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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



B6

DATE: JUL 30 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:

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 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fire and security systems design company. It seeks to employ the beneficiary permanently in the United States as an electrical systems designer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed 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 March 30, 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 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 \$4,033 per month (\$48,396 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 1988 and to currently employ 5 workers. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claimed to work for the petitioner since January 2000.

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 onwards. The wages paid to the beneficiary are as follows:

- For year 2001, the petitioner paid the beneficiary \$29,022 (shortfall of \$19,374).²

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).

² Form I-140 and the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, both state the beneficiary's social security number starting with a nine (9), which would represent a taxpayer identification number. The W-2 statements all list a social security number beginning with a six (6). The discrepancy in the claimed social security numbers casts doubt on the veracity of the W-2 statements. This issue must be addressed in any further filings

- For year 2002, the petitioner paid the beneficiary \$33,409 (shortfall of \$14,987).
- For year 2003, the petitioner paid the beneficiary \$29,848 (shortfall of \$18,548).
- For year 2004, the petitioner paid the beneficiary \$27,512 (shortfall of \$20,884).
- For year 2005, the petitioner paid the beneficiary \$39,634 (shortfall of \$8,762).
- For year 2006, the petitioner paid the beneficiary \$38,669 (shortfall of \$9,727).
- For year 2007, the petitioner paid the beneficiary \$42,841 (shortfall of \$5,555).
- For year 2008, the petitioner paid the beneficiary \$41,775 (shortfall of \$6,621).

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it can establish that it paid partial wages from 2001 to 2008 upon resolution of the social security number issue set forth above. Since the proffered wage is \$48,396.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, as indicated above, upon resolution of the issues set forth.

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 (Bryan A. Garner ed., 7th ed., West 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

before the AAO can definitively accept the W-2 statements as evidence of the petitioner's pay to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* 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. *Id.* at 591.

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 four (4).³ The proprietor's tax returns reflect the following information for the following years:

<u>Year</u>	<u>AGI</u> ⁴	<u>Expenses</u> ⁵
2001	\$78,318	\$104,534.40
2002	\$100,536	\$104,534.40
2003	\$16,022	\$104,534.40
2004	\$67,540	\$104,534.40
2005	\$110,507	\$104,534.40
2006	\$96,936	\$104,534.40
2007	\$163,471	\$104,534.40

In 2003, the sole proprietor's adjusted gross income of \$16,022 fails to cover the proffered wage of \$48,396. 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. As in *Ubeda*, the petitioner here reports adjusted gross income that suggests he is highly unlikely to support himself, his spouse and three dependents, given his reported expenses. In 2001, 2002, 2004,

³ For tax years 2001 to 2004, the petitioner reported three (3) dependents on his tax return. For tax years 2005 to 2007, the petitioner reported four (4) dependents on his tax return.

⁴ Adjusted gross income is reported on IRS Form 1040, line 33 (2001), line 35 (2002), line 34 (2003), line 36 (2004), and line 37 (2005-2007).

⁵ The petitioner provided a letter, dated February 27, 2009, and exhibits documenting the petitioner's personal expenses in the monthly amounts of: household expenses of \$2,390.00; and mortgage expenses of \$6,321.20. The director noted in his decision that it was unclear when the petitioner's \$6,321.20 mortgage obligation began. The petitioner did not clarify this issue on appeal. Therefore, the petitioner's annual expenses are calculated by adding the expenses provided and multiplying by 12 months, which equals \$104,534.40, and the estimated expenses of \$104,554.40 will be used throughout. The sole proprietor's letter states that he has no car payments. Whether this was true from the entire time period of April 2001 onward is unclear. The sole proprietor should provide a more thorough accounting of expenses by year in any further filings. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N at 591-92.

and 2006, the petitioner's AGI is less than the petitioner's stated household expenses. Therefore, after reducing the petitioner's AGI by the petitioner's expenses for those years, there are insufficient funds available to pay the balance of the prevailing wage offered to the beneficiary. In 2005 and 2007, the petitioner's AGI is more than the petitioner's stated expenses, leaving a surplus of \$5,972.60 for 2005 and \$58,936.60 for 2007. The surplus in 2005 is insufficient to pay the balance of the proffered wage, which is \$8,762 as described above. The surplus in 2007 would be sufficient to pay the balance of the proffered wage, which is \$5,555.00 as described above, if the sole proprietor's personal expenses are accurate, and the sole proprietor can resolve the issues related to the beneficiary's social security number, as set forth above. Therefore, the petitioner appears to be able to establish its ability to pay the proffered wage to the beneficiary in year 2007, but has failed to demonstrate its ability to pay the proffered wage to the beneficiary from the priority date to 2006.

On appeal, the petitioner asserts that it does have the ability to pay the proffered wage, and provides unaudited financial statements for 2001, additional copies of its 2001 and 2002 tax returns, and monthly business checking and business saving bank statements for the sole proprietorship from January 2003 to December 2008.

The funds in the [REDACTED] accounts are located in the sole proprietorship's business checking and business savings accounts. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 [REDACTED], 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.

The sole proprietor provided business checking and business savings bank statements. Based on the evidence in the record, the funds in the sole proprietorship's business bank accounts appear to be included on the Schedule C to IRS Form 1040. The net profit is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage, as discussed above.

In the instant case, the information provided by the petitioner does not reflect significant or historically increasing sales. The petitioner has not established its historical growth since its establishment, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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 and the sole proprietor's personal expenses.

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 two (2) years of experience in the job offered, as an electrical systems designer. The labor certification, signed by the beneficiary on April 21, 2001, under penalty of perjury, indicates that the beneficiary claims to qualify for the offered position based on experience as an electrical systems designer with [REDACTED]. The beneficiary attests that his full-time work experience with Security Management Services began in 1996 (no month indicated) and ended in 1998 (no month indicated). The labor certification does not indicate the month in which the beneficiary's work began or ended with this employer, therefore, the length of the beneficiary's work experience cannot be calculated based on the information provided. The beneficiary attests that he worked full-time for another company, [REDACTED] from August 1999 to January 2000, as a "Drafting Design [sic]." The beneficiary also attests that he began working full-time for the petitioner beginning January 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 only one experience letter, dated April 20, 2001, from [REDACTED]. The letter states that the beneficiary has worked for that company as a [REDACTED] "from April of 1998 to November of 2000." These dates of employment conflict with the dates provided by the beneficiary on the labor certification of 1996 to 1998. Also, the dates provided by [REDACTED] overlap with the beneficiary's claimed full-time employment with the two additional employers discussed above. No objective evidence or explanation regarding these inconsistencies exists in the record. The petitioner must address and resolve these inconsistencies in any further filings. *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.

Consequently, no credible evidence exists in the record demonstrating the beneficiary possessed the work experience required by the labor certification. 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.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.