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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, D.C. 20529-2090



U.S. Citizenship  
and Immigration  
Services



B6

Date: **JUN 22 2011** Office: NEBRASKA SERVICE CENTER

FILE:

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:

SELF-REPRESENTED

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,

*Kerain S. Poulos for*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition and a subsequent motion to reopen and reconsider were denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a house/commercial moving business. It seeks to employ the beneficiary permanently in the United States as a foreman (1<sup>st</sup> line supervisor/manager of construction trades/extraction workers). 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 also noted that the experience letter submitted with the petition was insufficient as it does not give the exact dates of the beneficiary's employment. 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 November 15, 2007 denial and affirmed in his March 3, 2008 decision on the motion, the issues in this case are: (1) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and (2) whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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

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

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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Furthermore, evidence provided by the petitioner in response to a Request for Evidence (RFE) issued by the AAO on December 29, 2010, is included in the record and will be considered in the adjudication of this appeal.

*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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$33.00 per hour, which equates to \$68,640 per year. The Form ETA 750 states that the position requires four years of high school education, E.D.D. training, three years of experience in the position offered, and that the employee must be willing and able to do constant travel.

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 on March 19, 1989, to have a gross annual income of \$405,619 and net annual income of \$375,341, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on November 25, 2003, the beneficiary claimed to have worked for the petitioner as a foreman since January 2001, and to have previously worked as a [REDACTED] located in [REDACTED].

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'l Comm'r 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'l Comm'r 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 established that it employed and paid the beneficiary partial wages from the priority date onwards.

Here, the petitioner submitted Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, indicating that the petitioner paid the beneficiary as follows:<sup>2</sup>

<u>Year</u>	<u>Wages Paid (\$)</u>	<u>Difference Between Wages Paid and Proffered Wage (\$)</u>
2001	33,684.39	34,955.61
2002	41,555.75	27,084.25
2003	42,126.33	26,513.67
2004	45,610.52	23,029.48
2005	45,057.99	23,582.01
2006	47,509.50	21,130.50
2007	51,005.25	17,634.75
2008	54,256.13	14,383.87
2009	54,533.75	14,106.25

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 (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'r 1984). Therefore the sole proprietor's adjusted gross income (AGI), 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

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<sup>2</sup> The petitioner also submitted pay statements and payroll summaries establishing payments to the beneficiary during the relevant period.

sustain themselves and their dependents. *See 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 the 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 sole proprietor has a spouse and no dependents. The sole proprietor's IRS Forms 1040, U.S. Individual Income Tax Returns, reflect the petitioner's AGI as follows:<sup>3</sup>

<u>Year</u>	<u>AGI (\$)</u>
2001	50,964
2002	- 9,840
2003	26,863
2004	59,270
2005	35,178
2006	- 23,347
2007	25,886
2008	29,238
2009	101,513

In response to the AAO's RFE, the sole proprietor also submitted an estimate of his expenses totaling \$2,240.02 per month (\$26,880.24 per year). Therefore, the sole proprietor's AGI, minus his household expenses, covers the difference between the wages paid to the beneficiary and the proffered wage in 2004 and 2009. However, the sole proprietor's AGI, minus his household expenses, does not cover the difference between the wages paid to the beneficiary and the proffered wage in the years 2001, 2002, 2003, 2005, 2006, 2007 and 2008.

The sole proprietor petitioner states on appeal that he has ample assets to meet the proffered wage. In support of this statement, the sole proprietor has submitted documentation indicating that he and his spouse own five separate properties (a principal residence, a commercial property, an investment remodeling property, and two rental properties) with an alleged total value of \$4,805,000, on which they have liens totaling \$755,416 (resulting in an alleged net worth of \$4,049,584).<sup>4</sup> As noted by the

<sup>3</sup> AGI for a sole proprietor is shown on IRS Form 1040, line 33 (2001), line 35 (2002), line 34 (2003), line 36 (2004), or line 37 (2005-2009).

<sup>4</sup> The petitioner provided a letter dated [REDACTED] stating her opinion of the values of four of the petitioner's properties. [REDACTED] is not a licensed real estate appraiser in the State of California. *See* <http://www.orea.ca.gov/html/SearchAppraisers.asp> (accessed June 7, 2001). Further, she did not state any facts or provide any evidence on which her opinion was based (for example, she did not indicate whether the values were based on a cost approach, sales comparison approach or income approach and did not provide evidence to support the approach she used). Accordingly, her opinion

director, real estate is not a readily liquefiable asset. Further, it is unlikely that the sole proprietor would sell such significant personal assets as his home, commercial, investment and rental properties to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The sole proprietor petitioner claims on motion and on appeal that he could use the equity in his real estate holdings to pay the proffered wage. The petitioner also states in response to the AAO's RFE that "banks were offering 2<sup>nd</sup> deeds of trust on properties within days of applying." USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not generally improve its overall financial position. USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'1 Comm'r 1977). Further, the petitioner has not established that unused funds from a deed of trust were available at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The record of proceeding also contains bank statements from the petitioner's business accounts with Bank of the West for three months in 2006 and two months in 2007. 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 Sonogawa*, 12 I&N Dec. 612 (Reg'1 Comm'r 1967). Further, the bank statements cover only certain months in 2006 and 2007; they do not cover the entire relevant period and do not establish the petitioner's continuing ability to pay the proffered wage from the priority date.

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 id.* 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

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of the values of the four properties is of little probative value in this proceeding.

United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been established in 1989 and to employ five full-time employees. The petitioner has submitted a brochure from the International Association of Structural Movers (IASM); letters from the IASM stating that the petitioner has been a member of the association since 1985 and attesting to the specialization of the industry and the importance of its ability to retain qualified employees; photographs of the equipment used in its business; and, a news article noting its movement of a large structure. The petitioner has not, however, established its historical growth since 1989. Its tax returns indicate that its gross receipts fluctuated from 2001 to 2009, and steadily declined from 2007 to 2009.

Further, on appeal, the petitioner claims that "over the past few years we have made expensive equipment investment" and that the expenses were "necessary expenses for the business to increase productivity and competitiveness in the industry." However, the petitioner has not established any uncharacteristic business expenses or losses during the relevant period.

The petitioner also indicated that it restructured its operations in 2006 in order to accommodate paying the beneficiary the full proffered wage, and that it thereby saved about \$93,000 in wages paid to another employee. The record does not, however, name the worker, verify his/her full-time employment, or provide evidence that the petitioner has replaced or will replace him/her with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the other worker involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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.

In his decision, the director also noted that the experience letter submitted with the petition was insufficient as it does not give the exact dates of the beneficiary's employment. The petitioner must demonstrate that, on 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 (Acting Reg'l Comm'r 1977). 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'r 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). As previously stated, the labor certification application was accepted on April 26, 2001 and stated, in part, that the proffered position requires four years of high school education, "E.D.D." training, and three years of experience in the position offered.

Furthermore, 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, 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.

In the RFE, the AAO noted the following:

The petition is for a skilled worker and the Form ETA 750 states that the position requires four years of high school education, E.D.D. training, three years of experience in the position offered, and the additional requirement that the employee must be willing and able to do constant travel.

The work experience letters dated [REDACTED] from [REDACTED] [REDACTED] are not signed. Furthermore, the letters conflict. The February 16, 2001 letter states the beneficiary worked for the company "for approximately 3 years," and the [REDACTED] letter states the beneficiary worked for the company for four years "from January 1997 through December 2000." 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). Please provide independent, objective evidence of the beneficiary's prior employment with [REDACTED] Inc. Such evidence may include pay stubs, tax documents, financial statements or other

evidence of payments made to the beneficiary during periods of employment that precede the priority date.<sup>5</sup> We note that evidence that is created after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's decision.

In response to the RFE, the petitioner submitted a letter dated [REDACTED] from [REDACTED], explaining the discrepancy between the two letters. [REDACTED] states, in part:

In the first letter, dated February 16, 2001, we have Gerardo working for us for "approximately 3 years" and in the April 6, 2001 letter we have that he worked for us "almost 4 years from January 1997 through December 2000."

The correct date is the period covering January 1997 through December 2000. This is what our records showed at the time. Notice that in the first letter we did not specify the time period and that is where the mistake was made.

It is not possible for us, however, to provide payroll records for that period of time because those have been destroyed, it has been over ten years. Nevertheless, it was during that time [REDACTED] worked for us that we trained him in the use of the [REDACTED] [REDACTED] a skill he later put to good use when he went to work with [REDACTED]

The petitioner failed to provide independent, objective evidence of the beneficiary's prior employment with [REDACTED]. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not resolved the inconsistencies in the record and has not established that the beneficiary has the required three years of experience in the position offered. Further, the record does not include evidence of the beneficiary's four years of high school education and E.D.D. training required by the Form ETA 750. Thus, the petitioner has not established 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.<sup>6</sup>

<sup>5</sup> 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. *Id.* at 591.

<sup>6</sup> When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's

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.