

(b)(6)



U.S. Citizenship  
and Immigration  
Services

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 board and care home facility. It seeks to employ the beneficiary permanently in the United States as a resident care aide. 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 I-140 petition was submitted without all of the required initial evidence, specifically evidence of the petitioner's ability to pay the proffered wage and evidence of the beneficiary's experience. 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 February 24, 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The 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>

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 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.

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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).

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage as well as evidence that the beneficiary met the requirements of Form ETA 750 as of January 20, 2005, the priority date, 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:

- Partial copies of [REDACTED] 2005, 2006, 2007, and 2008 jointly filed Individual Income Tax Returns (Forms 1040); and
- A Certification of Employment from [REDACTED] signed by the House Manager, [REDACTED] and dated December 16, 2004, attesting to the beneficiary's full-time employment as a resident care aide from January 4, 2002 to January 31, 2004.

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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on January 20, 2005. The proffered wage as stated on the Form ETA 750 is \$9.19 per hour, which is \$19,115.20 per year based on forty hours per week, and time and a half per hour for overtime. The Form ETA 750 states that the position requires two years of experience in the job offered as a resident care aide or two years of experience as a mental retardation aide.

The petitioner failed to submit a complete copy of its tax returns for the relevant years. The petitioner's failure to provide a complete copy of its tax returns, specially a copy of all Schedules C of Forms 1040, impedes the AAO from determining the company's legal structure and financial details. However, taking into consideration that: (i) the petitioner submitted copies of Forms 1040; and (ii) no information was found for [REDACTED] in the public records, the

AAO will treat the petitioner as a sole proprietorship for the purpose of examining its ability to pay the proffered wage to the beneficiary starting on January 20, 2005.

On the petition, the petitioner claimed to have been established in 2003 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on December 16, 2004, the beneficiary claimed to work for the petitioner since January 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'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 Sonogawa*, 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 January 2005 onward.

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), *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 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'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 and as mentioned above, the petitioner failed to provide copies of all Schedules C for all relevant years, which prevents the AAO from verifying the petitioner's business-related income and expenses. 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 (7<sup>th</sup> 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 most updated information of record, the sole proprietor supported a family of four in 2005, of five in 2006 and 2007, and six in 2008.<sup>2</sup> The proprietor's tax returns reflect the following information for the following years:

	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>
Proprietor's adjusted gross income (Form 1040, line 37)	\$121,052	\$153,403	\$161,755	\$204,802

As mentioned above, sole proprietors must show that they can cover their existing business expenses, pay the proffered wage out of their adjusted gross income or other available funds, and support themselves and their dependents. Even though the sole proprietor's adjusted gross income for the relevant years is greater the proffered wage, without considering the sole proprietor's monthly expenses, it is impossible to evaluate the petitioner's ability to pay. The petitioner failed to provide a statement of the sole proprietor's monthly household expenses for all relevant years from the priority date onward. Thus, the evidence of record is deficient.

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

<sup>2</sup> [redacted] jointly filed Individual Income Tax Return (Forms 1040) list as dependents: [redacted] (daughter) and [redacted] (parent) in 2005; [redacted] (daughter), [redacted] (grandchild), and [redacted] (grandchild) in 2006 and 2007; and [redacted] (grandchild) in 2008.

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 *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 evidence of record falls short in determining the petitioner's ability to pay the proffered wage, as well as prevents the AAO from conducting a totality of the circumstances analysis based on *Sonegawa*. Further, the petitioner has not established a historical growth since 2003, 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 to 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 (1<sup>st</sup> Cir. 1981).

According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered as a resident care aide or two years of experience as a mental retardation aide.

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 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. Part B.12 of Form ETA 750 indicates that the beneficiary has more than two years of experience in the job. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she works for the petitioner as a resident care aide from January 2004 to present, and also represented that she worked for [REDACTED] as a full-time resident care aide, from January 2002 to January 2004. She does not provide any additional information concerning her employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information, signed by the beneficiary on April 2, 2008, and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's employment for the last five years, in contrast to what the beneficiary declared on the labor certification, she represented that she worked for [REDACTED] as a resident care aide from March 2002 to May 2003, above a warning for knowingly and willfully falsifying or concealing a material fact.

On appeal, the petitioner submitted a document entitled "Certification of Employment" signed by [REDACTED] House Manager of [REDACTED] and dated December 16, 2004. [REDACTED] attested to the beneficiary's full-time employment as a resident care aide at [REDACTED] from January 4, 2002 to January 31, 2004.

The period of employment with [REDACTED] represented by the beneficiary on the labor certification and stated on the December 16, 2004 letter from [REDACTED] cannot be reconciled with the period of employment listed by the beneficiary on her Form G-325A. By signing Form ETA 750 on December 16, 2004, the beneficiary declared under penalty of perjury that she worked for [REDACTED] from January 2002 to January 2004. By signing Form G-325A on April 2, 2008, the beneficiary also declared under penalty of perjury that she worked for [REDACTED] from March 2002 to May 2003. This discrepancy raises doubts as to whether the beneficiary worked at [REDACTED] for more than two years, thus establishing that she

possesses the qualifying work experience for the job offered. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence in the record does not establish 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.

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). In the instant case, the employer listed on the labor certification Form ETA 750 is [REDACTED]. The petitioner listed on the Form I-140 is [REDACTED]. No evidence was submitted to establish a relationship, if any, to [REDACTED] or that these entities are the same.

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The petitioner submitted no evidence to demonstrate that it is the same entity listed as the employer on the labor certification, or that it is a successor-in-interest to that employer. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

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.

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<sup>3</sup> [REDACTED] is also listed as the appellant on the Form I-290B for the instant appeal.