

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **DEC 04 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:

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,

Kieran Forbes for

Ron Rosenberg
Acting 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 book store. It seeks to employ the beneficiary permanently in the United States as an instructional coordinator. 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, 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 July 10, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 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).

Here, the Form ETA 750 was accepted on January 10, 2005. The proffered wage as stated on the Form ETA 750 is \$37.32 per hour (\$77,625.60 per year based on 40 hours per week).

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. On the petition, the petitioner claimed to have been established in October 1, 2003 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on February 10, 2005, 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 demonstrated that it paid the beneficiary wages as shown in the table below:

- In 2005, the IRS Form W-2 shows wages paid of \$36,000
- In 2006, the IRS Form W-2 shows wages paid of \$32,000.
- In 2007, the IRS Form W-2 shows wages paid of \$21,090.
- In 2008, the IRS Form W-2 shows wages paid of \$30,600.

The petitioner paid the beneficiary less than the proffered wage each year from 2005 to 2008. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage from 2005 to 2008, as represented in the following table:

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).

- In 2005, difference of \$41,625.60.
- In 2006, difference of \$45,625.60.
- In 2007, difference of \$56,535.60.
- In 2008, difference of \$47,025.60.

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 (AGI), 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 supported a family of four in 2005 and 2006 and a family of three in 2007 and 2008. The proprietor's tax returns reflect the following information for the following years:

- In 2005, proprietor's adjusted gross income² of \$(41,542).
- In 2006, proprietor's adjusted gross income of \$(16,312).

² The proprietor's adjusted gross income is found on line 37 of Form 1040 for 2005 to 2008.

- In 2007, proprietor's adjusted gross income of \$23,881.
- In 2008, proprietor's adjusted gross income of \$36,942.

The sole proprietor's AGI for 2005 to 2008 fails to cover the proffered wage. It is improbable that the sole proprietor could support herself and her family on a deficit, which is what remains after reducing the AGI by the amount required to pay the proffered wage.

Further, the record contains evidence regarding the proprietor's monthly expenses to support her family. A list of expenses was not provided to estimate total expenses. The petitioner instead provided sample monthly bills. The total monthly expenses represented in the sample bills are \$4,602. Based on that estimate, the proprietor's expenses for a year would be \$55,234.32. That amount exceeds the proprietor's AGI for 2005 to 2008. It is improbable that the sole proprietor could support herself and her family on a deficit.

On appeal, counsel asserts that an error occurred during the labor certification process that resulted in the proffered wage on the certified Form ETA 750 being higher than it should have been. Counsel asserts that the wage should have been either \$25.27 per hour (\$55,561.60 per year based on 40 hours per week) or \$22.43 per hour (\$46,654.40 per year based on 40 hours per week). The rate of pay on the Form ETA 750 is \$37.32 (\$77,625.60 per year based on 40 hours per week). The wages per week on the I-140 petition are \$1,492.80 (\$77,625.60 per year based on 52 weeks per year). The petitioner signed the Form ETA 750 and the I-140 petition. On appeal, a petitioner cannot materially change the terms of the employment. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Further, even if the AAO were to accept either of the lower rates of pay, as discussed above, the proprietor's AGI for 2005 to 2008 is less than the proprietor's expenses to support herself and her family, leaving a deficit to pay the beneficiary regardless of the proffered wage.

Although the petitioner claims that its former counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Id. The instant appeal does not address these requirements. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

A copy of a letter from [REDACTED] was provided as evidence of a certificate of deposit for the petitioner. The letter is dated January 30, 2008 and indicates that the account was opened September 26, 2003 and that the current balance as of the date of the letter was \$27,022.15. The funds are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record of proceeding contains monthly statements from the sole proprietor's personal checking account with [REDACTED] covering the period September 13, 2008 through December 11, 2008 and January 15, 2009 to April 13, 2009. The average balance in the account during those periods is \$5,838.77. As in the instant case, where the petitioner has not established its ability to pay the difference between the proffered wage and the wages paid to the beneficiary in the priority date year or in any subsequent year based on its AGI, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the difference between the proffered wage and the wages paid to the beneficiary. The evidence in the record does not establish the average balance in the petitioner's bank account in 2005, the year of the priority date, and does not show annual average balances which increase each year after the priority date year by an amount exceeding the difference between the proffered wage and the wages paid to the beneficiary.

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 petitioner has been in business since 2003 and has three employees. The submitted evidence indicates that the petitioner's gross receipts declined from 2005 to 2007. The petitioner paid minimal wages to all employees in each relevant year. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities. Although bank statements were submitted reflecting funds in the sole proprietorship's business bank account, based on the evidence in the record, the funds appear to have been included on the Schedule C to IRS Form 1040. The net profit (or loss) from Schedule C is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's AGI, which is insufficient to establish the petitioner's ability to pay the proffered wage. Further, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. No evidence was provided to document that the beneficiary is replacing a former employee or an outsourced service. 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.

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).

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'1 Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'1 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 completion of grade school, completion of high school, 4 years of college, a Bachelor's degree in elementary education and two years of experience in the related occupation of teaching. On the labor certification, the beneficiary claims to qualify for the offered position based on a Bachelor's degree completed in 1991 at [REDACTED]. The beneficiary also claims to qualify for the

offered position based on employment as a school teacher in Pusan, Korea from March 1991 to September 1998 with [REDACTED] and [REDACTED]

The record contains a copy of the beneficiary's Bachelor's degree in Elementary Education from [REDACTED]. Therefore, the petitioner has established that the beneficiary has the required education.

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 does not contain any experience letters. A copy of the beneficiary's resume was provided. However, a resume contains the beneficiary's representations of her employment experience. The unsupported representations of the beneficiary are not reliable evidence and are insufficient to demonstrate that the beneficiary has the required experience. No regulatory-prescribed evidence was provided to establish that the beneficiary has the required experience.

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.