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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

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DATE: **JUN 06 2012**

OFFICE: TEXAS SERVICE CENTER

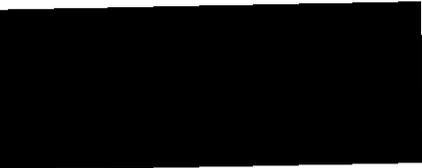


IN RE: Petitioner:
 Beneficiary:



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 with the field office or service center that originally decided your case by filing a 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a tile and marble setter pursuant to sections 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a labor certification accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards.

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 March 5, 2012, this office notified the petitioner in a Notice of Derogatory Information and Request for Evidence (NDI) that the evidence in the record concerning the organization of the petitioner's business contained discrepancies, raising questions concerning the credibility of the claims. Specifically, the NDI noted that although the petitioner claimed to be a sole proprietorship, it also claimed to have four owners (two married couples). As the IRS regulation indicates that a sole proprietorship may only be owned by one owner (or one married couple), the NDI requested evidence to reconcile this discrepancy.

This office notified the petitioner that it must establish its ability to pay the proffered wage from the priority date onward pursuant to 8 C.F.R. § 204.5(g)(2)² and that any discrepancies must be resolved before the evidence submitted could be accepted. See *Matter of Ho*, 19 I & N Dec. 582, 586 (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). "It is

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 The regulation 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.

incumbent upon 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 id.* The NDI also stated that a sole proprietorship must submit evidence concerning its owners’ household expenses in order to calculate the amount available to pay the proffered wage and requested such a statement.³

Beyond the decision of the director, the NDI informed the petitioner that no evidence was submitted concerning the beneficiary’s qualifications as required by the terms of 8 C.F.R. § 204.5(l)(3). The NDI requested evidence of the beneficiary’s experience as claimed on the Form ETA 750B and required by the terms of the labor certification for the position.

This office allowed the petitioner 30 days in which to provide evidence that the sole proprietorship was formed in accordance with IRS regulations, to provide evidence of the sole proprietor(s)’ household expenses, and to provide evidence that the beneficiary possesses the skills required by the terms of the labor certification. More than 30 days have passed and the petitioner has failed to respond to this office’s request. Thus, the appeal will be dismissed as abandoned.

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.

³ 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.