year-to-date totals or copies of W-2s or Form 1099s. It is noted that the copies of checks issued in February 2009 and submitted on appeal did not include any issued to the beneficiary.

² This return is not probative of the petitioner's ability to pay the proffered wage as it only indicates gross sales for 2006 and does not reflect any net income or the sole proprietor's adjusted gross income.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation as claimed by counsel, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In this case as the petitioner is a sole proprietorship, the analysis is slightly different. A sole proprietorship is 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 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). For this reason, the sole proprietors provide a summary of annual household expenses. In this case, no summary of household expenses has been submitted.

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 [REDACTED] where the beneficiary's proposed salary was [REDACTED] or approximately thirty percent [REDACTED] of the petitioner's gross income.

In the instant case, the sole proprietor's tax returns reflect the following information:

| Year | 2004 | 2005 | 2008 |
|---|------------|------------|------------|
| Proprietor's adjusted gross income ³ (Form 1040, line 33) | [REDACTED] | [REDACTED] | [REDACTED] |

In 2004, 2005 and 2008, the sole proprietor's adjusted gross income of [REDACTED] in 2004; [REDACTED] in 2005; and [REDACTED] in 2008 failed to cover payment of the proffered wage of [REDACTED] even without considering payment of any household expenses.⁴ The petitioner has not established that it has had the continuing ability to pay the proffered wage. The sole proprietor did not submit any other evidence of other personal or cash assets on appeal.

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

³As noted above, for sole proprietors, USCIS considers adjusted gross income as reflected on the individual income tax returns. In this case, in 2004, adjusted gross income is shown on line 33; in 2005, it is shown on line 35; and in 2008, adjusted gross income is stated on line 37.

⁴The record does not contain any statement of the sole proprietor's monthly estimated expenses from the priority date onward. In any further filings, the sole proprietor must submit his monthly personal expenses to demonstrate that he could pay the proffered wage and support himself.

██████████ routinely earned a gross annual income of about ██████████. 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 ██████████. Her clients included ██████████. The petitioner's clients had been included in the lists of the best-dressed ██████████. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in ██████████. 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.

The petitioner has not established its continuing financial ability to pay the proffered wage. The sole proprietor's adjusted gross income in each of the tax returns submitted was more than ██████████ less than the proffered wage of ██████████ without even considering personal expenses. Further, although the business appears to be longstanding, its gross receipts or sales declined from ██████████ in 2004, to ██████████ in 2005, which are the only two years in which Schedule C, Profit or Loss from Business was submitted. The petitioner has not established its continuing ability to pay the proffered wage in 2004, 2005 or 2008. Additionally, as the financial documentation required by 8 C.F.R. 204.5(g)(2) was not provided for 2002, 2003, 2006 or 2007, the petitioner has not established its continuing ability to pay the proffered salary during these years either. No other circumstances such as uncharacteristic losses, factors of outstanding reputation or other factors that prevailed in *Sonegawa* are persuasive in this matter. The petitioner has not demonstrated that it has had the continuing ability to pay the proffered wage to the beneficiary.

Relevant to work experience, 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(ii) *Other documentation*—

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 has submitted several documents in support of its claim of the beneficiary's two years of experience as a body man. They are summarized as follows:

- 1) An undated letter from the sole proprietor indicating that the beneficiary has been employed since 1996. The letter does not

specifically indicate whether or when the beneficiary has been employed part-time or full-time and does not sufficiently describe the duties performed. Further, the record is unsupported by W-2 statements to verify such employment and whether the employment was part-time or full-time.

- 2) A letter, dated February 23, 2009, from [REDACTED] who merely references his acquaintance with the beneficiary and that he retained the beneficiary to re-paint a vehicle in 1992. The letter does not confirm the dates, part-time or full-time employment and does not establish that the beneficiary had two years of full-time employment as a body man as of the priority date.
- 3) A copy of a W-2 issued by [REDACTED] to the beneficiary in 1990. It shows that this employer paid the beneficiary [REDACTED] in wages. This amount of compensation does not indicate full-time employment for that year and is not accompanied by any documentation that demonstrates employment dates or job duties. An accompanying letter from a co-worker merely states that he and the beneficiary worked together at [REDACTED] in 1992. Similarly, the co-worker's letter relating to 1992 employment at [REDACTED] is not from an employer or trainer as required by 8 C.F.R. § 204.5(l)(3)(ii) and does not confirm specific dates or part-time or full-time employment.⁶ A copy of a check, dated February 21, 1995, and issued to the beneficiary by [REDACTED] indicates that he was paid [REDACTED]. As with the W-2 for 1990, this check does not establish ongoing full-time employment and is unaccompanied by any letter from an employer or trainer that verifies job duties, dates of employment or part-time or full-time work.

As set forth above, we do not find that this evidence sufficiently demonstrates that the beneficiary's work experience satisfied the terms of the labor certification, which required two years of experience in the job offered as a body man.

Based on a review of the underlying record and argument submitted on appeal, the petitioner has not established that the beneficiary had the requisite work experience as required by the labor certification and has not established its continuing financial ability to pay the proffered wage as of

⁶ The accompanying translation of the co-worker's letter also did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

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.



the priority date. *See* 8 C.F.R. § 204.5(g)(2). Additionally, as noted above, the labor certification does not support the visa classification of unskilled worker designated on 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. 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.