

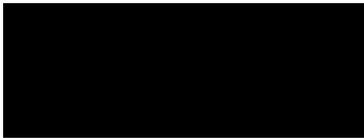
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: **MAY 01 2012**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Other Worker Pursuant to § 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 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

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. It then came before the Administrative Appeals Office (AAO) on appeal. On April 13, 2011, this office informed the petitioner through a request for evidence and notice of intent to dismiss (RFE/NOID) that the record in this case lacks conclusive evidence as to whether the petition is based on a *bona fide* job offer or whether a pre-existing family, business, or personal relationship may have influenced the labor certification. In response to the RFE/NOID, the petitioner stated “there is not any doubt that [the beneficiary] is my relative. Therefore, on February 29, 2012, this office provided the petitioner with notice of adverse information in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information.

The petitioner is a home owner. It seeks to employ the beneficiary permanently in the United States as a house worker pursuant to section 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 approved by the Department of Labor accompanied the petition. 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. Therefore, the director denied the petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On April 13, 2011, the AAO issued an RFE/NOID seeking verifiable evidence of the relationship between the beneficiary and the petitioner’s household and verifiable evidence that the Department of Labor (DOL) was cognizant of that relationship when it certified the instant labor certification for the instant beneficiary. In response, the petitioner stated that “There is not any doubt the [the beneficiary] is my relative.” On August 1, 2011, the AAO sent a letter to DOL seeking clarification concerning the relationship between the petitioner and the beneficiary to determine if a material misrepresentation was made involving the labor certification and to determine if the job offer was *bona fide* and open to all qualified U.S. Workers. Also, on August 1, 2011, the petitioner was notified that the AAO was referring the approved ETA Form 9089 to DOL seeking advice as to the validity of the labor certification and whether it intended to take any action based on the information the AAO would provide to DOL pursuant to our consultation authority at section 204(b) of the Act. The petitioner was informed that the instant administrative proceedings before the AAO were being held in abeyance pending resolution of the DOL’s review of the labor certification application.

On January 23, 2012, the AAO received a response from DOL. The DOL explained that it believed misrepresentation occurred when the petitioner responded to question C.9 of the ETA Form 9089 following receipt of his admission that, “[t]here is not any doubt that [the beneficiary] is my relative.” DOL also explained that the issue is the undue influence and control the beneficiary is afforded by virtue of the familial relationship. DOL stated that it is not unexpected that an individual would have a vested interest in the employment of a relative and would do what he or she could do to provide the beneficiary a job opportunity at the expense of U.S. workers. Thus, the DOL stated that it would initiate the revocation process for the labor certification, as the granting of the certification was not justified.

The petitioner should have disclosed the relationship between the beneficiary and the petitioner to the DOL. *See Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. at 406.¹ The petitioner failed to make this disclosure.

The petitioner was told that the AAO intends to dismiss the appeal with a finding of fraud. The AAO may also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d).² While the petitioner may withdraw the appeal, withdrawal will not prevent a finding that the petitioner has engaged in fraud and the willful misrepresentation of material facts.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she “by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act.” *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).³

¹ The burden rests on the employer to provide clear evidence that a *bona fide* job opportunity is available, and that the employer has, in good faith, sought to fill the position with a US worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

² On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefore shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

³ The term “willfully” in the statute has been interpreted to mean “knowingly and intentionally,” as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) (“knowledge of the falsity of the representation” is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting “willfully” to mean “deliberate and voluntary”). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements

This office allowed the petitioner 45 days to respond to the NDI. More than 45 days have passed and the petitioner has failed to respond to this office's NDI. Thus, the appeal will be dismissed as abandoned.

Further, as set forth in the director's March 9, 2009 denial, an 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. The director determined that the petitioner had not established its ability to pay the proffered wage from the priority date of January 11, 2006.

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 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). 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 January 11, 2006. The proffered wage as stated on the ETA Form 9089 is \$12.00 per hour or \$24,960 per year. The ETA Form 9089 states that the position requires no education or training, but does require one year of experience.

are the actual minimum requirements for the position, see 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, see *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to currently employ six workers. On the ETA Form 9089, signed by the beneficiary on January 9, 2006, the beneficiary did not claim to have worked for the petitioner.

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2006 onwards.

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, an individual, is treated as 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 and lists his yearly personal expenses as \$35,628 in 2006, \$36,828 in 2007, \$38,688 in 2008, \$41,688 in 2009, and \$41,568 in 2010. The proprietor's tax returns reflect the following information for the following years:

Proprietor's 2006 adjusted gross income (Form 1040, line 37)	\$52,226
Proprietor's 2007 adjusted gross income (Form 1040, line 37)	\$44,584
Proprietor's 2008 adjusted gross income (Form 1040, line 37)	\$59,453
Proprietor's 2009 adjusted gross income (Form 1040, line 37)	\$65,541
Proprietor's 2010 adjusted gross income (Form 1040, line 37)	\$72,574

Therefore, when taking the proffered wage of \$24,960 and the petitioner's yearly personal expenses together, the petitioner has not established his ability to pay the proffered wage in 2006 through 2009. In 2006, the petitioner's personal expenses and the proffered wage equal \$60,588 or \$8,362 more than the petitioner's adjusted gross income. In 2007, the petitioner's personal expenses and the proffered wage equal \$61,788 or \$17,204 more than the petitioner's adjusted gross income. In 2008, the petitioner's personal expenses and the proffered wage equal \$63,648 or \$4,195 more than the petitioner's adjusted gross income. In 2009, the petitioner's personal expenses and the proffered wage equal \$66,648 or \$1,107 more than the petitioner's adjusted gross income. In 2010, the petitioner's personal expenses and the proffered wage equal \$66,528 or \$6,046 less than the petitioner's adjusted gross income. Therefore, the petitioner has established its ability to pay the proffered wage and support his family of five in 2010, but not in 2006 through 2009.

On appeal, the petitioner asserts that he has established the continuing ability to pay the proffered wage to the beneficiary based on depreciation, the value of his rental homes, the projected increases in his rental income and his salary, his bank statements, and on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The AAO does not agree. With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's

choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added). Therefore, the AAO will not consider the petitioner's depreciation when determining his continuing ability to pay the proffered wage from the priority date.

The AAO notes that the petitioner submitted a statement with regard to the value of his rental properties as evidence of his ability to pay the proffered wage. Regarding the petitioner's property value, a rental property is not a readily liquefiable asset. In addition, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that 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). Further, there is no evidence that the petitioner could easily sell his rental properties or that he would receive full value for the properties in order to pay the beneficiary's wage. Therefore, the AAO will not consider the petitioner's rental properties' values when determining his continuing ability to pay the proffered wage from the priority date of January 11, 2006.

With regard to the petitioner's rental income, that income is already included in his adjusted gross income for each year in question (2006 through 2009), and therefore, may not be considered separately from the adjusted gross income.

With regard to the petitioner's projected increases in his rental properties and his salary as evidence of his continuing ability to pay the proffered wage, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45,

49 (Comm'r 1971). Therefore, the AAO will not consider the petitioner's future increases in rent or his future increases in his salary when determining the petitioner's continuing ability to pay the proffered wage from the priority date of January 11, 2006.

With regard to the petitioner's bank statements, the petitioner has only submitted partial bank statements (May 21, 2008 through August 20, 2008 and April 1, 2011 through April 29, 2011), and therefore, the AAO cannot determine if the petitioner's bank statements for those periods represent a complete picture of the petitioner's funds for 2006 through 2009. It is unclear whether or not the petitioner's bank statements that were submitted are representative of the petitioner's funds for each month during the years in question. Therefore, in this instance, the AAO will not consider the incomplete bank statements as submitted to the record when determining the petitioner's continuing ability to pay the proffered wage.

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 petitioner is an individual who is treated as a sole proprietorship. The petitioner has submitted copies of his 2006 through 2010 individual income tax returns, and has not established his ability to both pay the proffered wage and support his family of five in four of the five years. He has not submitted complete personal checking and savings account statements for the entire years of 2006 through 2009 (the years in question) and has not shown that his rental properties are easily liquefiable in order to pay the proffered wage. 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.⁴ 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 with a finding of fraud.

FURTHER ORDER: The AAO finds that the petitioner fraudulently misled DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

⁴ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.