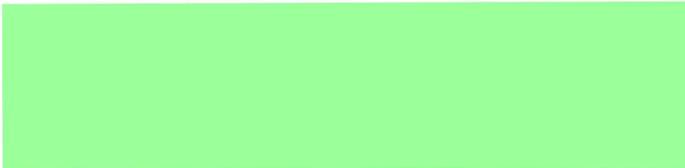




U.S. Citizenship
and Immigration
Services

(b)(6)



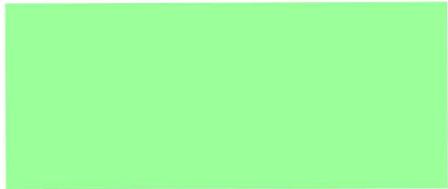
Date: **JUN 01 2012** Office: NEBRASKA SERVICE CENTER

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed.

The petitioner is a furniture finishing business. It seeks to employ the beneficiary permanently in the United States as a furniture finisher. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that: 1) the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker; 2) the petitioner had not established the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; 3) the petitioner had not established that the beneficiary met all of the requirements of the offered position set forth on the labor certification by the priority date of the petition; and 4) the petitioner had not submitted the original Form ETA 750. 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. The AAO notes however, that the evidence submitted on appeal demonstrates that the beneficiary meets the requirements stated in the labor certification, and the evidence includes an original copy of the Form ETA 750. Therefore, the AAO withdraws those portions of the director's decisions based on the failure of the petitioner to: 1) establish that the beneficiary met all of the requirements of the offered position set forth on the labor certification, and 2) submit the original Form ETA 750.

As set forth in the director's March 26, 2009 denial, the first issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on March 4, 2008. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

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 On appeal, counsel asserts that the director erred in not issuing a Notice of Intent to Deny (NOID) or otherwise allowing the petitioner an opportunity to respond to or rebut the director's findings and submits a copy of an article which describes furniture refinishing processes. Counsel also asserts that the petition was denied in part due to the beneficiary not being a skilled worker under 8 C.F.R. § 204.5(l)(4) and in response refers to a previously submitted letter dated February 15, 2008, from the petitioner which states that the beneficiary is an excellent furniture refinisher.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, [United States Citizenship and Immigration Services (USCIS)] USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage; evidence that the beneficiary met the education, training, and experience requirements of the labor certification; and an original Form ETA 750 certified by the DOL, and therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility.

The AAO also notes that counsel is mistaken in his assertion that the petition was denied due to the beneficiary not being a skilled worker under 8 C.F.R. § 204.5(l)(4). The director denied the petition firstly on the grounds that the position as certified by the DOL on the labor certification did not require two years of education, training, and experience as required by 8 C.F.R. § 204.5(l)(4). The article explaining furniture refinishing processes and the petitioner's letter both fail to demonstrate that the position is one which requires two years of education, training, or experience.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that proffered position requires one year of experience. However, the petitioner requested the skilled worker classification on the Form I-140. There is no

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).

provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. 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).

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

(i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

The AAO further notes that the petition was not denied on the basis of any derogatory information unknown to the petitioner. As the petitioner filed the petition and supporting documents which have been entered into the record, the lack of inclusion of the initial evidence as well as the minimum requirements of the labor certification are well known to the petitioner. Therefore, the director was not required to provide an opportunity to rebut information on which the denial was based.

Counsel also asserts that the director mistakenly referred to the job title in the denial as a dental office manager rather than a furniture refinisher. The AAO notes that the director's decision misstates the title of the job, but this error is *de minimis*.

Therefore, it is concluded that the petitioner has not established that the petition requires at least two years of training, education, or experience as required for classification as a skilled worker under 8 C.F.R. § 204.5(l).

The petitioner must also establish that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour (\$30,160 per year). The Form ETA 750 states that the position requires one year of experience in the job offered.

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 1995 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to work for the petitioner since February 1999.

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. No evidence of payments made from the petitioner to the beneficiary was submitted.

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.

The record before the director closed on March 26, 2009, with the issuance by the director of the denial of the petition. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available.

In the instant case, the sole proprietor supports only himself. The sole proprietor's tax returns reflect adjusted gross income² (AGI) for 2001 through 2007 as shown in the table below.

- In 2001, the Form 1040 stated adjusted gross income of \$19,489.
- In 2002, the Form 1040 stated adjusted gross income of \$19,845.
- In 2003, the Form 1040 stated adjusted gross income of \$20,801.
- In 2004, the Form 1040 stated adjusted gross income of \$23,636.
- In 2005, the Form 1040 stated adjusted gross income of \$24,635.
- In 2006, the Form 1040 stated adjusted gross income of \$10,776.
- In 2007, the Form 1040 stated adjusted gross income of \$21,615.

² The adjusted gross income of the petitioner is shown on page one of IRS Form 1040 on line 33 (2001); line 35 (2002); line 34 (2003); line 36 (2004); and line 37 (2005 - 2007). See Instructions for Form 1040, at <http://www.irs.gov/app/picklist/list/priorFormPublication.html> (accessed April 30, 2012).

In each year from 2001 through 2007, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$30,160. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, counsel asserts that the submitted tax returns demonstrate the ability to pay the proffered wage.

The AAO notes that 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). Further, no evidence of the amount spent on household expenses for the sole proprietor was submitted.

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 sole proprietor's gross receipts as well as his adjusted gross income varied. No distinct pattern of increasing growth or profits was reflected in the tax returns. The petitioner indicated on the Form I-140 that he employs only two workers, which is not substantial. While the petitioner has now been in business over fifteen years, the business activity does not appear to pay substantial compensation to the sole proprietor. In addition, there is no 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 his industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage beginning on the priority date.

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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.

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.