



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: AUG 24 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 29, 2009 denial, the 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.

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 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 August 7, 2003. The proffered wage as stated on the Form ETA 750 is \$42.29 per hour (\$87,963.20 per year based on forty hours a week). The Form ETA 750 states that the position requires a high school diploma and, either a bachelor's degree in hotel and restaurant management or business administration, or alternatively, two years of experience in the job offered as a restaurant manager.

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

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship.² On the petition, the petitioner claimed to have been established in 2001 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on July 17, 2003, 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 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 onwards.

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

² [REDACTED] appeared to be structured as a corporation from November 2000 through May 2006. The director issued a Request for Evidence (RFE) on February 27, 2009, requesting clarification of the petitioner's corporate structure for the years in question. In response, the petitioner submitted the owner's Forms 1040, U.S. Individual Tax Return, with Schedule C, Profit or Loss from Business, for those years demonstrating that the petitioner was a sole proprietorship.

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 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. 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, the sole proprietor supports himself and two dependents. The proprietor's tax returns reflect the following information for the following years:

- In 2003, the Form 1040, line 34 stated adjusted gross income of \$113,605.³
- In 2004, the Form 1040, line 37 stated adjusted gross income of \$133,027.
- In 2005, the Form 1040, line 37 stated adjusted gross income of \$85,819.
- In 2006, the Form 1040, line 37 stated adjusted gross income of \$87,904.
- In 2007, the Form 1040, line 37 stated adjusted gross income of \$52,881.

³ From 2003 through 2005, the restaurant was owned by [REDACTED]. The petitioner submitted Mr. [REDACTED]'s Forms 1040 for 2003 through 2005. For 2006 and 2007, the petitioner submitted Forms 1040 for Mr. [REDACTED].

In 2005, 2006, and 2007, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$87,963.20. The petitioner's sole proprietor submitted a statement indicating that his yearly expenses for 2006 and 2007 were \$57,684 and \$57,852, respectively. It is improbable that the sole proprietor could support himself and two dependents on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Further, the petitioner failed to submit a list of the previous owner's personal monthly expenses for 2003 through 2005, which would enable the AAO to analyze the petitioner's continuing ability to pay the proffered wage. Therefore, the petitioner has not demonstrated its ability to pay the proffered wage from the priority date, August 7, 2003, onward.

On appeal, the petitioner asserts that he does have the ability to pay the proffered wage. In a letter dated June 29, 2009, the petitioner states, "The Decision states that there is not enough evidence to show that the adjusted gross income on my wife and me, less household expenses, leave sufficient funds to cover [the beneficiary's] salary. This is not true, since both she and I have substantial incomes, since we work full-time at our own jobs. With [the beneficiary] managing [redacted] there is sure to be an influx of business, and new activity which will easily provide revenues to pay his wage." In addition to the brief, the petitioner submitted newspaper articles regarding the beneficiary's involvement with the [redacted] Chamber of Commerce and copies of training certificates previously submitted with the petition. No other evidence was provided.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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 petition shows that the petitioner has been in business since 2001 and employs six employees. The sole proprietor's adjusted gross income reported on Form 1040 is less than the proffered wage from 2005 through 2007. Further, the petitioner failed to provide details of the sole proprietor's monthly expenses from 2003 through 2005, which would allow the AAO to conclude whether it had the ability to pay the proffered wage. No evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director,⁴ the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The Form ETA 750 was originally filed on August 7, 2003 for "[REDACTED]" with V [REDACTED] listed as the owner. According to the California Secretary of State Website, [http://\[REDACTED\]](http://[REDACTED]) (accessed August 8, 2012), the status of [REDACTED] is "Dissolved." The petitioner submitted a bill of sale dated May 3, 2006, indicating that Mr. [REDACTED], the current owner, purchased [REDACTED] from Mr. [REDACTED]. The petitioner appears to be a different entity from the employer listed on the labor certification with a different Federal Employer Tax Identification Number (FEIN).⁵

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,

⁴ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁵ In the instant case, the employer listed on the Form ETA 750 labor certification is "[REDACTED] dba [REDACTED]" and the employer listed on the Form I-140 is "[REDACTED]". Form I-140 lists the petitioner's FEIN as [REDACTED]. However, the 2004 and 2005 Federal Tax returns from the original owner, Mr. [REDACTED] list the petitioner's FEIN as [REDACTED]. The 2006 and 2007 Federal Tax returns for Mr. [REDACTED] do not list a FEIN for [REDACTED]. No explanation for the difference in FEIN has been provided. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, 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).

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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).

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 evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. 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.

Also beyond the decision of the director, 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).

In the instant case, the labor certification states that the offered position requires the completion of high school and, either a bachelor's degree in hotel and restaurant management or business administration, or at least two years of experience in the job offered as a restaurant manager.

On the labor certification, the beneficiary claims to qualify for the offered position based on a bachelor's degree in hotel and restaurant management from [REDACTED] of the Philippines, Philippines, completed in June 1981. The record contains an educational evaluation dated March 4, 2002 from Global Services Associates addressed to the Registrar's Office of [REDACTED]. The evaluation states that the beneficiary completed studies equivalent to a Bachelor of Science in Hotel and Restaurant Management. However, the petitioner failed to submit a copy of the beneficiary's high school diploma, bachelor's degree, or transcripts. The evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date.

On the labor certification, the beneficiary claims to qualify for the offered position based on his experience as a restaurant manager with [REDACTED] in Saudi Arabia from February 1993 to June 1995. In addition, the labor certification also shows that the beneficiary was unemployed beginning on January 2000 and continuing to the date the form was signed, on July 17, 2003. No other experience is listed.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains the following pertinent experience letters:

- A letter dated March 23, 2009 from [REDACTED] in [REDACTED], California, written by [REDACTED] Owner. The letter states that the beneficiary was employed as a Restaurant Manager from January 1, 2000 to December 31, 2001.
- A letter dated September 5, 1995 from [REDACTED] in [REDACTED] written by [REDACTED] Owner/Chairman. The letter states that the beneficiary was employed as a Personal Butler from February 19, 1993 to September 5, 1995.
- A letter dated September 24, 1990 from [REDACTED] in [REDACTED], Philippines, written by [REDACTED] Personnel Officer. The letter states that the beneficiary was employed as an Assistant Food and Beverage Manager/Cost Controller from January 28, 1989 and continuing at least until the date the letter was signed on September 24, 1990.

The record contains other letters of experience from other employers; however, the experience described in those letters is not as a restaurant manager. The AAO notes that the above listed experience and the other letters of experience in the file were not listed on the Form ETA 750. 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.

The AAO also notes that there are inconsistencies in the record. The labor certification indicates that the beneficiary was unemployed from January 2000 until at least July 17, 2003, the date the form was signed. The letter from [REDACTED] states that the beneficiary was employed as a restaurant manager from January 1, 2000 until December 31, 2001. In addition, the record contains a Form G-325A, Biographic Information, signed by the beneficiary on March 3, 2008. The Form G-325A indicates that the beneficiary was self-employed as a clerk from August 2002 until June 2003. Further, while the Form ETA 750 does not indicate that the beneficiary worked for the petitioner, the Form G-325A indicates that the beneficiary began working for the petitioner in June 2003. The record also includes an undated resume for the beneficiary that indicates he was employed as the general manager of [REDACTED] from "January 2000 - present." The resume also states that the beneficiary was employed as the restaurant manager for [REDACTED] from "June 1999 - 2000."

The dates listed on Form ETA 750 cannot be reconciled with the dates listed in the experience letters, G-325A, and other documents in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or

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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.

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.