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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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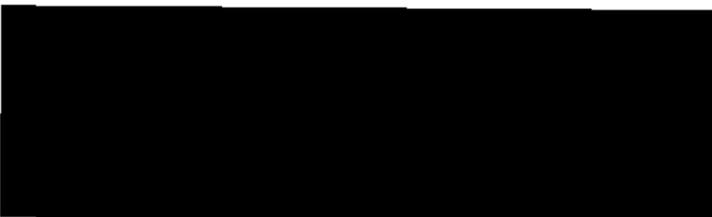
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FILE:  Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: 
Beneficiary:  MAR 04 2011

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 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 in the construction business. It seeks to employ the beneficiary permanently in the United States as a carpenter supervisor. 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 May 22, 2009 denial, the 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15.22 per hour (\$31,658 per year). The Form ETA 750 states that the position requires two years experience in the proffered position as a carpenter supervisor or four years experience in a related occupation as a carpenter.

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 2000 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have previously worked for the petitioner.

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 petitioner did submit, however, Forms 1099 showing the beneficiary was paid wages as follows from 2001 through 2008:

- 2001 - \$32,163
- 2002 - \$27,415
- 2003 - \$17,392

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).

- 2004 - \$23,565
- 2005 - \$22,262
- 2006 - \$25,311
- 2007 - \$16,860
- 2008 - \$22,532

Thus, it will be necessary for the petitioner to establish that it paid the beneficiary the difference between the proffered wage and wages actually paid to the beneficiary in those years. Those sums are as follows:

- 2001 - The sole proprietor paid to the beneficiary wages of \$32,163 in 2001, an amount which exceeds the proffered wage.
- 2002 - \$4,243
- 2003 - \$14,266
- 2004 - \$8,093
- 2005 - \$9,396
- 2006 - \$6,347
- 2007 - \$14,798
- 2008 - \$9,126

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 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 this proceeding, the record closed on April 20, 2009 with the sole proprietor's response to the director's request for evidence. As of that date the most recent tax return available would have been for tax year 2008. The petitioner did not submit a tax return for 2008 but did submit a Form 4868 showing that he applied for an automatic extension of time in which to file that tax return.

In the instant case, the sole proprietor's 2001 through 2007 tax returns show that the sole proprietor claimed no dependents and filed his tax returns as a single person. The proprietor's tax returns reflect the following information:

- 2001 - Adjusted Gross Income of \$17,699²
- 2002 - Adjusted Gross Income of \$27,834
- 2003 - Adjusted Gross Income of \$27,086
- 2004 - Adjusted Gross Income of \$25,337
- 2005 - Adjusted Gross Income of \$24,220
- 2006 - Adjusted Gross Income of \$18,829
- 2007 - Adjusted Gross Income of \$11,898

As previously noted, the sole proprietor must not only establish the ability to pay the proffered wage, or the difference between the proffered wage and wages actually paid to the beneficiary (if any) in each year from the priority date until the beneficiary adjusts status to that of a permanent resident, but his individual living expenses and those of any dependents as well. The sole proprietor provided a list of his regularly recurring living expenses stating that those expenses total \$2,810 per month, or \$33,720 per year. Thus, it will be necessary for the sole proprietor to establish that he has the ability to pay the difference between wages paid to the beneficiary and the proffered wage plus those living expenses. Those sums are as follows:

- 2001 - \$31,153³

² The sole proprietor's adjusted gross income (AGI) is found on Line 37 of the Form 1040 in 2005, 2006 and 2007. The AGI for years 2001 through 2004 is found on the Form 1040 as follows: 2001 – Line 33; 2002 – Line 35; 2003 – Line 34; and 2004 – Line 36.

³ In 2001, the sole proprietor paid to the beneficiary wages which exceeded the proffered wage by \$505. Thus, for that year it will be necessary to establish that he can pay his necessary living expenses plus the sum of \$31,153 (Wages paid to the beneficiary of \$32,163 minus the proffered wage = \$505).

- 2002 - \$37,963
- 2003 - \$47,986
- 2004 - \$41,813
- 2005 - \$43,116
- 2006 - \$40,067
- 2007 - \$48,518

The sole proprietor's tax returns show insufficient adjusted gross income to pay the difference between the proffered wage and wages paid to the beneficiary plus the sole proprietor's necessary living expenses in any year from 2001 through 2007.

On appeal, counsel states that the sole proprietor has established the ability to pay the proffered wage in all relevant years. Counsel states that the wages paid to the beneficiary plus the petitioner's business net income⁴ exceed the proffered wage from the priority date. Counsel further states that the sole proprietor's assets are more than sufficient "to cover the proffered wage since 2001."

Counsel states that the value of the sole proprietor's real estate holdings should be considered in determining his ability to pay the appropriate wage. The petitioner did not, however, submit sufficient documentation to determine the value of any such real estate. The only documentation submitted was a real estate loan application listing various properties owned by the sole proprietor. Any statement as to the values of such real estate is purely the opinion of the sole proprietor and is unsupported by corroborating documentation. The opinion is self-serving and is insufficient to establish the value of the property.⁵ It should further be noted that real estate is not a readily liquefiable asset and is not the type of liquid asset normally relied on to pay employee wages. 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 (5th 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). Additionally, any income received from renting such properties would be reflected on the sole proprietor's tax return and considered within his adjusted

⁴ As previously noted, the business net income on the sole proprietor's Schedule C of his Forms 1040 are considered and carried forward to page one of each tax return and factored into the determination of the sole proprietor's adjusted gross income, which is the appropriate figure for consideration in determining the sole proprietor's ability to pay the appropriate wage. *See Ubeda*, 539 F. Supp. at 650.

⁵ Additionally, we note that the properties listed on the loan application all state mortgage payments and increase the sole proprietor's liabilities. None of these mortgage amounts due were listed on the sole proprietor's monthly estimated expenses. 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).

gross income. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner also states that it owns various motor vehicles which have value and should be considered in the ability to pay analysis. The sole proprietor has not submitted sufficient documentation to establish the value of any such motor vehicles or independent corroborating evidence that the vehicles are unencumbered. Additionally, counsel states that the vehicles are for business use. It is unclear from the record that the petitioner could sell a business asset without negatively impacting the business. Counsel references case law that he asserts would allow consideration of "inventory" in determining the petitioner's ability to pay the proffered wage, and states that the referenced vehicles are "inventory." The AAO disagrees. The vehicle would constitute a business asset. Inventory is listed as a separate category on Schedule C of the petitioner's tax returns. The sole proprietor's tax returns list no figures on the line for inventory. Again, such assets [vehicles] are not the type of liquid assets normally relied upon by employers to pay worker's wages.

The sole proprietor submitted copies of 2005, 2006 and 2007 business bank statements from the MidAmerica Bank and the La Salle Bank N.A. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Further, business receipts (i.e. resulting in cash in bank accounts) would be considered on Schedule C of the sole proprietor's tax returns as the bank accounts would contain sums listed on the Schedule C as gross receipts. There is nothing in the record to show that those funds came from anything other than the petitioner's business receipts. Any such sums contained in those accounts have already been considered and are insufficient to establish the sole proprietor's ability to pay the appropriate wage from the priority date onward. Bank records were submitted only for years 2005 through 2007.

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 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 sole proprietor has not established sufficient income or liquefiable personal assets to pay the required wage from 2001 onward. An examination of Schedule C of the sole proprietor's Forms 1040 show that his gross receipts have steadily declined since 2004.⁶ The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that he (the sole proprietor) has maintained the continuing ability to pay the required wage from the priority date. 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary has two years of experience in the proffered position as a carpenter supervisor or four years in a related occupation as a carpenter as required by the Form ETA 750. As previously stated, the petitioner must 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). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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) (the AAO reviews appeals on a de novo basis). The petitioner submitted an experience letter dated December 6, 2007 from [REDACTED] which states that the beneficiary was employed by that organization from November 1995 to December 1999 as a carpenter. The letter, however, does not state the title of the letter's author or otherwise state how the author would have knowledge of the experience attested to. As such, it does not comply with 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A) which requires experience letters to contain the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁶ The sole proprietor's Forms 1040, Schedule C show that gross receipts have declined by over \$200,000 from 2004 to 2007.