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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**

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DATE: DEC 08 2011 Office: TEXAS SERVICE CENTER



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 Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential concrete business. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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 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, 2008 denial, the primary issue in this case is whether the petitioner has 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 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 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$23.05 per hour (\$47,944.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed that his business was established in 1982. The sole proprietor claims to currently employ 12 workers. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claims to have worked for the petitioner since August 1998.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards. The record of proceeding contains copies of IRS Forms W-2 that were issued by the petitioner to the beneficiary as shown in the table below.

- In 2001, the Form W-2 stated total wages of \$26,457.00 (a deficiency of \$21,487.00).<sup>2</sup>
- In 2002, the Form W-2 stated total wages of \$29,156.00 (a deficiency of \$18,788.00).

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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 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).

<sup>2</sup> Although the petitioner argues that it only needs to establish its ability to pay the proffered wage after the priority date, the record does not establish that these wages reported on the 2001 Form W-2 were all paid to the beneficiary after the priority date.

- In 2003, the Form W-2 stated total wages of \$31,757.00 (a deficiency of \$16,187.00).
- In 2004, the Form W-2 stated total wages of \$35,564.50 (a deficiency of \$ 12,379.50).
- In 2005, the Form W-2 stated total wages of \$37,116.25 (a deficiency of \$10,827.75).
- In 2006, the Form W-2 stated total wages of \$43,421.00 (a deficiency of \$4,523.00).
- In 2007, the Form W-2 stated total wages of \$45,277.00 (a deficiency of \$2,667.00).<sup>3</sup>

Therefore, for 2001 through 2007, the petitioner has failed to demonstrate its ability to pay the full proffered wage.

If, as in this case, 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (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).

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

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<sup>3</sup> It is noted that the 2007 Form W-2 is not persuasive evidence of any wages having been paid to the beneficiary by the petitioner in that year because information contained in that Form W-2 is inconsistent with the beneficiary's other Forms W-2 and the Form I-140, I-485, and G-325A that were submitted by the petitioner, where the beneficiary's social security number is listed in the Form W-2 for 2007 as [REDACTED]. Whereas the other Forms noted above state that the beneficiary's social security number is [REDACTED]. There has been no explanation given for this inconsistency. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept this Form W-2 as persuasive evidence of wages paid to the beneficiary.

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 sole proprietor supports himself. IRS Forms 1040 from the sole proprietor reflect the adjusted gross income (AGI) as shown in the table below.

- In 2001, the sole proprietor's IRS Form 1040 stated AGI of \$19,064.00.
- In 2002, the sole proprietor's IRS Form 1040 stated AGI of \$33,780.00.
- In 2003, the sole proprietor's IRS Form 1040 stated AGI of \$27,207.00.
- In 2004, the sole proprietor's IRS Form 1040 stated AGI of \$24,877.00.
- In 2005, the sole proprietor's IRS Form 1040 stated AGI of \$43,959.00.
- In 2006, the sole proprietor's IRS Form 1040 stated AGI of \$62,903.00.
- In 2007, the sole proprietor's IRS Form 1040 stated AGI of \$101,449.00.

The sole proprietor indicated that his annual household expenses (HHE) for 2001 through 2007 as shown in the table below.

- In 2001, the sole proprietor's HHE were \$42,586.00 (a deficiency of \$23,522.00).
- In 2002, the sole proprietor's HHE were \$52,497.00 (a deficiency of \$18,717.00).
- In 2003, the sole proprietor's HHE were \$47,053.00 (a deficiency of \$19,846.00).
- In 2004, the sole proprietor's HHE were \$38,191.00 (a deficiency of \$13,314.00).
- In 2005, the sole proprietor's HHE were \$39,559.00 (a deficiency of \$4,400.00).
- In 2006, the sole proprietor's HHE were \$42,377.00 (a surplus of \$20,526.00).
- In 2007, the sole proprietor's HHE were \$43,359.00 (a surplus of \$58,090.00).

Therefore, in 2001, 2002, 2003, 2004, and 2005, the sole proprietor's adjusted gross income minus his annual household expenses fails to cover the difference between the proffered wage and the wages paid to the beneficiary in those years. It is noted that in 2006 and 2007, the remainder of the sole proprietor's adjusted gross income minus his annual household expenses was sufficient to cover the balance of the proffered wage (or in the case of 2007, the entire proffered wage, since the credibility of the 2007 Form W-2 is undermined by the social security number discrepancy).

On appeal, counsel asserts that the director erred in his decision in not taking the totality of the circumstances into consideration in determining the petitioner's ability to pay the proffered wage. Evidence submitted on appeal includes copies of bank statements for the sole proprietor's personal checking accounts, money market accounts, and investment accounts.

Taking into consideration the evidence submitted on appeal, the sole proprietor's liquefiable asset amounts are sufficient to establish the petitioner's continuing ability to pay the proffered wage amounts for 2002 through 2007. However, the petitioner has failed to provide sufficient evidence to establish his ability to pay the proffered wage in 2001. The Form W-2 for 2001 indicates \$26,457.00 paid to the beneficiary in wages, with a deficiency of \$21,487.00. Therefore, the sole proprietor must demonstrate his ability to cover the remaining proffered wage of \$21,487.00. However, his household expenses for that year (\$42,586.00) exceeded his adjusted gross income of \$19,064.00. The remaining deficit for the household expenses is \$23,522.00. The sole proprietor provided copies of his personal checking account and retirement account statements which demonstrate an aggregate amount of liquefiable assets in the amount of \$21,569.73. Subtracting the remaining household expense balance (\$23,522.00) from the liquefiable assets amount (\$21,569.73) leaves a balance of -\$1,952.27. Therefore, the sole proprietor has failed to establish his ability to pay his household expenses and the remaining proffered wage in 2001. The job was not realistic until 2002.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. 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 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.

During the AAO's adjudication of this appeal, evidence has come to light that in this matter the petitioning business has filed additional Form I-140 petitions since the petitioner's establishment in 1982; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750B job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Therefore, there is insufficient evidence to demonstrate that the sole proprietor has established his ability to pay the proffered wage amounts for the beneficiary and each additional beneficiary.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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 assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses during the relevant year. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750.<sup>4</sup>

Beyond the decision of the director, the record does not establish that the beneficiary is qualified for the proffered position. 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<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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<sup>4</sup> It is noted that according to the petitioner's website, the sole proprietorship has been replaced by a corporation. Therefore, there is a possibility that the original job offer made by the sole proprietor may not be supported by the labor certificate any longer.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the 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 25, 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, *Madany 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 requirements for the proffered position of cement mason are set forth in Part 14 of the Form ETA 750. That section states that the applicant must have two years of experience in the job offered. Additionally, in order to establish that the beneficiary has the necessary experience in the job offered by the priority date, the petitioner must submit "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." 8 C.F.R. § 204.5(l)(3)(ii)(A). Furthermore, 8 C.F.R. § 204.5(g)(1) requires such letters to include a "specific description of the duties performed by the alien."

In support of the beneficiary's qualifications, the petitioner submitted a letter dated March 29, 2001 signed by the general manager of [REDACTED] who stated that the company employed the beneficiary from January 1995 through October 1998. However, on the Form ETA 750, which the beneficiary signed under penalty of perjury, the beneficiary indicated that he began employment with the [REDACTED] in February 1994. There is no evidence of record to resolve this inconsistency. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record does not contain a letter complying with the applicable regulatory provisions that demonstrates that the beneficiary has the qualifying employment experience. Additionally, the inconsistencies in the record regarding the start date of the beneficiary's employment with the petitioner require clarification and explanation through objective supporting evidence. Further, the general manager of [REDACTED] stated that the beneficiary was employed as a construction worker whereas the beneficiary described his job title as cement mason on the Form ETA 750. Again, it is incumbent on the petitioner to resolve inconsistencies in the record with independent objective evidence. *Id.* Furthermore, the general manager fails to specify the job duties performed by the beneficiary and whether or not the beneficiary was employed full-time. Without this specific information, the AAO is unable to determine whether the beneficiary

was qualified to perform those duties as of the filing date of the Form ETA 750. For this additional reason, the appeal will be dismissed.

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.