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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529 2090



U.S. Citizenship
and Immigration
Services

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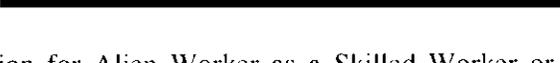
Office: TEXAS SERVICE CENTER

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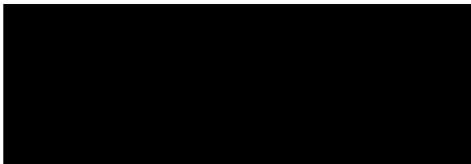
IN RE:

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 employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), 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 July 17, 2008 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. An additional issue identified by the AAO is whether the beneficiary possesses requisite qualifications for the proffered position.

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 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 February 25, 2004. The proffered wage as stated on the Form ETA 750 is \$24.60 per hour (\$44,772 per year¹). The Form ETA 750 states that the position requires two years of training and 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.²

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 1996 and to currently employ 11 workers. On the Form ETA 750B, signed by the beneficiary on December 9, 2003, 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 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In

¹ Based on working 35 hours per week.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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). On appeal, counsel submitted the beneficiary's paystubs for 2008 and requested additional thirty (30) days to submit a brief and additional evidence to support the instant appeal, however, as of this date, more than two and a half years later, counsel has not submitted any brief and further evidence.

the instant case, the petitioner submitted the beneficiary's Form 1099-MISC for 2004 through 2007 and the beneficiary's paystubs for 2008. The Forms 1099-MISC show that the petitioner paid the beneficiary nonemployee compensation of \$28,237 in 2004,³ \$23,006 in 2005, \$80,442 in 2006 and \$41,998 in 2007. The beneficiary's paystubs and paychecks show that the petitioner paid the beneficiary at rate of \$17.00 per hour from the week ending March 14, 2008 to the week ending May 16, 2008. The petitioner did not submit paystubs for the period before the week ending March 14, 2008 and after the week ending May 16, 2008. Assuming that the petitioner paid the beneficiary the entire year at the same rate, the total compensation the beneficiary received from the petitioner would not be more than \$35,360.⁴ Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$44,772 for 2004, 2005, 2007 and 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).

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

³ The AAO notes that the petitioner provided two Forms 1099-MISC for 2004. The record does not contain any evidence showing the issuing dates and any explanation why the petitioner issued two 1099 forms for the beneficiary in 2004.

⁴ The labor certification indicates that the beneficiary will work 35 hours per week and the paystubs show that the beneficiary actually worked on a part-time base for at least three weeks of the ten weeks for which the petitioner provided the beneficiary's paystubs.

sustain themselves and their dependents. See *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 petitioner 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 is a sole proprietorship. However, counsel did not submit the sole proprietor's individual income tax returns for the relevant years, a statement of the sole proprietor's household living expenses, or any evidence showing that the sole proprietor had other liquefiable assets or personal liabilities, such as statements from the sole proprietor's personal checking, savings, money market, CDs, brokerage accounts, or statements from the sole proprietor's traditional, Roth individual retirement account (IRA) or 401K retirement account and documentation that the sole proprietor would be willing to take withdrawals from these accounts to pay the proffered wage.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicates that the petitioner failed to establish the ability to pay the proffered wage as well as to cover his household living expenses. Accordingly, the denial was appropriate. On appeal, the petitioner failed to adequately rebut this determination.

In addition, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director,⁵ the petitioner declined to provide copies of the sole proprietor's tax returns for all relevant years. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The sole proprietor family's living expenses statement and personal assets would

⁵ On June 3, 2008, the director issued a request for evidence requesting the petitioner to submit a list of all the sole proprietor's monthly expenses, all pages of Form 1040 for 2004 and 2007, and the sole proprietor's personal saving accounts, money market accounts, certificates of deposit or other similar accounts for each relevant year.

further determine whether the sole proprietor had sufficient income or assets to pay the proffered wage as well as to support his family. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 (Reg. Comm. 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's Schedule Cs of the Form 1040 for 2004 and 2005 show that the gross receipts were decreasing from \$2,016,365 in 2004 to \$1,161,172 in 2005, 42.4% in one year. While the petitioner claims to employ 11 workers on the Form I-140, the line 26, Wages, in Schedule C of the tax return shows that the petitioner did not pay any wages to its employees. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that these years were uncharacteristically unprofitable years for the petitioner. 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the record that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL to the present. The evidence

submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the director's decision and counsel assertions on appeal, the AAO has identified an additional ground of ineligibility. 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).

As previously mentioned, the Form ETA 750 states that the proffered position also requires two years of training and two years of experience in the job offered. 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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, 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). According to the plain terms of the labor certification, the applicant must have two years of training and two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's education, he represented that he attended and graduated from [REDACTED] for High School and Elementary study. On the section of the beneficiary's work experience, he represented that he worked for [REDACTED] in Stamford Connecticut as a carpenter from 1996 to 1999 and prior to that, he worked for [REDACTED] in San Tiago, Chile as a carpenter from 1986 to 1995. He does not provide any additional information concerning his education, training and employment background on that form.

While the petitioner submitted a letter from [REDACTED] with its English translation to establish that the beneficiary possessed the required two years of experience in the job offered, the record does not contain any documentary evidence showing that the beneficiary also possessed the two years of training required for the proffered position as set forth on the Form ETA 750. Further, the beneficiary does not provide his training history on the Form ETA 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the

Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Therefore, the petitioner failed to establish that the beneficiary is qualified for the proffered position.

The petition would 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.