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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[REDACTED]

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAR 01 2011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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,

Elizabeth McCormack

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 The director's decision will be withdrawn. The petition will be remanded.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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 February 25, 2009 denial, the single 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)(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 other 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 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 \$8.10 per hour (\$16,848.00 per year). The Form ETA 750 states that the position requires one year training as a hair stylist (beauty school diploma) and one year experience as a hair stylist.

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 did not indicate when the sole proprietorship was established. The petitioner did indicate on the petition that she currently employs nine workers. On the Form ETA 750B, signed by the beneficiary on May 27, 2003, the beneficiary claimed to work for the petitioner since 1999.

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 affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards. The record of proceeding contains copies of IRS Forms W-2 that were issued by the petitioner to the beneficiary as shown in the table below.

- In 2001, the petitioner did not provide a copy of the Form W-2.²

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).

² The petitioner states that she is unable to secure a copy of the beneficiary's IRS Form W-2 for 2001 because she changed accountants and the previous accountant has refused to provide her the tax returns she previously had him prepare. There is no evidence in the record to

- In 2002, the Form W-2 stated total wages of \$23,229.50.
- In 2003, the Form W-2 stated total wages of \$21,399.00.
- In 2004, the Form W-2 stated total wages of \$13,713.50 (\$3,134.50 less than the proffered wage).
- In 2005, the Form W-2 stated total wages of \$17,123.50.
- In 2006, the Form W-2 stated total wages of \$18,729.42.
- In 2007, the Form W-2 stated total wages of \$16,621.00 (\$227.00 less than the proffered wage).

Therefore, for 2001 the petitioner has failed to demonstrate its ability to pay the proffered wage, and for 2004 and 2007 the petitioner has failed to demonstrate its ability to pay the full proffered wage.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (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

demonstrate efforts on the petitioner's part to obtain this document from the Internal Revenue Service (IRS) or from the beneficiary herself.

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 supported a family of three in 2001 and 2007, and a family of two in 2004. The sole proprietor's IRS Forms 1040 reflect her adjusted gross income (AGI) as follows:

- In 2001, the proprietor's IRS Form 1040 stated AGI of \$46,849.00.
- In 2004, the proprietor's IRS Form 1040 stated AGI of \$60,970.00.
- In 2007, the proprietor's IRS Form 1040 stated AGI of \$50,118.00.

Although the AGI amounts for 2001, 2004, and 2007 are in excess of the difference between the wages paid to the beneficiary and the proffered wage (\$16,848.00 in 2001; \$3,134.50 in 2004; and \$227.00 in 2007), the sole proprietor must demonstrate she can cover her existing business expenses as well as pay the proffered wage out of her adjusted gross income or other available funds. In addition, the sole proprietor must show that she can sustain herself and her dependents. *See Ubeda v. Palmer, supra.*

On appeal, the sole proprietor submitted a list of her average recurring household expenses totaling \$16,224.00 per year. Therefore, after subtracting the household expense amounts from the AGI amounts, the proprietor is left with sufficient funds to pay the total proffered wage in 2001, 2004, and 2007 (\$30,625.00 in 2001; \$41,611.50 in 2004; and \$33,667.00 in 2007).³ Thus the petitioner has overcome the decision of the director.

The petition may not be approved, however, as the beneficiary does not appear to be qualified to perform the duties of the position. As the director did not address this issue, the case will be remanded in order for the director to determine whether the beneficiary is qualified to perform the duties of the position.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (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

³ The AAO notes that the sole proprietor's IRS Forms 1040 at Schedule A list additional expenses she incurred in each of the above noted years, and cancelled bank checks which demonstrate her payment of additional expenses. The cumulative amounts are not excessive and do not infringe upon the proprietor's ability to pay the proffered wage.

plain terms of the labor certification, the applicant must have one year experience in the job offered as a travel consultant, and must be proficient in the Apollo computer system.

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 (Act. Reg. Comm. 1977).

The Form ETA 750 requires that the beneficiary have one year of training (beauty school diploma) and one year experience as a hair stylist. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a hair stylist. In support of the beneficiary's qualifications, the petitioner submitted a translated letter from [REDACTED] of [REDACTED] who stated that the beneficiary provided services to the business establishment from December 1994 through February 1997. This letter is deficient in that the representative fails to describe the type of service provided, whether the beneficiary was employed by the business establishment, or the number of hours worked. Moreover, the beneficiary did not list this business establishment as her former employer on the ETA 750B, at Section 15, where she was asked to list all relevant employment. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The letter does not include a specific description of the job duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. See *Matter of Wing's Tea House*, *supra*.

The AAO further notes that the petition may not be approved, as the petitioner filed the petition for an unskilled worker by checking box g on the Form I-140 at part 2.

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

- (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates one year of training (beauty school diploma) and one year experience as a hair stylist. However, the petitioner requested the unskilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification once the decision has been rendered. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The Form I-140 petition is for an unskilled worker, which requires less than two years training or experience. The Form ETA 750, however requires two years combined training and experience. Thus, the petition was filed under the wrong category. For this additional reason, the petition may not be approved.

Upon review of the record, the AAO has determined that the petitioner has overcome the director's decision that the petitioner does not have the ability to pay the proffered wage since the priority date. However, the petition may not be approved, as the petitioner has failed to submit sufficient evidence to demonstrate that the beneficiary had the qualifications stated on its labor certification application prior to the priority date, and because the petitioner filed the petition under the wrong category. It does not appear from the record of proceeding that the director examined either of these issues. Thus, the director's decision will be withdrawn and the petition will be remanded in order for the director to address whether the beneficiary was qualified to perform the duties of the position as of the priority date and whether the petition may proceed without the appropriate category having been checked on the Form I-140. As always, the burden of proof remains with the petitioner.

The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office (AAO) for review.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which if adverse to the petitioner shall be certified to the AAO for review.