

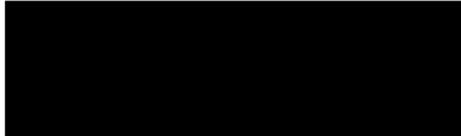
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



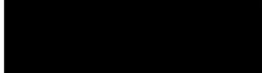
U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



B6

DATE: Office: NEBRASKA SERVICE CENTER

FILE: 

**MAY 31 2011**

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the petition was submitted without all of the required initial evidence, and therefore, the petitioner failed to establish the ability to pay the proffered wage as well as the beneficiary's requisite qualifications. Accordingly, the petition was denied.

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.

On appeal, the petitioner claims that the director abused his discretion by not requesting additional evidence after determining that all required evidence was not submitted with the initial petition. However, the regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *See* 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007). The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

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

As set forth in the director's December 17, 2008 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

continuing until the beneficiary obtains lawful permanent residence as well as to sustain his household during the period.

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 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 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).

Here, the Form ETA 750 was accepted on March 26, 2004. The proffered wage as stated on the Form ETA 750 is \$8.89 per hour (\$18,491.20 per year). On the Form ETA 750B signed by the beneficiary on March 24, 2004, he did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in January 1994, and to have a gross annual income of \$350,000, net annual income of \$50,000 and six employees.

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, 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 submitted Forms W-2, Wage and Tax Statements ("W-2 Form"), issued by [REDACTED] (Federal employer identification number (FEIN): [REDACTED]) to [REDACTED] (identified with Social Security Number (SSN): [REDACTED]) for 2003 through 2007. These W-2 forms show that [REDACTED] paid [REDACTED] \$13,500 in 2004 and \$14,040 in each year of 2005 through 2007. The record contains Forms 1040 U.S. Individual Income Tax Return jointly filed by [REDACTED] and [REDACTED]. However, these tax returns do not reflect FEIN [REDACTED] and the schedule C does not identify any petitioning proprietorship with this FEIN. Thus, the record does not corroborate that the petitioner and [REDACTED] the same.

The record contains Form 1040 jointly filed by [REDACTED] and [REDACTED] for 2004 through 2007. As the beneficiary of the instant petition and the individual identified on the W-2 forms is [REDACTED], it is unclear whether [REDACTED] identified on these individual income tax returns is the same person. Therefore, on January 26, 2011, the AAO served the petitioner a request for evidence (RFE) granting 45 days to confirm their identifications among other things. However, as of this date, more than three months after the RFE, this office has not received any correspondence from the petitioner.

*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.

Without independent objective evidence, the AAO cannot determine whether [REDACTED] identified with FEIN [REDACTED] is the petitioner, whether [REDACTED] identified with SSN [REDACTED] is the beneficiary, and thus, whether the W-2 forms submitted in the record are issued by the instant petitioner to the instant beneficiary. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Therefore, the AAO cannot accept and consider the W-2 forms issued by [REDACTED] for 2004 through 2007 as primary evidence that the petitioner paid a full or partial proffered wage to the beneficiary for the relevant years. Accordingly, the petitioner failed to demonstrate with independent objective evidence that it paid the instant beneficiary any compensation for his services in the proffered position from the priority date in 2004 to the present, and thus, failed to establish its continuing ability to pay the beneficiary the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner claims to be a sole proprietorship by submitting his individual income tax returns as evidence to establish the petitioner's continuing ability to pay the proffered wage.<sup>2</sup> 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 (7<sup>th</sup> 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.

On appeal, the petitioner submitted copies of the sole proprietor's Form 1040 U.S. Individual Income Tax Return for 2004 through 2007. The sole proprietor's tax returns indicate the sole proprietor's income as following for all the relevant years:

Tax Year	Adjusted gross income <sup>3</sup>	Proffered wage	Surplus or deficit
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<sup>2</sup> The AAO's RFE dated January 26, 2011 requested the petitioner to provide evidence to confirm its organizational structure and FEIN [REDACTED]. However, the petitioner did not respond to the AAO's RFE. The record does not contain any evidence pertinent to the petitioner's organizational structure. The AAO considers the petitioner as a sole proprietorship for purposes of determining whether the petitioner had the continuing ability to pay the proffered wage based on the petitioner's claim on appeal.

<sup>3</sup> The line for adjusted gross income on Form 1040 varies every year. It is Line 36 for 2004, and Line 37 for 2005, 2006 and 2007.

2004	\$37,579	\$18,491.20	\$19,087.80
2005	\$27,015	\$18,491.20	\$8,523.80
2006	\$31,622	\$18,491.20	\$13,130.80
2007	\$26,179	\$18,491.20	\$7,687.80

Therefore, for 2004 through 2007, the sole proprietor appears to have sufficient adjusted gross income to pay the instant beneficiary the proffered wage without consideration of his household's living expenses. However, the sole proprietor must also establish his ability to sustain his household's living expenses. The sole proprietor's tax returns show that the sole proprietor in this matter has a family of six. The petitioner did not submit a statement of the sole proprietor's household's monthly living expenses for any relevant years. Without the sole proprietor's living expenses statements, the AAO cannot determine whether the sole proprietor had sufficient adjusted gross income to pay the beneficiary the full proffered wage as well as to cover his family's living expenses for the years 2004 through 2007. The AAO notes that the schedules A to the sole proprietor's tax returns show that the sole proprietor reported \$17,321 for 2005, \$19,182 for 2006 and \$18,844 for 2007 respectively as itemized deductions. While the reported itemized deductions are much less than the actual living expenses, the sole proprietor did not have sufficient adjusted gross income to pay the proffered wage as well as to cover his family's living expenses in 2005, 2006 and 2007.

The record does not contain the sole proprietor's tax returns for 2008 through the present. Without these tax returns, the AAO cannot determine whether the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover his household's living expenses for these years. Further, although specifically and clearly requested by this office in our RFE dated January 26, 2011, the petitioner declined to provide copies of its tax returns for 2008 through 2010. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, the petitioner failed to establish his ability to pay the proffered wage as well as to cover his household's living expenses for 2008 through 2010 because he failed to submit requested evidence that precludes a material line of inquiry.

USCIS considers the sole proprietor's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. If the accounts represent what appears to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. In the instant case, the petitioner did not submit any documentary evidence showing that the sole proprietor had any liquefiable assets to be considered in determining the petitioner's ability to pay.

USCIS may also 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.

The petitioner did not submit statements of the sole proprietor's household living expenses for any relevant years. Without such statements, the AAO cannot determine whether the sole proprietor had sufficient adjusted gross income or other liquefiable assets to pay the beneficiary the proffered wage as well as to cover his household's living expenses. According to the sole proprietor's schedules A, the sole proprietor's adjusted gross income was not sufficient to pay the proffered wage as well as to cover his household's living expenses for 2004 through 2007. The petitioner did not submit the sole proprietor's tax returns for 2008 through 2010, and thus, the petitioner failed to establish the ability to pay for these years. Therefore, the petitioner failed to establish the ability to pay for 2004 through the present. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that all these relevant years were uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioning household has not established that he had the continuing ability to pay the proffered wage as well as to support the household for all relevant years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2004, the petitioner failed to establish its continuing ability to pay the proffered wage for all the years through the present.

Another ground of ineligibility in the director's decision is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite experience for the proffered position prior to the priority date with regulatory-prescribed evidence.

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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. The Form ETA 750A, item 14, requires three months of experience in the job offered, i.e. cook of foreign food.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

On appeal, the petitioner submitted a letter as evidence of the beneficiary's qualifying experience. This letter was, dated January 12, 2009 and addressed to USCIS, written and signed by the owner of This letter is from the beneficiary's former employer, verifies the beneficiary's employment with the company as a cook from May 1992 to October 1993, and includes a description of the duties the beneficiary performed during the employment. It appears to comply with the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(1). However, the letter is on a computer created letterhead and contains an overly detailed description and verification considering the fact that the short-term employment was more than 15 years ago. Furthermore, the contents of the letter are not supported by any independent evidence and the beneficiary's statement on the Form ETA 750B. Although the instructions on Item 15. Work Experience of the Form ETA 750B clearly requires to "[l]ist all jobs held during the last three (3) years. Also list any other jobs related to the occupation for which the alien is seeking certification as indicated in Item 9", the beneficiary did not provide any employment information on the Form ETA 750B, but signed his name on March 24, 2004 under a declaration that the contents of the form are true and correct under the penalty of perjury. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's

dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Therefore, the AAO will not give the full credibility of the evidence to this letter. The petitioner failed to demonstrate with regulatory-prescribed evidence that the beneficiary possessed the requisite three months of experience in the job offered prior to the priority date.

The petitioner's assertions and evidence submitted on appeal cannot overcome the grounds of denial in the director's December 17, 2008 decision. The petitioner failed to establish that the sole proprietor had the continuing ability to pay the proffered wage as well as to support his household beginning on the priority date and continuing to the present. The petitioner also failed to demonstrate that the beneficiary possessed the requisite three months of experience in the job offered prior to the priority date. Therefore, the director's decision is affirmed.

Beyond the director's decision, the AAO has identified an additional ground of ineligibility. 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 (9<sup>th</sup> 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).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. The instructions for the Form ETA 750A, item 14, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

In this case, the petitioning employer also checked boxes for Grade School and High School as minimum educational requirements for the proffered wage on the Form ETA 750A, item 14. The beneficiary set forth his credentials on Form ETA 750B. On Part 11, eliciting information of the beneficiary's schools attended, he represented that he attended 1 [REDACTED] [REDACTED] from September 1978 to May 1984. However, the record does not contain any documentary evidence to demonstrate that the beneficiary graduated from high school prior to the priority date and thus, meets the minimum educational requirements set forth for the proffered position in the instant case. Therefore, the petitioner failed to establish the beneficiary's educational qualifications for the proffered position.

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.