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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



B6.

FEB 11 2011

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a fast food cook. 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 denial, an issue in this case is 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of 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 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$9.66 per hour (\$20,092.80 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004).¹

Accompanying the petition and the labor certification, counsel submitted the first two pages of the beneficiary's federal income tax returns (Forms 1040) for 2006 and 2007; the beneficiary's Wage and Tax Statements (W-2) for 2006-\$12,487.50 and 2007-\$12,631.00 issued by the petitioner; the beneficiary's bank checking statement for the period March 19, 2008 to April 16, 2008; and an "Affidavit of Residency."

On February 24, 2009, the director requested that the petitioner submit evidence, *inter alia*, of his ability to pay the proffered wage from the priority date according to the regulation at 8 C.F.R. § 204.5(g)(2) above cited (i.e. copies of annual reports, federal tax returns, or audited financial statements). The director also indicated that the petitioner could also include additional evidence such as the petitioner's profit/loss statements, bank account records, and/or personnel records.

In response, counsel submitted, *inter alia*, a letter dated March 23, 2009; the beneficiary's Wage and Tax Statements (W-2) issued by the petitioner for 2001-\$8,721.00; 2002-\$13,338.00; 2003-\$13,008.07; 2004-\$10,589.57; 2005-\$12,005.41; 2008-\$10,062.00² with W-2 statements for 2006 and 2007 already submitted; and Schedules C from the petitioner's federal income tax returns (Forms 1040) for 2001, 2002, 2003, 2004, 2005, 2007 and 2008.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² It is noted that the petitioner submitted two W-2 Statements for 2008. In addition to the statement reflecting \$10,062.00 in wages, there is a second statement for \$3,528.00 bearing the name of [REDACTED]. However, since the social security number on the W-2 Statement bearing the smaller stated wage differs from the other W-2 Statements attributed to the beneficiary, this second W-2 statement is not persuasive evidence, and will not be considered. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Schedules C were submitted without the remainder of the tax returns that were filed with the IRS by the petitioner.

Therefore, the director issued an additional RFE to the petitioner dated April 9, 2009. The director requested the petitioner's complete federal income tax returns (Forms 1040) for 2001 through 2008, and a copy of the petitioner's checking and savings account statements.

Further, from the record of proceeding, the director identified the petitioner as a sole proprietor, therefore, the director's requested the sole proprietor's average recurring monthly expenses including but not limited to the following items: mortgage or rent payments; automobile payments; installment loans; credit card payments; and household expenses.

In response, counsel submitted a letter dated May 7, 2009, and the petitioner's federal income tax returns (Forms 1040) for 2001, 2002, 2003, 2004, 2005, 2007 and 2008. Counsel indicated in his letter accompanying the response that the director's request for "personal information" is "excessive." Accordingly, the petitioner did not submit evidence of recurring household expenses.

Accompanying the appeal, counsel submitted a letter dated July 7, 2009, and evidence already submitted in the record of proceeding (i.e. Schedules C from the petitioner's federal income tax returns (Forms 1040) for 2001 through 2008).

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 1988 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner from May 1994 to the present (i.e. April 17, 2001).

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 this matter, the petitioner submitted IRS Forms W-2, Wage and Tax Statement, as evidence of wages paid to the beneficiary by the petitioner in 2001 through 2008. However, information contained in these Forms W-2 are inconsistent with claims made by the petitioner in the Form I-140 under penalty of perjury and, therefore, the Forms W-2 are not persuasive evidence of wages having been paid to the beneficiary. The Forms W-2 state that the wages were paid to a person having social security number [REDACTED]. The petitioner responded "none" to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, [REDACTED] is the beneficiary's social security number. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms W-2 as persuasive evidence of wages paid to the beneficiary in 2001 through 2008. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010). However, assuming the Forms W-2 are persuasive evidence, the differences between the proffered wage and the wages paid to the beneficiary are indicated in the following table.

Tax Year:	The Proffered Wage the Petitioner Must Pay:	Petitioner's Wages Paid to the Beneficiary for Years 2001 to 2008:	The Differences:
2001	\$20,092.80	\$8,721.00	\$11,371.80
2002	\$20,092.80	\$13,338.00	\$6,754.80
2003	\$20,092.80	\$13,008.07	\$7,084.73
2004	\$20,092.80	\$10,589.57	\$9,503.23
2005	\$20,092.80	\$12,005.41	\$8,087.39
2006	\$20,092.80	\$12,487.50	\$7,605.30
2007	\$20,092.80	\$12,631.00	\$7,461.80
2008	\$20,092.80	\$10,062.00	\$10,030.80

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 through 2008.

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 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

As already stated, the director requested the sole proprietor's average recurring monthly expenses including but not limited to the following items: mortgage or rent payments; automobile payments; installment loans; credit card payments; and household expenses, but no such evidence was submitted. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

In the instant case, the sole proprietor supported a family of four. The proprietor's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$26,277.00	\$40,763.00
	<u>2003</u>	<u>2004</u>
Proprietor's adjusted gross income (Form 1040)	\$39,860.00	\$44,615.00

	<u>2005</u>	<u>2006</u>
Proprietor's adjusted gross income (Form 1040)	\$41,389.00	\$44,165.00
	<u>2007</u>	<u>2008</u>
Proprietor's adjusted gross income (Form 1040)	\$51,492.00	\$45,059.00

In 2001 through 2008, the petitioner's adjusted gross incomes fail to cover the proffered wage of \$20,092.80 because it is improbable that the sole proprietor could support himself on the negative or nominal amounts, which is what remains after reducing his adjusted gross income by the amount required to pay the proffered wage, and the personal expenses stated on the petitioner's Forms 1040, Schedule A for the same years (i.e. real estate taxes; personal property tax; home mortgage interest and points; gifts). Had the petitioner reported all his reasonable recurring personal expenses to include omitted items (i.e. automobile payments; installment loans; credit card payments; and household expenses) not found on Form 1040, Schedule A, it is more likely than not that the petitioner would demonstrate a deficit for every year for which his tax returns were submitted.

On appeal, counsel asserts:

Not all pertinent documentation provided by the United States employer to comply with his ability to pay the proffered wage was considered. The petitioner will submit additional evidence to establish that the petitioner did have the ability to pay the proffered wage at the time the priority date was established and continuing to the present. *A brief and additional evidence will be sent to the AAO on a timely manner.* (Emphasis added).

As of this date no additional evidence or a brief was submitted.

As already stated, accompanying the appeal, counsel submitted a letter dated July 7, 2009, and evidence already submitted in the record of proceeding. (i.e. Schedules C from the petitioner's federal income tax returns (Forms 1040) for 2001 through 2008).

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. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 proprietor's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the proprietor'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 proprietor claimed to have been established in 1988 and to currently employ two workers. According to the Schedules C in the record, the business name is [REDACTED] located in Westminster, California. Gross receipts stated on the Schedules C were in 2001-\$183,776.00; 2002-\$299,951.00; 2003-\$291,182.00; 2004-\$311,975.00; 2005-\$315,084.00; 2006-\$305,928.00; 2007-\$320,058.00; and 2008-\$336,882.00. Despite these substantial gross receipts, the net incomes from the business, which are the petitioner's sole income, were not sufficient when offset by the proprietor's personal expenses items stated on the Forms 1040, Schedules A in the record, the differences between wages paid to the beneficiary, from 2001 through 2008, and the proffered wage, and the proprietor's reasonable recurring personal expenses, which were not provided by the petitioner.

Based upon what is known, the proprietor has employed the beneficiary, but contrary to the director's RFE, the petitioner has not submitted evidence of his recurring personal expenses according to the decision in *Ubeda v. Palmer*. 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).

Counsel has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. The petitioner has not provided evidence of expectations of increased profitability. 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.

An additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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).

The beneficiary under penalty of perjury stated in Form ETA 750B that he was employed by the petitioner as a fast food cook from May 1994, to present (i.e. April, 2001). The beneficiary's job duties are exactly as stated in the labor certification as recited below.

According to a USCIS Form G-325 dated April 20, 2008, in the record of proceeding, the beneficiary stated under penalty of perjury that he was employed by the petitioner from May 1995 (not May 1994), to present time (i.e. April 20, 2008). There is no explanation in the record for this inconsistency.

From January 1993, to April 1994, the beneficiary stated that he was employed fulltime as a fast food cook with the [REDACTED] located in Santa Ana, California. The beneficiary's job duties with the [REDACTED] found in Form ETA 750B are exactly as stated in the labor certification as recited below.

No other employment experience is stated in the labor certification.

The Form ETA 750 states that the position requires three months experience in the offered job of fast food cook.

The Form ETA 750, Part A, Line 13, describes the job duties of fast food cook as follows:

Prepares and cooks to order foods requiring short preparation time, such as hamburgers, sandwiches, tacos, fish and chips, salads. Reads food order slips or receives verbal instructions as to food required by patron and prepares and cooks food according to instructions. Cleans work area and food preparation equipment. May prepare beverages and may serve meals to patrons over counter. (1 hour lunch).

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

(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.

* * *

(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 director issued an RFE to the petitioner dated February 24, 2009, and according to the regulation above cited, requested, *inter alia*, evidence that the beneficiary obtained three months experience in the job offered before April 27, 2001. In response, counsel provided information concerning employment not stated in the labor certification as certified. This employment reputedly occurred between January 1, 1990, to October 31, 1991, at the [REDACTED] located in Jalisco, the Republic of

Mexico, where according to the translated job reference the beneficiary “provided his services as a COOK in my country style restaurant.” A Spanish language menu was provided with the information.

The information concerning [REDACTED] is dated March 10, 2009. There is no substantiation for this submitted information in the record such as wage information or information concerning the training or experience the beneficiary received while working there. Since this job information was not stated in the labor certification certified on August 22, 2006, and received in 2009, it is an attempt to amend both the labor certification and the petition filed May 23, 2008, after the fact. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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. 1998). Further, in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board in *dicta* notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B (i.e. prior employment) lessens the credibility of the evidence and facts asserted.

Further, no prior employment verification according to the above cited regulation was provided for the [REDACTED] job experience which was stated in the labor certification.

Therefore there are no admissible or sufficient statements submitted in the record concerning the beneficiary’s qualifications according to the regulation at 8 C.F.R. § 204.5(1)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. There is no other evidence in the record submitted concerning the beneficiary’s qualifications to meet the requirements of the labor certification.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.