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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

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Date:

Office:

FILE:

APR 22 2011

IN RE:

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 \$630. 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, [REDACTED] Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a conservatory construction company. It seeks to employ the beneficiary permanently in the United States as a conservatory designer/production supervisor. 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 and that the beneficiary did not have the education, training, and experience required by the terms of 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 May 28, 2009 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 had the required education, training, and experience as of the priority date.

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.<sup>1</sup>

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

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<sup>1</sup> 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). 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).

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$35 per hour for the required 50 hour work week (\$91,000 per year).<sup>2</sup> The Form ETA 750 states that the position requires three years of college in manufacturing, two years of training in Computer Studies and three years of experience in the job offered as a conservatory designer, production supervisor.<sup>3</sup>

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 1999 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

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<sup>2</sup> The labor certification states that 40 hours are basic work and states that 10 hours of overtime are required for a total of 50 hours.

<sup>3</sup> The petitioner asserts that it amended the experience requirements. This issue will be addressed later in the decision.

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 or paid the beneficiary any wages from the priority date 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*, 696 F. Supp. 2d 873, 881 (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.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, 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*, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

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 (7<sup>th</sup> 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 petitioner submitted tax information for the following years, which indicate that the sole proprietor resides in [REDACTED] has a spouse and supported no dependents in 2001, two dependents from 2002 to 2006 and one dependent in 2007 and 2008:

<b>Tax Return for Year:</b>	<b>Sole Proprietor’s AGI (1040)</b>	<b>Petitioner’s Gross Receipts (Schedule C)</b>	<b>Petitioner’s Wages Paid<sup>4</sup> (Schedule C)</b>	<b>Petitioner’s Net Profit from business (Schedule C)</b>
2008	\$74,536	\$675,000	\$198,761	\$41,886
2007	\$68,038	\$442,735	\$158,807	\$28,719
2006	\$70,307	\$362,217	\$65,950	\$34,252
2005	\$52,584	\$270,887	\$0	\$15,489
2004	\$58,852	\$307,426	\$0	\$18,926
2003	\$49,353	\$239,478	\$0	\$22,461
2002	\$49,014	\$216,583	\$0	\$22,091
2001	\$48,783	\$160,480	\$0	\$20,700

<sup>4</sup> The sole proprietor’s Schedule C for every year indicates that he paid no wages or costs of labor, but paid some contract labor amounts in 2006, 2007, and 2008. To the extent that the chart indicates that wages were paid, the figure comes from the contract labor line instead of the wages paid line.

We will consider a sole proprietor's total income or AGI, reflected on the Form 1040 as a whole against the sole proprietor's personal expenses and proffered wage to be paid. *See Ubeda*, 539 F.Supp. 647. The petitioner submitted a letter in response to the director's request for evidence, which states that the personal expenses of the sole proprietor total \$3,866 per month (\$46,392 per year total expenses). Even without considering the sole proprietor's household expenses, the beneficiary's proffered wage exceeds the sole proprietor's AGI in every year. As a result, the petitioner is unable to demonstrate the ability to pay the proffered wage in any year and show that the sole proprietor can pay the personal household expenses. On appeal, counsel stated that the sole proprietor had sufficient personal assets to pay the proffered wage and that certain expenses paid to outside contractors would be diverted to the beneficiary's proffered wage.

Specifically, counsel claims that the equity in the sole proprietor's residence could be used to pay the proffered wage. Counsel cites to a non-precedent AAO decision in *Matter of \_\_\_\_\_*, WAC 02 246 52330 (AAO Sept. 16, 2005), for the proposition that sole proprietors may use the equity in their house as evidence of the ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In the non-precedent case cited, the petitioner submitted evidence of an existing line of credit that offered over \$200,000 in unused funds.<sup>5</sup> Here, the petitioner seeks to rely on a non-liquefiable asset, real estate. Although the petitioner submitted a statement from a realtor stating that the sole proprietor's residence was valued at \$565,000 and a mortgage statement dated May 1, 2009 stating that the principal balance owed on the property is \$320,515, no evidence was submitted that a financial institution would make the same assessment of value on the house or that a financial institution would make any credit available to the sole proprietor based on other factors. Nothing demonstrates that the sole proprietor had any equity or an equity line of credit or the amount of equity as of the priority date.

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<sup>5</sup> In the non-precedent case cited, the director found that the petitioner could pay the proffered wage based on the sole proprietor's AGI from the 1997 priority date to 2001, and only the petitioner's ability to pay in 2002 was in question on appeal. In the remaining year, the sole proprietor's AGI met most of the proffered wage, and the sole proprietor submitted personal bank statements, and a brokerage statement to exhibit liquefiable cash assets, as well as information concerning a line of credit. Considering a totality of the circumstances, the AAO determined that the sole proprietor could establish its ability to pay in the final year as well. In the present matter, the sole proprietor's AGI would not establish the petitioner's ability to pay the proffered wage in any year and the sole proprietor did not submit any evidence of readily liquefiable cash assets.

Additionally, 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 corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner here has not established that any line of credit was 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). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit 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 the line of credit 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 firm's liabilities and will not improve its overall financial position. Although lines of credit 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).

Counsel also claims on appeal that contract labor invoices submitted for 2007 and 2008 show that the petitioner paid \$97,000 and \$117,000, respectively, in fees for conservatory design projects. Although the petitioner submitted invoices from [REDACTED] for various conservatory designs, the invoices are only for 2007 and 2008. As the priority date is 2001, the petitioner must establish its ability to pay in 2001 and all years onward. In addition, this evidence combined with the lack of wages and costs of labor paid suggests that the petitioner did not have a need for a full-time employee in the beneficiary's proffered position until 2007, so that the bona fide nature of the job offer from the priority date is in doubt.

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 *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 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 tax returns in the record indicate that the petitioner has had a minimal net profit in every year and the owner's AGI was less than the proffered wage in every year as well. Despite claiming on the Form I-140 that it employed six workers, the petitioner submitted no evidence of wages or costs of labor paid in 2001 through 2008, and instead only relied on contract labor in 2006, 2007, and 2008. The evidence does not support the petitioner's claims regarding the number of workers employed. The petitioner submitted no evidence that it employed or paid the instant beneficiary any wages. In addition, the petitioner submitted no evidence concerning its reputation or that it had one off year to liken its situation to the one in *Sonegawa*. While the petitioner's Schedule C's do show growth in the business overall from 2001 to 2008, in no year does the petitioner's net profit or the sole proprietor's AGI meet or exceed the proffered wage. 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.

Regarding the second issue identified by the director, the petitioner cannot establish that the beneficiary has the experience required for the position offered. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

- (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.
- (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.

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); to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 requires three years of college education with a major in manufacturing, two years of training in Computer Studies and three years of experience before the April 30, 2001 priority date as a conservatory designer, production supervisor. The petitioner submitted one letter to document the beneficiary's experience from [REDACTED] a personnel employee at [REDACTED] [REDACTED] wrote that the beneficiary worked as a full-time conservatory designer from 1988 to 1993. The letter fails to identify the position of the author, the exact start and end date to include the month of start and month of work completion to calculate the total length of time with this employer. Additionally, this experience was not listed on Form ETA 750. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). The petitioner submitted no transcripts or other educational documents to demonstrate that the beneficiary attended college or majored in manufacturing to meet the educational requirements of the labor certification. In addition, the beneficiary submitted no evidence that the beneficiary had the two years of training in Computer Studies.

Both in response to the director's Request for Evidence and on appeal, counsel claimed that the terms of the Form ETA 750 were amended before DOL certification and submitted a letter addressed to DOL with amendments. On appeal, the petitioner submitted a November 30, 2006 letter from the DOL requesting that the petitioner modify its education requirements because, as written, they were too "unduly restrictive." The DOL letter states that "changes, additions, or deletions to the application must be initialed and dated by the employer on Part A, and the alien on Part B." The DOL letter also states "changes should be made by lining through each entry and must be dated and initialed by the appropriate person. White out must not be used." Despite these instructions, no changes were made on Form ETA 750A or 750B, initialed, or stamped accepted by DOL. Instead, counsel submitted a separate letter. Nothing shows that DOL accepted these amendments as the certified Form ETA 750 does not state or reflect these changes. Counsel maintains that the labor certification was modified before certification to require no education or training and "3 years in the job offered or 3 years related experience in extrusion design." Counsel states that the petitioner conducted its recruiting in accordance with these requirements and the petitioner submitted its recruitment materials. Despite counsel's assertions, as noted herein, nothing shows that DOL accepted these amendments. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The AAO must read the terms as set forth on the labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406. As a result, the petitioner has failed to

demonstrate that the beneficiary has the education, training, and experience as required by the terms of the labor certification.

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.