



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: DEC 21 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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,

*Rachel Vitrino*  
RVR

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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**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 trainer of thoroughbred race horses. It seeks to employ the beneficiary permanently in the United States as a thoroughbred race horse groom. 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 on July 30, 2009. The petitioner filed a motion to reopen the decision on August 28, 2009, and the director reaffirmed the decision on September 22, 2009.

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 30, 2009 denial and September 22, 2009 reaffirmation of the decision, an 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).

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Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$418.00 per week plus two hours of overtime hours at \$11.00 per hour (\$22,880.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered of thoroughbred race horse groom or two years of experience in the related occupation of grooming quarter horse race horses.

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 evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship from 2001 through 2007. An S Corporation 100% owned by the sole proprietor, [REDACTED] was then established on February 7, 2007, and the petitioner filed its tax returns on Form 1120S for 2007 and 2008. On the petition, the petitioner did not indicate when its business was established or how many workers it employs. On the Form ETA 750B, signed by the beneficiary on April 2, 2007, the beneficiary claimed to work for the petitioner from January 1997 to July 1998 and from May 2000 to the present.

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 2001 onwards.

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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).

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).

As previously noted, the petitioner was a sole proprietorship from 2001 through 2007, 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 (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 \$20,000.00 where the beneficiary's proposed salary was \$6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports no dependents. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the Form 1040 stated adjusted gross income<sup>2</sup> of \$7,363.00.
- In 2002, the Form 1040 stated adjusted gross income of \$5,726.00.
- In 2003, the Form 1040 stated adjusted gross income of \$13,300.00.
- In 2004, the Form 1040 stated adjusted gross income of \$46,014.00.
- In 2005, the Form 1040 stated adjusted gross income of \$70,863.00.
- In 2006, the Form 1040 stated adjusted gross income of \$110,641.00.
- In 2007, the Form 1040 stated adjusted gross income of \$105,129.00.
- In 2007, the Form 1120S stated net income<sup>3</sup> of \$72,668.00.

<sup>2</sup> The adjusted gross income on the proprietor's Forms 1040 is found on line 33 in 2001, line 35 in 2002, line 34 in 2003, line 36 in 2004, and line 37 in 2005 through 2007.

- In 2008, the Form 1120S stated net income of \$73,611.00.

The sole proprietor's adjusted gross income does not exceed the proffered wage of \$22,880.00 in 2001, 2002, or 2003. Therefore, the proprietor did not demonstrate that he had sufficient adjusted gross income to pay the proffered wage in those years. In addition, the proprietor's recurring monthly household expenses must be considered in determining whether or not the proprietor had the ability to pay the proffered wage during the period in which the business was operating as a sole proprietorship. In the instant case, it is improbable that the sole proprietor could pay the proffered wage on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the household expenses in 2001, 2002, and 2003. The proprietor provided an estimate of monthly household expenses according to the table below.

Year	Adjusted Gross Income	Household Expenses	Balance Available to Pay Proffered Wage
2001	\$7,363.00	\$18,000.00	-\$10,637.00
2002	\$5,726.00	\$18,000.00	-\$12,274.00
2003	\$13,300.00	\$18,000.00	-\$4,700.00
2004	\$46,014.00	\$18,000.00	\$28,014.00
2005	\$70,863.00	\$18,000.00	\$52,863.00
2006	\$110,641.00	\$18,000.00	\$92,641.00
2007	\$105,129.00	\$18,000.00	\$87,129.00

The proprietor's adjusted gross income remaining after the payment of household expenses is not sufficient to pay the proffered wage of \$22,880.00 in 2001, 2002, and 2003.

On appeal, counsel asserts that, as a small business, the petitioner must offset his gross income with numerous expenses in order to avoid paying more taxes. The AAO notes that all businesses may deduct expenses from gross income and that there is no evidence in the record of any special circumstances that would indicate that the income and expenses considered above do not reflect the petitioner's available funds to pay the proffered wage.

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<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions, or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 14, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedule K for 2008, the petitioner's net income is found on Schedule K of its tax return for 2008.

Counsel refers to two decisions issued by the AAO concerning the ability to pay the proffered wage, but does not provide their published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel asserts that the petitioner paid the beneficiary \$13,780.00 in 2003 and submits a copy of the beneficiary's Schedule C, without the beneficiary's complete tax return from 2003 as evidence. The AAO notes that every employer engaged in a trade or business who pays remuneration, including noncash payments of \$600.00 or more for the year (all amounts if any income, social security, or Medicare tax was withheld) for services performed by an employee must file a Form W-2 Wage and Tax Statement for each employee. See <http://www.irs.gov/instructions/iw2w3/ch01.html> (accessed November 14, 2012). In addition, non-wage payments to an individual of over \$600.00 made in conjunction with a trade or business are required to be reported on Form 1099-MISC. See <http://www.irs.gov/pub/irs-pdf/i1099misc.pdf> (accessed November 14, 2012). Absent copies of the appropriate Forms W-2 or 1099 reflecting payment from the petitioner to the beneficiary, the AAO will not consider the amount of \$13,780.00 in the beneficiary's gross receipts in determining the petitioner's ability to pay the proffered wage.

Counsel asserts that, in 2000, the petitioner relocated his business from California to Texas and had to rebuild his business. On the Form I-290B filed as a motion to reopen the director's decision, counsel asserted that the petitioner paid over \$100,000.00.00 to purchase a ranch in 1999, but was unable to obtain copies of the purchase agreement due to a dispute with the petitioner's accountant. The AAO notes that the record does not include evidence sufficient to demonstrate that either a move to Texas or the purchase of a ranch two years before the priority date had any effect on the petitioner's ability to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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 *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 petitioner did not have sufficient adjusted gross income to pay the proffered wage from 2001 through 2003. The petitioner's gross receipts during the relevant years varied and reached as low as \$3,556.00 in 2001, the year of the priority date. The petitioner did not indicate on the Form I-140 how many people it employs. Salaries and wages were not substantial. The evidence submitted does not demonstrate how many years the petitioner has been in business or the financial condition of the petitioner's business prior to the claimed relocation from California and the unsubstantiated purchase of a ranch. The S Corporation formed in 2007 does not pay substantial compensation to its owner. In addition, there is insufficient evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. Copies of several website pages were submitted, which indicated that [REDACTED] worked in the industry and trained horses that won races, but the website pages failed to indicate that the business enjoys a reputation significant enough to disregard the petitioner's financial condition as reflected on the tax returns. 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,<sup>4</sup> 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-*

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

*Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered of thoroughbred race horse groom or two years of experience in the related occupation of grooming quarter horse race horses. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as: 1) a thoroughbred race horse groom working 42 hours per week for [REDACTED] Mexico from June 1994 to December 1996; 2) a thoroughbred race horse groom working 42 hours per week for the petitioner from January 1997 to July 1998 and again from May 2000 to the present; and 3) a gun part manufacturer working 40 hours per week for [REDACTED] for which no address was provided, from August 1998 to March 2000.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, 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 a letter from [REDACTED] dated May 24, 2007, who gives his title as attorney, and states that the beneficiary worked for his ranch as a groom from June 1997 through November 1999. The AAO notes that the letter fails to meet the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) because the letter does not include the address of the employer. The letter states that the beneficiary worked as a groom, but it fails to state that the beneficiary worked as a groom specifically for quarter horse race horses or for thoroughbred race horses as required by the terms of the labor certification. The letter also fails to state whether the position was full-time or part-time and to list the beneficiary's duties.

The beneficiary set forth his credentials on the labor certification and signed his name on April 2, 2007 under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary did not list the claimed work experience with [REDACTED]

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.

Further, the beneficiary claimed on the labor certification to be working for the petitioner and for Stanley de Chihuahua during that same time period. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t 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.

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.