



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **APR 10 2012** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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

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:

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 carpet cleaning company.¹ It seeks to employ the beneficiary permanently in the United States as a carpet cleaner. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the I-140 petition was submitted without all of the required initial evidence, specifically evidence of the beneficiary's experience and evidence of the petitioner's ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 March 9, 2009 denial, the petitioner failed to submit initial evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. The director denied the petitioner accordingly.

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.²

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the

¹ The current petition was filed by [REDACTED] on December 20, 2007. [REDACTED] is also the employer listed on the labor certification of record. Research conducted in all appropriate databases could verify neither the FEIN number listed on Part 1 of Form I-140, nor any existent records for [REDACTED]. On appeal the petitioner submitted a copy of [REDACTED] Individual Income Tax Return for 2007, accompanied by its Schedule C (Profit or Loss from Business – Sole Proprietorship). Schedule C lists [REDACTED] as a business name. No evidence of any relationship between [REDACTED] and [REDACTED] or any other entity was submitted. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Evidence to verify the existence of the petitioning company must be submitted with any future filings.

² 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).

application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage as of October 30, 2006, the priority date, as well as evidence that the beneficiary met the requirements of ETA Form 9089, and therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility.

On appeal, the petitioner submitted the following evidence:

- A "Certification of Employment" dated August 14, 2007, signed by [REDACTED] in the capacity of owner/manager of [REDACTED], stating that the beneficiary worked as a full-time carpet cleaner with [REDACTED] from May 1997 to July 2000;
- A copy of [REDACTED] 2007 Individual Tax Return (Form 1040); and
- Copies of [REDACTED] 2008 California e-file Signature Authorization for Individuals (Form 8879).

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 30, 2006. The proffered wage as stated on the ETA Form 9089 is \$9.37 per hour, which is \$19,489.60 per year based on forty hours per week. The ETA Form 9089 states that the position requires the completion of elementary education and twenty-four months of experience in the job offered as a carpet cleaner.

The petitioner submitted evidence suggesting that it is structured as a sole proprietorship.³ On the petition, the petitioner claimed to have been established in January 1993 and to currently employ two workers. On the ETA Form 9089, signed by the beneficiary on October 9, 2006, the beneficiary claimed to have worked for the petitioner since January 3, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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'l Comm'r 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 in 2006 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

³ As mentioned above, [REDACTED] Individual Income Tax Return for 2007, accompanied by its Schedule C (Profit or Loss from Business – Sole Proprietorship) lists [REDACTED] as a business name. No evidence of the relationship between [REDACTED] and [REDACTED] was submitted. The actual corporate structure of [REDACTED] is unclear. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Evidence to verify the existence of the petitioning company must be submitted with any future filings.

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).

If the petitioner is a sole proprietorship, it 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'r 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. In the instant case, as mentioned above, the petitioner failed to provide evidence that verifies its corporate structure. Even if the evidence submitted were accepted to demonstrate that the petitioner is a sole proprietorship, the petitioner failed to provide copies of its tax returns and all Schedules C for all relevant years from the priority date in 2006, which prevents the AAO from verifying the petitioner's business-related income and expenses. In addition, 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. See *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 petitioner 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 instant case, pursuant to the information of record, the sole proprietor supports a family of six.⁴ The proprietor's tax returns reflect the following information for the following years:

Proprietor's adjusted gross income (Form 1040, line 37)

<u>2006</u>	<u>2007</u>	<u>2008</u>
Not submitted	\$68,371	Not submitted

As mentioned above, if the petitioner is a sole proprietor, it must show that its owner can cover his existing business expenses, pay the proffered wage out of his adjusted gross income or other available funds, and support himself and his dependents. Even though the sole proprietor's adjusted gross income for the year 2007 is greater than the proffered wage, without considering the sole proprietor's monthly expenses, it is impossible to evaluate the petitioner's ability to pay the

⁴ [redacted] and [redacted] 2007 jointly filed Individual Income Tax Return (Form 1040) lists [redacted] (daughter), [redacted] (son), [redacted] (son), and [redacted] (daughter) as dependents.

proffered wage. In addition to verifying its corporate structure, the petitioner must provide a statement of the sole proprietor's monthly household expenses for all relevant years with any further filings.

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 (Reg'l Comm'r 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 evidence of record falls short in determining the petitioner's ability to pay, as well as prevents the AAO from conducting a totality of the circumstances analysis based on *Sonogawa*. Further, the petitioner has not established a historical growth since 1993, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Thus, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage beginning on the priority date of October 30, 2006 to the present.

The petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). *See also, Madany 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 twenty-four months of experience as a carpet cleaner.

The regulation at 8 C.F.R. § 204.5(l)(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 his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Section K of ETA Form 9089 the beneficiary represented that he worked for the petitioner as a full-time carpet cleaner from January 3, 2005 to October 30, 2006. The beneficiary also represented that he worked for [REDACTED] located at [REDACTED] Woodland Hills, CA [REDACTED], as a full-time carpet cleaner from May 1, 1997 to July 1, 2000.

On appeal, the petitioner submitted a document entitled "Certification of Employment" dated August 14, 2007 and signed by [REDACTED] in the capacity of owner/manager of [REDACTED]. Mr. [REDACTED] August 14, 2007 statement attested to the beneficiary's full-time employment as a carpet cleaner with [REDACTED] located at [REDACTED] Woodland Hills, CA [REDACTED] from May 1, 1997 to July 1, 2000.

A review of public records could not verify the existence of [REDACTED].⁵ Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and

⁵ Public record information revealed that [REDACTED] owns a company named [REDACTED] initiated on November 12, 1999. The current address for [REDACTED] is listed as [REDACTED], Woodland Hills, CA [REDACTED]. A Google search shows a website for [REDACTED] however no information regarding its address or ownership could be obtained. See [REDACTED] (accessed March 13, 2012). Googlemaps.com reveals that [REDACTED]

(b)(6)

sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record does not establish by credible evidence that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.

[REDACTED], Woodland Hills, CA [REDACTED] is a residential address. See [REDACTED] (accessed March 13, 2012). The period of employment represented by the beneficiary on the labor certification and stated on the August 14, 2007 letter signed by [REDACTED] cannot be reconciled with the information obtained from public records that [REDACTED] initiated its business in 1999. Furthermore, no information was found to verify the existence of [REDACTED]