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



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

MAR 04 2011

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 R. Hew
Chief, Administrative Appeals Office

DISCUSSION: The preference 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 Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook. 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 January 25, 2008 denial, the single issue 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. Beyond the director's decision, the AAO will determine whether the petitioner has been sufficiently identified based on the evidence in the record, and, therefore, whether a bona fide job opportunity exists. The AAO will also examine whether the petitioner established that the beneficiary is qualified to perform the duties of 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.

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$2,192 per month, or \$26,304 per year. The Form ETA 750 states that the position requires three years of work experience in the proffered job.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *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 Counsel submits a brief and the following evidence:

A letter dated March 12, 2008 from [REDACTED] identified as the owner of [REDACTED] states that the beneficiary has worked [REDACTED]

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).

for the petitioner since August 1, 2007 on a fulltime basis and that her monthly salary was \$2,192;

Copies of the Beneficiary's 2007 W-2 Wage and Tax Statement. The W-2 Form identifies the employer as [REDACTED], with [REDACTED] and indicates that the petitioner paid the beneficiary \$12,150 in 2007;

Copies of the beneficiary's pay stubs for August 17, 2007 to January 31, 2008 that indicates a weekly salary of \$1,150 with tips of \$200.

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).

On the petition, the petitioner identifies its EIN as 96-0251124. With the initial petition, the petitioner submitted Forms 1040s, U.S. Income Tax Return for an Individual for tax years 2003 to 2005. Only the 2005 Form 1040 contains a Schedule C for the petitioner identified as [REDACTED]

With its response to the director's RFE dated October 30, 2007, the petitioner submitted Forms 1120, U.S. Corporation Income Tax Return, for tax years 2001, 2002, 2003, 2005 and 2006³ for [REDACTED] located in tax years 2001 to 2003 at [REDACTED] and in tax year 2005 to 2006 at [REDACTED]

[REDACTED] This entity's EIN is [REDACTED]. The petitioner also submitted a Form 1120A, U.S. Corporation Short-Form Income Tax Return for tax year 2004, with the same EIN. The business entity on the 2004 tax return is [REDACTED]

[REDACTED] On all tax returns, the date of incorporation of this business is identified as March 12, 1996.⁴ *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." These serious and substantive inconsistencies undermine the credibility of the petition.

The AAO notes that the California Secretary of State business website indicates that [REDACTED] with agent identified [REDACTED]

² The Schedule C identifies the business' Employer Identification Number (EIN) as [REDACTED]

³ On the 2005 and 2006 Forms 1120, the business filing the returns is also identified as [REDACTED]

⁴ This date is twelve years later than the date of incorporation claimed by the petitioner on the instant I-140 petition, which was signed by the petitioner under penalty of perjury..

[REDACTED], is suspended. The same website indicates that [REDACTED] with agent identified as [REDACTED] is also suspended. See <http://kepler.sos.ca.gov/> available as of January 6, 2010. The website does not provide a date for either suspension; however, the suspension of two entities whose tax returns are submitted ostensibly to establish the petitioner's ability to pay the proffered wage further undermines the viability of the job offer and the credibility of the petitioner.

The petitioner also submitted copies of the Forms 1040, for [REDACTED] and spouse for tax years 2001 and 2002.⁵ In a letter dated November 13, 2007, from [REDACTED] the petitioner's owner itemizes his monthly household expenses, and identifies monthly expenses of \$3,020, and yearly household expenses of \$36,240.

The evidence in the record of proceeding does not establish the petitioner's corporate structure. The submission of Forms 1040 with the initial petition suggests that the petitioner is a sole proprietorship; however, only the 2005 Form 1040 includes a Schedule C for the restaurant [REDACTED]. The submission of the Income Tax Forms 1120 for tax years 2001 to 2006 for a corporation with different addresses and EIN numbers than the petitioner's conflict with the petitioner's being a sole proprietorship. Neither the petitioner nor counsel provide any explanation for the submission of the Forms 1120A and 1120 or the relationship between [REDACTED] and the current petitioner, [REDACTED].

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Further 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.

Based on the two distinct EIN numbers, these two restaurants appear to be two distinct businesses. Moreover, the various names and locations contained within the record of proceedings raise questions as to whether a bona fide position exists, as stated on the labor certification. Again, *Matter of Ho* states: "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."

Without clarification and independent documentation that the current petitioner existed in tax years 2001-2006, including evidence of corporate structure as well as any changes to corporate status, the

⁵ These two tax returns do not contain Schedules C for businesses of a sole proprietorship, but rather identify in Part II, Income from Partnerships and S Corporations, the name [REDACTED] as an S Corporation. The Schedules C found in [REDACTED] Form 1040 in tax years 2002, 2003, 2004, and 2005 are for a business named [REDACTED].

petitioner cannot establish that a viable business exists or that a bona fide job opportunity has been available since the April 30, 2001 priority date. As a consequence, the petition cannot be approved. Without the petitioner's identity and/or business structure more clearly defined, the AAO cannot determine whether the petitioner has the ability to pay the proffered wage during the relevant period of time. Currently, the record only establishes that during the 2005 tax year, based on the Schedule C submitted with the Form 1040, the petitioner was a business run by [REDACTED] operating as a sole proprietorship.⁶

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).

On the petition, the petitioner claimed to have been established in May 1, 1985⁷, to have a gross annual income of \$600,000, a net annual income of \$150,000, and to currently employ fourteen workers. On the Form ETA 750B, signed by the beneficiary on October 17, 2000, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the Forms 1120 submitted to the record document that the petitioner had enough net income to pay the proffered wage, and that the petitioner had filed annual family expenses estimated at \$36,240.

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

⁶ The director examined the submitted Forms 1040 in his decision, and did not comment on the Forms 1120 and Form 1120A submitted to the record. What he described as the petitioner's "net income" is the adjusted gross income identified as line 37 of the forms.

⁷ This date of incorporation is not supported by any evidence in the record of proceedings.

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). As stated previously, neither the petitioner nor counsel has clearly identified the petitioner's business structure. Thus, the record is not clear as to what evidence in the record pertains to the petitioner, and to its ability to pay the proffered wage.

For illustrative purposes, the AAO will briefly discuss how it would examine the petitioner's ability to pay the proffered wage, if the petitioner were considered a sole proprietorship.

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, on appeal, the I-140 petitioner has established that it employed and paid the beneficiary as of August 2007; but did not establish that it paid her the full proffered wage from the priority date in 2001 onwards.

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). 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).

As stated previously, the evidence in the record only identifies the I-140 petitioner as a sole proprietorship in tax year 2005. A sole proprietorship is 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 the director's decision dated January 25, 2008, the director referred to the petitioner's household expenses, an item specific to the sole proprietorship business structure. He then analyzed the instant petition based on the Forms 1040, identifying the sole proprietor's adjusted gross income as its net income.

In the instant case, in 2005, the sole proprietor supports a family of two. The proprietor's tax returns reflect that the sole proprietor's adjusted gross income (Form 1040, line 37) is \$110,516, with the business identified as [REDACTED] having a negative income of -\$18,259. Based on the sole proprietor's claimed annual expenses of \$36,240, the proprietor had \$74,276 available to pay the proffered wage. Therefore in tax year 2005, as a sole proprietorship, the petitioner had sufficient resources to both pay his annual household expenses and the proffered wage. However, without more clarification as to the petitioner's identity and business structure in the remaining relevant period of time, the I-140 petitioner had not established its continuing ability to pay the proffered wage.⁸

Further USCIS computer records indicate that the petitioner has filed nine other I-140 petitions as of the December 2001 priority date and until 2008. The petitioner predominantly submitted these petitions in 2007. Of the nine petitions filed six were filed in 2007, including the current petition. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). If the six wages offered to all six beneficiaries were the same, the sole proprietor would not have sufficient adjusted gross income to pay for all six wages.

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

⁸ As stated previously, for tax years 2001, 2002, 2003, and 2004, no Schedules C accompanied the Forms 1040. Therefore the record has no evidence that the sole proprietor operated its restaurant business in these years.

petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included [REDACTED], 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 *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 did not establish its business structure for tax years 2001, 2002, 2003, 2004, and 2006, and thus, the AAO cannot further examine whether the petitioner, regardless of corporate structure, could pay the proffered wage. Without further clarification as to the identify of the petitioner, the AAO cannot assess 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 AAO determines that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. 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).

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 plain terms of the labor certification, the applicant must have three years of experience as a cook of Korean food.

The regulation at 8 C.F.R. § 204.5(1)(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.

The beneficiary set forth her credentials on the labor certification and signed her 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 work experience, she represents that she was unemployed from February 1997 to October 17, 2000, the date she signed the ETA Form 750. She also represents that she worked at [REDACTED] as a cook from January 1994 to February 1997. She does not provide any additional information concerning her employment background on that form. In response to the director's RFE dated October 30, 2007, the petitioner submitted a letter dated December 24, 2007 from [REDACTED] owner, [REDACTED]. The owner states that the beneficiary worked for the restaurant as a cook from January 12, 1994 to February 17, 1997.

The AAO notes that the beneficiary's G-325 Biographic Information submitted with her I-485 Application to Adjust Status does not indicate that the beneficiary had any occupation abroad, although the certified ETA Form 750 indicates three years of previous work experience as a cook in Korea. Thus the record of proceedings contains conflicting evidence. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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." The petitioner, thus, has not established that the beneficiary had the requisite three years of work experience prior to the 2001 priority date, and that she is qualified to perform the duties of the proffered position.

Finally, the AAO notes that the beneficiary's I-485 application contains a certification of employment from [REDACTED] for her husband, [REDACTED] document indicates that [REDACTED] was sent to [REDACTED] in the United States, as president of the [REDACTED]. This certificate is signed by [REDACTED] as CEO of [REDACTED]. The beneficiary's I-94 Arrival/Departure document indicates that the beneficiary entered the United States on January 20, 2006 in E-1 status. However, the California Secretary of State website indicates that the business [REDACTED], with agent identified as [REDACTED] was forfeited. Thus, the record is not clear as to whether the beneficiary was entitled to E-1 status at the

time of her 2006 entry into the United States, and whether her status at entry identified on the I-140 and I-485 documents is accurate.

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.

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.