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



U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

Date:
JAN 03 2011

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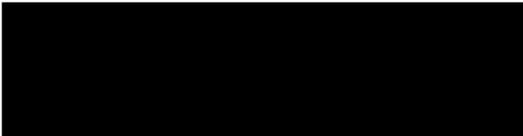
Petitioner:



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 \$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,

Kerai 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 used industrial sales business. It seeks to employ the beneficiary permanently in the United States as a mechanic technician. 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 April 7, 2008 denial, the primary 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.

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 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 \$11.49 per hour, which equates to \$23,899.20 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.¹

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 January 1986 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner as of the date the Form ETA 750B was signed. The beneficiary indicated he had been self-employed as a precision scraper since July 2000 (location not indicated), and as a scraper for [REDACTED] from March 1995 to April 2000.² It is noted, however, that the beneficiary indicated on a Form G-325, Biographic Information sheet, signed by him on June 5, 2007, and filed in connection with a Form I-485, Application to Register Permanent Residence of Adjust Status, that he had been employed by the petitioner as a mechanic from July 2000 until the date he signed the Form G-325. The petitioner also indicated in a letter submitted by counsel dated December 14, 2007, that the beneficiary “does not receive W-2s [Internal Revenue Service (IRS) Wage and Tax Statements] so there are none to provide. The beneficiary will be placed on formal payroll and will receive W-2 forms at such time he is granted legal permanent residency in the United States [sic].” These discrepancies in the record have not been explained. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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

¹ 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).

² The record includes a letter from [REDACTED] with English translation, stating that the beneficiary worked for the company from March 17, 1995 to April 16, 2000 as a mechanic technician repairing and adjusting industrial machines.

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. On appeal, counsel submits the beneficiary's pay stubs indicating that the petitioner paid the beneficiary at a rate of \$12.00 per hour from January 7, 2008 through April 18, 2008, for a total of \$7,164.00. While the petitioner has established that it paid the beneficiary partial wages in 2008, it has not established that it paid the beneficiary an amount at least equal to the proffered wage from 2001 through 2007.³

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).

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

³ The record before the director closed on December 20, 2007, with the receipt by the director of the petitioner's submissions in response to a Request for Evidence (RFE) dated October 16, 2007.

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 record reflects that the sole proprietor supported a family of six in 2001, 2002, 2003, and 2004, and a family of five in 2005 and 2006. The sole proprietor's IRS Forms 1040, U.S. Individual Income Tax Returns, reflect the petitioner's adjusted gross income (AGI) from Form 1040, line 34 as follows: \$27,211, \$25,442, \$12,748, \$83,058 and \$63,715, in 2001, 2002, 2004, 2005 and 2006, respectively. For the year 2003, the petitioner submitted a Tax Return Transcript showing AGI of \$29,515 for the tax period ending December 31, 2003.

The sole proprietor also submitted an estimate of his monthly expenses for October 2007 as follows: house payment \$1,815; automobile \$490; credit card payments \$120; utilities \$650; and, household expenses \$560, which total \$3,635 per month (or approximately \$43,620 per year in 2007). It is not clear if the expenses were the same in prior years from 2001 through 2006. It is noted that this estimate for October 2007 does not include, or specify a breakdown of, costs for auto insurance or health insurance. It also does not appear to include the health costs claimed by the petitioner on Schedule A to his IRS Form 1040 of \$10,750 in 2005 and \$12,100 in 2006, the true value of his mortgage payments,⁴ or his gifts to charity.⁵ 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. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)

While in 2001, 2002, 2003, 2005 and 2006, the sole proprietor's AGI covers the proffered wage of \$23,899.20, in 2004, the sole proprietor's AGI does not cover the proffered wage. It is also improbable that the sole proprietor could support himself and his family on a deficit, which is what remains in 2001, 2002, 2003 and 2006, after reducing his AGI by his estimated household expenses including the amount required to pay the beneficiary the proffered wage.

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

⁴ The sole proprietor paid home mortgage interest and points as follows: \$26,400 in 2001, \$6,793 in 2002, \$16,893 in 2003, \$12,700 in 2005 and \$32,361 in 2006.

⁵ \$2,400 in 2001, \$2,575 in 2002, \$ 0 in 2003 and 2004, \$5,000 in 2005 and \$4,300 in 2006.

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.

The petitioner submitted an unaudited balance sheet as of September 31, 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record of proceeding also contains bank statements from the petitioner's business account with Wells Fargo Bank, N.A. The funds in the petitioner's bank accounts represent the sole proprietor's business accounts. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of an entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

The petitioner's bank account statements reflect ending balances as follows:

<u>Year</u>	<u>Month</u>	<u>Ending Balance (\$)</u>
2001:		
	January	8,878.33
	February	10,473.47
	March	13,890.08
	April	3,577.76
	May	12,148.14
	June	8,030.49
	July	3,902.94
	August	7,356.43
	September	3,896.49
	October	3,674.71
	November	8,837.89
	December	14,277.30

2002:

January	1,513.17
February	14,166.68
March	1,392.51
April	(269.41)
May	10,007.42
June	2,348.51
July	318.70
August	906.20
September	171.98
October	1,465.18
November	550.69
December	297.24

2003:

January	3,331.64
February	(7.00)
March	844.27
April	9,858.34
May	(3.36)
June	2,333.47
July	4,837.43
August	2,371.66
September	1,736.55
October	736.64
November	2,819.43
December	(12.00)

2004:

January	(2,891.42)
February	370.61
March	2,271.61
April	2,012.64
May	2,837.74
June	820.13
July	2,557.64
August	76.67
September	10.00
October	519.88
November	141.61
December	457.17

2005:

January	1,972.66
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February	17,645.79
March	121.69
April	3,198.99
May	1,370.10
June	3,670.04
July	729.67
August	1,068.00
September	798.01
October	16,307.26
November	1,546.68
December	84.82

2006:

January	6,366.74
February	5,618.83
March	5,032.03
April	1,362.71
May	8,634.94
June	5,510.11
July	16,048.20
August	3,201.36
September	30,466.22
October	5,997.08
November	(374.93)
December	2,643.43

2007:

January	9,932.57
February	2,762.93
March	752.74
April	1,847.19
May	1,444.19
June	12,900.59
July	23,145.04
August	9,799.31
September	4,303.98
October	2,353.98
November	916.58
December	2,643.43

The priority date in the instant case is April 30, 2001. In order to establish the ability to pay the proffered wage, bank statements would have to show closing balances which are greater than the annual proffered wage or would have to show monthly increases in balances by at least the amount of the monthly proffered wage as of the priority date and continuing through the date the beneficiary

obtains lawful permanent residence. The annual proffered wage of \$23,899.20 is equal to \$1,991.60 per month. Monthly closing balances on bank statements do not represent new funds each month, but rather show the amount of the petitioner's cash reserves remaining after expenditures. If the cash reserve were used in a given month to pay the monthly wage, the balance in every succeeding month would then be lower by that amount. The petitioner has not shown monthly increases in balances by at least the amount of the monthly proffered wage. Except for 2006, the petitioner has also not shown closing balances which are greater than the annual proffered wage in any relevant year.

In the instant case, the petitioner is a small business, established in 1986 with only one employee.⁶ There is no evidence of historical growth,⁷ 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 would be deemed relevant to the petitioner's ability to pay the proffered wage. Furthermore, the petitioner's business bank statements do not establish its ability to pay 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 has the continuing ability to pay the proffered wage.

Based on the evidence submitted, the AAO affirms the decision of the director. The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Beyond the decision of the director, it is noted that the petitioner must demonstrate that, as of 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). The regulations for the skilled worker classification contain a minimum requirement that the position requires two years 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). 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,

⁶ The petitioner's Schedule Cs indicate no wages were paid in 2001, 2002, 2003, 2005 and 2006, and that wages of \$24,800 were paid in 2004.

⁷ The petitioner's Schedule Cs indicate gross receipts or sales fluctuated between \$386,270 in 2001; \$70,413 in 2002; \$110,650 in 2003; \$162,817 in 2004; \$379,438 in 2005; and, \$494,876 in 2006.

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 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.

As previously stated, the labor certification application was accepted on April 30, 2001. The duties of the position as described on the Form ETA 750 are as follows:

Scrapes metal workpieces with handtools to smooth machine ways, surface plates, and bearing surfaces to ensure free action of parts. Positions workpiece on worktable, in vise, or in fixture, and secures it with clamps and wrenches. Files and grinds burrs from workpiece. Applies pigment to surface plate with brush, cloth, or sponge. Positions workpiece and surface plate against each other, rubs one surface against other against other to determine high spots. Selects hand scraper and scrapes workpiece surface to remove high spots indicated by pigment pattern. Repeats operation until pigment pattern is even over work surface. May inspect workpiece for conformity to specifications, using such instruments as dial indicator, height gauge, master, surface plate, and gauge blocks. May use powered hand scraper. May polish and buff steel articles, using portable polisher or buffing brush.

The petition is for a skilled worker and the job requires two years of experience in the job offered, yet the record of proceeding does not contain sufficient evidence reflecting that the beneficiary has two years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter from the beneficiary's prior employer, [REDACTED] merely indicates that the beneficiary was employed "as a mechanic technician being his duties: Repair and adjust industrial machines." Further, the beneficiary did not list that employment on his Form G-325, Biographic Information sheet, signed by the beneficiary under penalty of perjury on June 5, 2007.⁸ Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988)

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.

⁸ The beneficiary left the section requesting his last occupation abroad blank.

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).

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.