

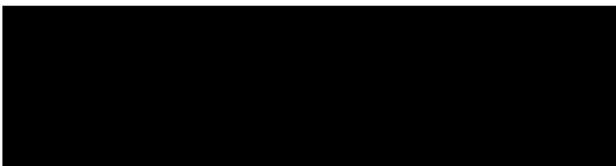
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

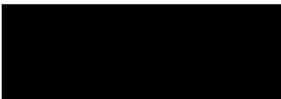
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B6

Date: **MAY 04 2011**

Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 a paint and automobile body repair shop. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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.

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*, 299 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) (AAO's *de novo* authority is well recognized by the federal courts).

As a threshold issue, and although not noted by the director in either the Notice of Intent to Deny or Notice of Denial, the petition cannot be approved because the certified job of automobile body repairer requires at least two years of experience as listed on the Form ETA 750 but the petitioner indicated that it was filing the Form I-140, Petition for Alien Worker, for an "other worker."

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. Section 203(b)(3)(A)(iii) of 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.

Here, the Form ETA 750 was accepted on April 30, 2001. The Form ETA 750 states that the position requires two years of experience in the offered job. The Form I-140 was subsequently filed on January 22, 2010. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for an "other worker (requiring less than two years of training or experience)."

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 that the proffered position of automobile body repairer requires two years of experience in the offered job. However, the petitioner requested the other worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The evidence submitted does not establish that the job requires less than two years of training or experience such that the beneficiary may be found qualified for classification as an "other worker." Accordingly, the petition shall be denied for this additional reason.

As set forth in the director's August 26, 2010 denial, the next 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.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As previously noted, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.78 per hour, or \$39,062.40 annually.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the USCIS Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the

Relevant evidence in the record includes Forms 1099-MISC, representing non-employee compensation paid by the petitioner to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009, the petitioner's Form 1040, U.S. Individual Income Tax Return, for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009, three receipts, and the petitioner's bank statements from April 30, 2010 and May 31, 2010.

On appeal, counsel asserts that USCIS erred in determining that the annual proffered wage was \$39,062.40, but instead should have used the sum of \$34,179.60 to calculate the annual proffered wage. Counsel includes copies of previously submitted documents in support of the appeal.

The evidence in the record of proceeding indicates that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on October 18, 1983, to currently employ three employees, and to have \$240,000.00 in net annual income. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 provided photocopies of Forms 1099-MISC reflecting non-employee compensation paid to the beneficiary as follows:

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).

The Forms 1099-MISC failed to establish that the petitioner paid the beneficiary the full proffered wage of \$39,062.40 in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009. However, it must be noted that the petitioner is only obligated to show that it can pay the difference between the proffered wage and wages already paid from 2001 to 2009.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

² It must be noted that the record contains an additional Form 1099-MISC reflecting the petitioner's payment of \$34,353.70 in non-employee compensation to the beneficiary in 2009. The record is absent any explanation as to why the petitioner issued two separate Forms 1099-MISC, one reflecting payment of \$34,179.60 in non-employee compensation to the beneficiary and the other reflecting payment of \$34,353.00 in non-employee compensation to the beneficiary, in 2009. This unexplained discrepancy regarding the amount of non-employee compensation paid by the petitioner to the beneficiary in 2009 raises doubt regarding the credibility of these Forms 1099-MISC and the information contained therein. Consequently, the lesser of these sums, \$34,179.60, shall be considered to be the amount of non-employee compensation paid by the petitioner to the beneficiary in 2009. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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.

A review of the Form 1040 tax returns reveals that the sole proprietor supported himself, his spouse, and three dependents in 2001, 2002, 2003, 2004, and 2005, and himself, his spouse and two dependents in 2006, 2007, 2008, and 2009. The petitioner reported annual living expenses³ of \$29,480.04 for each of these respective years.

Thus, it is necessary to show that the petitioner had the ability to pay the beneficiary the proffered wage of \$39,062.40 per year minus wages already paid in each year, plus the annual living expenses of the petitioner and his dependents, or sums of \$34,566.64 for 2001, \$34,518.96 for 2002, \$34,503.46 for 2003, \$34,467.12 for 2004, \$34,362.84 for 2005 and 2006, and \$34,188.74 for 2007 and 2008, and \$34,362.84 in 2009.

The proprietor Form 1040 tax returns reflect the following:

- Proprietor's adjusted gross income (Form 1040, line 33) for 2001 was \$86,754.00.
- Proprietor's adjusted gross income (Form 1040, line 35) for 2002 was \$64,412.00.
- Proprietor's adjusted gross income (Form 1040, line 34) for 2003 was \$57,063.00.
- Proprietor's adjusted gross income (Form 1040, line 36) for 2004 was \$40,646.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2005 was \$56,211.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2006 was \$27,741.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2007 was \$35,250.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2008 was \$17,824.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2009 was \$18,088.00.

The petitioner could pay the difference between the proffered wage and wages paid to the beneficiary through his adjusted gross income minus household expenses in 2001, 2002, 2003, 2004, 2005, and 2007. However, the evidence in the record for the years 2006, 2008, and 2009 does not

³ The petitioner provided a statement listing the petitioner's household expenses as \$2,456.67 for an unspecified month in an indeterminate year. The monthly expenses listed in this report shall be multiplied by 12 to determine the petitioner's annual living expenses for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009. Although the petitioner provided three receipts as evidence of expenses, these receipts reflect only a portion of the petitioner's annual expenses in 2010. For example, the petitioner has a substantial mortgage obligation, as indicated in his Schedules A to his Forms 1040.

establish that the petitioner had sufficient net income to pay the difference between the proffered wage and wages already paid in each year plus his claimed family living expenses.⁴

On appeal, counsel asserts that USCIS erred in determining that the annual proffered wage was \$39,062.40, but instead should have used the sum of \$34,179.60 to calculate the annual proffered wage. However, a review of the ETA Form 750 reflects that the petitioner listed a proffered wage of \$18.78 per hour for a 40 hour week which over the course of 52 weeks would constitute 2080 hours of work in one year. An hourly wage of \$18.78 for 2080 hours of work in one year amounts to an annual proffered wage of \$39,062.40. Counsel's assertion that the annual proffered wage should be calculated at \$34,179.40 is incorrect as this sum divided by 2080 hours of work in one year amounts to an hourly wage of \$16.43240384. Clearly, this sum does not match the hourly proffered wage of \$18.78 listed by the petitioner on the ETA Form 750. Furthermore, the proffered wage listed in the Form I-140 is \$751.20 per week, which is also \$39,062.40 per year.

Counsel is correct in asserting that as a sole proprietor, the petitioner's ownership of personal assets should be taken into account when considering his ability to pay the beneficiary the proffered wage. Counsel indicated that the petitioner owned a building worth \$111,801.00 since 2004. However, it is improbable that the petitioner would liquidate this asset to pay the proffered wage as it appears that this building is the location of his business. Further, the petitioner has failed to provide evidence demonstrating that any liens or encumbrances on this asset would not exceed its value. It is noted that the petitioner did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of the claimed assets. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592.

The record also contains copies of the petitioner's business checking account statements for April 30, 2010 and May 31, 2010 from US Bank. Nevertheless, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in this account are well below the proffered wage. Finally, it cannot be determined whether the bank records are complete, and there are many intervening months which are omitted. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date.

The bank statements discussed in the previous paragraph reflect that the petitioner had access to a \$3,500.00 business line of credit. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A limit on a credit card cannot be treated as cash or as a cash asset. Further, a "bank line" or "line of credit" is a bank's unenforceable

⁴ It is noted that, only considering the mortgage interest deduction for 2008, the petitioner could not have the difference between the proffered wage and wages actually paid to the beneficiary in that the petitioner's adjusted gross income in 2008 was \$17,824.00, while his Schedule A mortgage interest deduction was \$17,439.00.

commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are 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. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in a tax return or audited financial statement and would be fully considered in the evaluation of the net current assets of the business. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, 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. Comm. 1977). Here, as the evidence of this line of credit has not been submitted in the context of audited financial statements, their availability to pay the proffered wage has not been established.

As the petitioner is a sole proprietor, his ownership of personal assets may be taken into account when considering the ability to pay the beneficiary the proffered wage. However, the evidence in the record relating to sole proprietor's personal assets fails to establish that the petitioner possessed the continuing ability to pay the proffered wage since the priority date.

In some cases, 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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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.

In this matter, no specific detail or documentation has been provided similar to *Sonogawa*. The

instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are present in this matter. Furthermore, as the petitioner's adjusted gross income has been steadily declining since 2001, it does not appear likely that the petitioner will be able to pay the proffered wage. The AAO cannot conclude that the petitioner has established that he had the continuing ability to pay the proffered wage of the beneficiary in the instant case in addition to his household expenses.

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

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.