

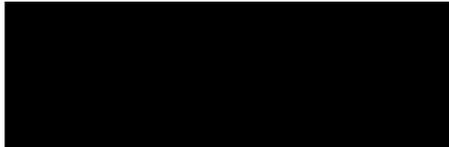
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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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Services**



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Office: NEBRASKA SERVICE CENTER

Date: SEP 01 2010

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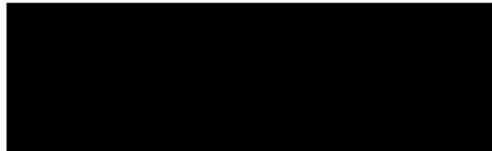
Petitioner:



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, with a fee of \$585. 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,

Kenneth S. Rhew for

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 landscaping business. It seeks to employ the beneficiary permanently in the United States as a lawn service manager. 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 also determined that the petitioner had not demonstrated that the beneficiary met the minimum requirements of the proffered job as of the priority date.¹ 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 May 28, 2009, denial, the two issues in this case are: (1) whether the petitioner demonstrated that the beneficiary satisfied the minimum level of work experience stated on the labor certification; and, (2) whether the petitioner had established 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 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The first issue in this matter is whether or not the beneficiary met the experience requirements stated on the labor certification. The petitioner indicated on Form ETA 750 that the position required a minimum of two years of experience as a lawn service manager. The beneficiary indicated on the Form ETA 750 that he had worked as a lawn service manager for [REDACTED], from July 1998 to June 2001, and that he has worked as a lawn service manager for the petitioner since June 2001. However, the petitioner failed to provide any evidence of the

¹ The Form ETA 750 states that the proffered position requires eight years of grade school education and one year of high school education, as well as two years of experience as a lawn service manager. The petitioner did not provide evidence that the beneficiary met these educational requirements.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

beneficiary's work history with the petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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, the labor certification application was accepted on April 27, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (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).

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.

(B) *Skilled Workers.* If the petition is for an skilled worker, it must be accompanied by evidence that the alien meets the educational, training and 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.

In response to the director's Request for Evidence (RFE) dated March 10, 2009, the petitioner attested to the beneficiary's employment after 2001; however, the petitioner failed to comply with the RFE's specific request for evidence that the beneficiary had acquired at least two years of experience as a lawn service manager prior to the April 27, 2001, priority date.

On appeal, the petitioner provided a letter dated June 10, 2009, from [REDACTED] of [REDACTED] who stated that the beneficiary had worked for him as a lawn service manager from 1998 until June 2001.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In his declaration in response to the RFE, the beneficiary stated that her had no information concerning the whereabouts of his past employer and that his former employer had indicated he was “getting out of the landscaping business.” The petitioner has not explained why it was able to obtain a letter from the prior employer on appeal, but not in response to the RFE. If the petitioner had wanted the letter from the beneficiary’s prior employer to be considered, it should have submitted the document in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. The petitioner has not demonstrated that the beneficiary met the minimum requirements of the proffered job as of the priority date.

The second issue to be considered is whether the petitioner has established its continuing ability to pay the proffered wage. 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).

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship until 2007, when it claims to have incorporated as [REDACTED]. On the petition, the petitioner claimed to have been established in July 1995 and to currently employ eight workers. On the Form ETA 750, signed by the beneficiary on April 24, 2001, revised, and signed again by the beneficiary on November 6, 2006, the beneficiary claimed to have worked for the petitioner as a lawn service manager since June 2001. The Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$22.65 per hour (\$47,112 per year).

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, 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 since the priority date of April 27, 2001. Financial records provided by the petitioner on appeal reflect the beneficiary was paid as follows:

- 2001 = \$17,665
- 2002 = \$24,158
- 2003 = \$29,490
- 2004 = \$29,910
- 2005 = \$58,680
- 2006 = \$51,610
- 2007 = \$44,000

The petitioner also provided evidence that the beneficiary received \$4,000 in compensation from [REDACTED] in 2007. The exact nature of the relationship between the petitioner and [REDACTED] has not been established by the petitioner. Therefore, the beneficiary's compensation from [REDACTED] has no bearing on the petitioner's ability to pay the proffered wage.

These records establish the petitioner's ability to pay the proffered wage in 2005 and 2006. However, the petitioner has established that it paid a portion of the proffered wage from 2001 through 2004 and in 2007. Since the proffered wage is \$47,112 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, that is:

- \$29,447 in 2001.³

³ Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2001. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of

- \$22,954 in 2002.
- \$17,622 in 2003.
- \$17,202 in 2004.
- \$3,112 in 2007.

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). 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).

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 supported a family of two. The sole proprietor petitioner's tax returns reflect the following adjusted gross income:

- 2001 = \$104,497⁴
- 2002 = \$92,521⁵

income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

⁴ IRS Form 1040, line 33

- 2003 = \$92,335⁶
- 2004 = \$67,205⁷
- 2007 = no tax records provided

From 2001 through 2004, the sole proprietor's adjusted gross income covers the difference between the proffered wage and the wages actually paid to the beneficiary. However, as stated above, the sole proprietor petitioner must also show that she can sustain herself and her dependents in addition to the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Therefore, on March 10, 2009, the director issued an RFE specifically requesting a list of the "petitioner's monthly recurring household expenses (supported by documentary evidence) for each deficient year" as well as copies of checking and savings account statements for each deficient year.⁸ Although specifically and clearly requested by the director, the petitioner declined to provide information regarding its monthly household expenses. This information would have demonstrated the amount of income available to establish its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Further, the petitioner has not established its ability to pay the difference between the wages paid to the beneficiary and the proffered wage in 2007, as it failed to submit its income tax return for 2007.

On appeal, counsel encourages the use of "alternative means of determining the Petitioner's ability to pay the proffered wage." However, counsel again ignored the director's request for information relating to the petitioner's monthly recurring household expenses.

The petitioner stated in response to the RFE, and again on appeal, her willingness to use "personal assets, lines of credit, loans, and other means available to pay [the beneficiary's] wage." In support of this statement, the petitioner provided a copy of her American Express statement dated January 25, 2004, and a copy of a January 13, 2004, MasterCard statement bearing an account number, but no name. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits. A credit

⁵ IRS Form 1040, line 35

⁶ IRS Form 1040, line 34

⁷ IRS Form 1040, line 36

⁸ In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

limit on a credit card is the maximum amount of credit that is available on the card. A credit limit is not a contractual or legal obligation on the part of the bank or financial institution. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner has not established that the unused funds from the credit limit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A limit on a credit card cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on credit limit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that maximizing the limit on its credit card will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although credit limits and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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 claimed to have been established in July 1995. It had gross receipts of \$357,943; \$438,357; \$648,087; \$665,037; \$956,179; and, \$662,388 in 2001, 2002, 2003, 2004, 2005 and 2006, respectively. The petitioner provided no evidence of its gross receipts in 2007. The record also reveals that the petitioner paid wages of \$101,676; \$108,990; \$117,407; \$53,405;

\$74,118; and \$60,749 in 2001, 2002, 2003, 2004, 2005 and 2006, respectively. Although the petitioner's gross receipts increased from 2002 to 2005, the petitioner has failed to provide any explanation for the decrease in labor costs after 2003 and for the decrease in gross receipts in 2006. 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.

Based on the petitioner's substantial adjusted gross income in 2001, 2002, and 2003, it is probable that the petitioner could pay the difference between the proffered wage and the wages actually paid to the beneficiary and still cover her personal expenses during those years. However, the petitioner's adjusted gross income in 2004 was significantly lower than in the other years and it is not clear that the petitioner could have covered her personal household expenses in addition to the paying the difference between the proffered wage and the wages actually paid to the beneficiary that year. Without the detailed information regarding her personal household expenses for 2004, USCIS is unable to make a determination of the petitioner's ability to pay the proffered wage in 2004. Additionally, USCIS is unable to make a determination of the petitioner's ability to pay the proffered wage in 2007, since the petitioner has failed to provide any tax records for that year, although they were specifically requested by the director. As detailed above, the petitioner's failure to provide the requested evidence is, alone, a ground for denying the petition. See 8 C.F.R. § 103.2(b)(14).

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.