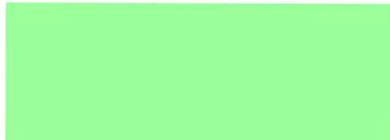




U.S. Citizenship
and Immigration
Services

(b)(6)



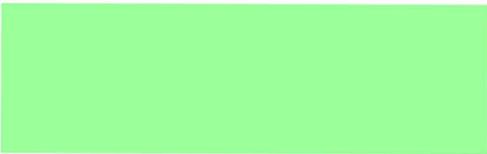
DATE: **JUL 09 2012** OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing contractor. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 February 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.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on November 20, 2006. The proffered wage as stated on the ETA Form 9089 is \$16.92 per hour. This equals \$35,193 per year, based on 40 hours per week.

The ETA Form 9089 states that the position requires 24 months of experience in the job offered of roofer.

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 2000 and to currently employ one employee. On the ETA Form 9089, signed by the beneficiary on December 7, 2006, the beneficiary claimed to have worked for the petitioner since January 2, 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of 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 beneficiary's Internal Revenue Service (IRS) Forms W-2 for 2006 and 2007 were submitted. The Forms W-2 state wages received from the petitioner in the amounts shown in the table below.

- In 2006, the Form W-2 stated compensation of \$28,560.
- In 2007, the Form W-2 stated compensation of \$3,360.

However, according to databases available to the AAO, the Social Security number (SSN) listed on the Forms W-2 does not relate to the beneficiary. Further, the beneficiary's IRS Forms 1040 indicate that he uses an Individual Tax Identification Number (ITIN) rather than a SSN. The IRS issues ITINs to help individuals comply with the U.S. tax laws, and to provide a means to efficiently

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).

process and account for tax returns and payments for those not eligible for SSNs.² Without a resolution of this inconsistency in the record, the Forms W-2 cannot be considered evidence of the petitioner's payment of wages to the beneficiary. 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).³

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 a family of five. The proprietor's tax returns reflect the following information for the following years:

² See <http://www.irs.gov/individuals/article/0,,id=222209,00.html>.

³ In addition, the misuse of another individual's SSN is a violation of law and may lead to fines and/or imprisonment.

	<u>2006</u>	<u>2007</u>
Proprietor's adjusted gross income (Form 1040, line 37)	\$45,832	\$44,686

In response to a Request for Evidence (RFE) from the director issued on September 26, 2008, the petitioner submitted a list of monthly household expenses totaling \$5,780 (\$69,360 per year). The list of monthly expenses submitted in response to the director's RFE states "Personal Monthly Expenses for [REDACTED]" The list does not indicate which years' expenses are stated, nor does it indicate whether or not the expenses are for the entire household. Additionally, the list does not show expenditures for food, clothing and entertainment. The AAO cannot perform a complete analysis of a sole proprietor's ability to pay the proffered wage without this information. Nonetheless, even considering the limited information provided by the petitioner, the claimed expenses exceed his adjusted gross income for the years 2006 and 2007. In 2006, the petitioner would need an additional \$23,528 just to cover his monthly expenses, plus an additional \$35,193 to pay the proffered wage. This totals \$58,721 for 2006. In 2007, the petitioner would need an additional \$24,647 to cover his monthly expenses plus an additional \$35,193 to pay the proffered wage. This totals \$59,867 for 2007. Without other funds available, the petitioner would not be able to sustain his family of five or pay the proffered wage.

On appeal, counsel asserts that the director failed to consider evidence of other funds available to pay the proffered wage beyond concluding that "they were not of an amount with which he could have paid the proffered wage and yearly expenses."

Counsel points to three accounts belong to the petitioner and his wife. Those accounts are:

- Brokerage Account of [REDACTED] and [REDACTED] as joint tenants.
- Individual Retirement Account for the benefit of [REDACTED]
- Individual Retirement Account for the benefit of [REDACTED]

The record contains a signed statement from both [REDACTED] and [REDACTED] stating that their mutual funds are available to pay the proffered wage. The record contains the following information for the brokerage account of [REDACTED] and [REDACTED] as joint tenants:

- A statement for the period of April 1, 2007 to April 30, 2007 (showing an ending account value of \$3,063).
- The first page of a seven-page statement for the period of August 1, 2008 through September 30, 2008 (showing an ending account value of \$2,037).

Statements for only one or two months in a year do not provide sufficient information to determine whether the account averaged sufficient funds throughout the year to pay the proffered wage. Further, the balances on the submitted statements are not sufficient to establish ability to pay the proffered wage. The statement for the period of August 1, 2008 through September 30, 2008 is not relevant to whether the petitioner possessed the ability to pay the proffered wage in 2006 and 2007.

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The record also contains statements from the sole proprietor's Individual Retirement Account (IRA) and his wife's IRA. The sole proprietor and his wife have asserted that they would be willing to take withdrawals from their IRA accounts to pay the proffered wage.

The statement in the record from [REDACTED]'s IRA shows the following information:

- July 1, 2008 through September 30, 2008 ending account value \$9,441.

[REDACTED]'s IRA balance of \$9,441 in 2008 is not sufficient to cover the proffered wage. In addition, the 2008 statement is not relevant to the petitioner's ability to pay the proffered wage in 2006 and 2007.

The IRA of [REDACTED] is not a jointly-owned asset of the sole proprietor and therefore it is not considered evidence of the petitioner's ability to pay the proffered wage.⁴

The record also contains the first page of a twelve-page bank statement for the period of July 15, 2008 through August 12, 2008 summarizing three business checking accounts and a nine month CD. The August 12, 2008 statement is also not relevant to whether the petitioner possessed the ability to pay the proffered wage in 2006 and 2007.

Thus, the sole proprietor has failed to establish that he had sufficient liquid assets to establish the continuing ability to pay the proffered wage in 2006 and 2007.

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

⁴ The age of the sole proprietor and his wife are unknown; but based on the fact that they claimed three dependent children on their 2006 and 2007 tax returns, it would appear they were younger than age 59 ½ during those years. Withdrawals from a traditional IRA before age 59 ½ are considered early withdrawals. If an individual takes an early withdrawal from a traditional IRA, then in addition to any regular federal income or state income tax due on the withdrawal, the individual may also be required to pay a 10% tax penalty, with certain exceptions. *See* 26 U.S.C. § 72(t); 26 U.S.C. § 408. In addition to the penalty, they would have to pay 15% federal tax and 5% state tax on any early IRA withdrawals. Therefore, even if [REDACTED]'s IRA were considered in this case, when factoring in penalties and taxes for early withdrawal, her IRA would not have sufficient funds to cover the proffered wage and the shortfall of household expenses in both 2006 and 2007. Further, it is highly unlikely that the petitioner and his spouse would deplete their retirement accounts in order to pay an employee for two years. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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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's gross revenues are not substantial and it only claims to have one employee. Its tax returns show gross receipts dropped from \$497,614 in 2006 to \$228,505 in 2007. This does not indicate historical growth of the business. There is no evidence in the record of uncharacteristic expenditures or losses, nor is there evidence in the record of the business' reputation. 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, 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 24 months of experience as a roofer. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a roofer for [REDACTED] in California from January 2, 1998 until December 31, 2000.

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 two letters in support of the beneficiary's experience as a roofer.

The first letter is from [REDACTED] Contractor, on letterhead from [REDACTED]. The letter states that the beneficiary worked as a roofer from January 2, 1998 to December 31, 2000. The website for the California Department of Consumer Affairs' Contractors State License Board shows that [REDACTED] was exempt from workers' compensation insurance from November 19, 1997 until December 2, 1998 because they certified that they had no employees at that time. This information conflicts with the dates of employment listed on the letter, and calls into question the credibility of the letter. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

The record also contains a letter from [REDACTED] Assistant Manager of [REDACTED]. The letter states that the beneficiary worked as a roofer from May 15, 1995 until December 12, 1997. This employment is not listed on the labor certification. 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. Thus, the letter from [REDACTED] is also not sufficient by itself to conclude that the beneficiary possessed the claimed experience without additional independent, objective evidence of the claimed employment.

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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.