

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6

DATE: **JAN 09 2012** OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

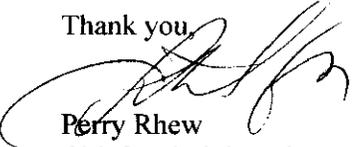
SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your 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

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The director issued a decision and denied the petition again and certified the decision to the AAO. The matter is now before the AAO on certification. The director's decision to deny the petition is affirmed.

The petitioner is a farm. It seeks to employ the beneficiary permanently in the United States as a farm equipment operator. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner failed to submit the initial required evidence to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The petitioner appealed this decision. On December 1, 2010, the AAO withdrew the decision to deny the petition, and remanded the case to the director to obtain additional evidence of the petitioner's ability to pay the proffered salary and of the beneficiary's ability to work all shifts.

On remand, the Director, Texas Service Center issued a Request for Evidence (RFE), dated March 14, 2011 to the petitioner. Based upon the response provided by the petitioner, the director denied the petition on September 26, 2011, and certified it to this office for review.<sup>1</sup> The petitioner has submitted other materials in response to the certification.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

For the reasons stated below, the AAO concurs with the director's denial of the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage and its failure to respond to questions posed the director's request for evidence that would have allowed the

---

<sup>1</sup> The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

director to undertake a thorough review.<sup>2</sup> The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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.

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 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); 8 C.F.R. 204.5(g)(2). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this respect, the position required no formal education, no experience, and no training. However, Part H, Item 14 specifies that the beneficiary must be able to work all shifts.

Here, the ETA Form 9089 was accepted on April 10, 2007, which establishes the priority date. The proffered wage as stated on the labor certification is \$9.00 per hour, which amounts to \$18,720 per year. There is no indication that the petitioner has employed the beneficiary as indicated on Part K of the ETA Form 9089. As indicated by the copy submitted on appeal, the beneficiary signed the ETA Form 9089 on July 26, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the labor certification, 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. In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to

---

<sup>2</sup> The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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. 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. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

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. Comm. 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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Upon remand to the director to determine the petitioner's ability to pay the proffered wage of \$18,720 per year, the director issued a request for evidence on March 14, 2011. He requested that the petitioner provide him with copies: 1) the individual owner's Form 1040, U.S. Individual Tax Return for 2007, 2008, 2009 and 2010; 2) a statement of monthly household living expenses pertinent to each year; 3) a statement of personal assets if the sole proprietor will use personal assets to cover the proffered wage; 4) evidence of any wages or salary paid to the beneficiary; and 5) evidence of the beneficiary's ability to work all shifts.

The petitioner responded within the allotted thirty days and provided: 1) monthly expenses for 2007 to 2010 that amounted to \$3,714.76 or \$44,577.12; 2) copies of the sole proprietor's 2007, 2008, 2009, and 2010 individual tax returns, which showed the following adjusted gross income:

2007	\$10,392
2008	\$35,435
2009	\$28,865
2010	-\$97,119

The petitioner did not submit any evidence of wages paid to the beneficiary, evidence of any other personal assets, and did not respond to the director's request for evidence that the beneficiary could work all shifts as of the priority date of April 10, 2007.

On remand, the director denied the petition based on the sole proprietor's failure to demonstrate the ability to pay the proffered wage. As reflected above, the petitioner's household expenses of \$44,577.12 exceeded every year's adjusted gross income for the sole proprietor even without considering payment of the proffered wage.

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 this case, the sole proprietor failed to provide any evidence of employment or wages paid to the director in response to his request for evidence. As noted by the director, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). It is noted that no evidence of the petitioner's employment was listed by the beneficiary on the ETA 9089.

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). 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 stated in the previous AAO decision, the petitioner is a sole proprietorship, an entity in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). 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. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). For this reason, sole proprietors provide evidence of the individual monthly household expenses to be considered as part of their ability to pay the proffered wage.

It is noted in *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship 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.

As noted above, the petitioner's household expenses exceeded every year's adjusted gross income even without considering payment of the proffered wage and thus could not establish the petitioner's ability to pay the proffered salary to the beneficiary during any of the relevant years.

The director issued his notice of certification reaffirming the denial of the Form I-140 based on the evidence in the record and on the petitioner's response to his April 14, 2011 request for evidence.

In response to the notice of certification, the petitioner has submitted copies of a September 2, 2011 and an October 7, 2011 check written to the beneficiary, copies of 2007, 2008, 2009, and 2010 Wage and Tax Statements (W-2) issued to the beneficiary by the petitioner,<sup>3</sup> and a statement from the petitioner that the beneficiary has been available to come to work during any shift. The AAO will not accept new evidence on certification, particularly where the petitioner was specifically requested by the director to respond with evidence of ability to work all shifts and evidence relating to the beneficiary's paid wages in the director's request for evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or on certification. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director's request for evidence. *Id.*

Further, it is noted that the 2007 W-2 shows substantial wages paid,<sup>4</sup> but as of July 26, 2007, when the ETA Form 9089 was submitted, the beneficiary was not claiming any employment by the petitioner.<sup>5</sup> 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. at 591-92. Under the circumstances, the AAO need not, and does not,

---

<sup>3</sup>Form I-140 does not state that the beneficiary has a social security number, however, the Form W-2s state a social security number for the beneficiary. This discrepancy raises a question regarding the validity of the information, which must be resolved. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

<sup>4</sup>This raises a question regarding whether the nature of the job offer was accurately described in terms of the position's minimum qualifications and whether the petitioner intends to employ the beneficiary in the job offered. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. See 20 C.F.R. § 656.30(C)(2). See *Matter of Sunoco*, 17 I&N Dec. 283, 17 I&N Dec. 283 (BIA 1979).

<sup>5</sup>The ETA Form 9089 states in Section K, "Alien Work Experience" to list "all jobs the alien has held during the past three years." The form additionally includes an attestation for both the petitioner and the alien to declare under penalty of perjury that all the information (in Section J and K for the beneficiary) and the application is true and correct. The ETA Form 9089, Section K lists no work experience for the beneficiary despite the form's clear instructions.

consider the sufficiency of the evidence submitted only on certification, following the petition's denial, appeal, and remand. Consequently, the evidence will not be considered by the AAO.

We concur with the director's denial of the petition for the reasons as set forth above. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date.<sup>6</sup> Upon review of the evidence contained in the record, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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 director's decision to deny the petition is affirmed. The petition will remain denied.

---

<sup>6</sup>In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. *Sonogawa* related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In this matter, the petitioner has submitted insufficient evidence upon which to conclude that the petitioner's circumstances justify approval based on *Sonogawa*. As stated above, none of the sole proprietor's tax returns' reflected adjusted gross income that was enough to cover the household expenses without even considering the payment of the proffered wage. No other cash or cash equivalent assets from which the proffered wage may be paid has been submitted and no other evidence similar to that discussed in *Sonogawa* has been provided that would demonstrate that such unusual and unique circumstances would apply here.