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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

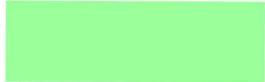


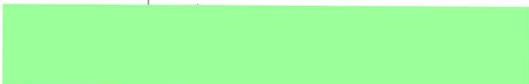
U.S. Citizenship  
and Immigration  
Services



DATE: **NOV - 3 2012**

OFFICE: TEXAS 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.

Thank you,

*Kerry Porlos for*

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 rejected.

The petitioner is an attorney.<sup>1</sup> He seeks to employ the beneficiary permanently in the United States as a Desktop Publisher-Portuguese Language, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), which 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.<sup>2</sup>

The petitioner submitted a copy of a labor certification from the United States Department of Labor (DOL), an approval notice for the original beneficiary of that certification, a copy of a letter written by the original beneficiary requesting to "port" to a new employer, a copy of a request to withdraw the approved petition and a request to substitute the beneficiary of the instant petition for the original beneficiary on the certification. The director determined that the labor certification was expired at the time of filing and that the original beneficiary had already adjusted status to that of a lawful permanent resident and denied the petition accordingly. Because the petition was denied due to the lack of a valid labor certification, the director noted that there was no appeal from his decision.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time

<sup>1</sup> The name of the employer on the labor certification is the [REDACTED]. However, the instant Form I-140 states that the petition is filed by an individual attorney, [REDACTED]. It has not been established that [REDACTED] an individual, is the same employer as the [REDACTED] or its successor-in-interest. According to his website, [REDACTED] operated the [REDACTED] from 1980 to 2000, worked for a law firm, [REDACTED] from 2000-2010, and now operates a professional association, [REDACTED] (accessed October 30, 2012).

<sup>2</sup> It is not clear why the petitioner, and attorney with a law office in Florida, requires the services of a desktop publisher in Massachusetts. It is noted that the worksite listed on the labor certification for the proffered position, [REDACTED] Massachusetts, is a personal residence. Further, the address of the prospective employer listed on Form ETA 750B is [REDACTED] Massachusetts, which is the address of [REDACTED].

of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.11 states the following:

Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The Act does not provide for the substitution of aliens in the permanent labor certification process. DOL's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the Department of Homeland Security's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. See 72 Fed. Reg. 27904 (May 17, 2007).

The procedural history of the instant case is as follows:

Form ETA 750, Application for Alien Employment Certification<sup>3</sup> was filed with the DOL by the [REDACTED] on behalf of [REDACTED] on November 14, 1997. The DOL certified the Form ETA 750 on August 9, 2002.

On May 19, 2003, the [REDACTED] filed Form I-140<sup>5</sup> on behalf of [REDACTED] with the above-referenced Form ETA 750. That case was approved by USCIS on April 16, 2004. USCIS records reflect that the approval of the petition was never revoked. On August 29, 2006, [REDACTED]

<sup>3</sup> Case number [REDACTED]

<sup>4</sup> Alien registration number [REDACTED]

<sup>5</sup> Receipt number [REDACTED]

became a lawful permanent resident (LPR) based on the underlying Form I-140 and Form ETA 750 referenced above.

On August 3, 2006, filed Form I-140<sup>6</sup> on behalf of . The petitioner submitted a photocopy of the above-referenced Form ETA 750, requesting a substitution of for the original beneficiary, . Also submitted was a copy of a September 1, 2004 letter from the petitioner requesting to withdraw the petition filed on behalf of . Additionally, the petitioner submitted a May 5, 2004 letter from indicating that he accepted employment with a new employer, .

On March 27, 2008 the Director, Nebraska Service Center, denied the second Form I-140 on the grounds that had already used the underlying labor certification to adjust status; thus, according to the director's decision, the petition was filed without a valid labor certification.

The instant Form I-140 petition was filed on May 15, 2008 on behalf of . The petitioner submitted a photocopy of the above-referenced Form ETA 750, requesting a substitution of for the original beneficiary, . As the filing of the instant petition was after July 16, 2007, the petitioner is not able to substitute the beneficiary.<sup>8</sup> The petition was, therefore, filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the 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).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As alien labor certification substitution is no longer permitted and the petition is not accompanied by a valid labor certification, this office lacks jurisdiction to consider an appeal from the director's decision. The appeal will be rejected.

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<sup>6</sup> Receipt number

<sup>7</sup> There is no evidence to establish that the original letter was presented to the USCIS prior to August 3, 2006.

<sup>8</sup> Substitution requests do not relate back to previous timely-filed petitions. In accordance with 8 CFR 103.1(f)(3)(iii)(B), petitioning employers may not file an appeal of USCIS' decision to deny a Form I-140 petition that is filed with an approved labor certification issued by DOL in the name of an alien other than the alien named in the Form I-140 petition.

The AAO notes that on appeal, counsel asserts that the labor certification was not used by the original beneficiary. He asserts that *Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm'r 1986), supports a finding that the labor certification remains valid because the position with the employer was unfilled when the original beneficiary ported to a new employer. Counsel asserts that the labor certification is valid and unused because the position named therein remains unfilled. Thus, the employer is in the position of having obtained a labor certificate for a job that is still open.

Additionally, the petitioner submits a copy of a USCIS memorandum issued by William Yates, on December 27, 2005,<sup>9</sup> entitled *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*. Counsel points to Question 9 in support of his argument:

*Must a successor employer in an I-140 portability case provide a new labor certification? No. There is no requirement that successor employers in adjustment portability cases obtain a new labor certification for those occupations traditionally requiring one. AC21 also provides that any underlying labor certification also remains valid if the conditions of § 106(c) are satisfied. The beneficiary of an approved labor certification may benefit from it although the alien seeks to adjust on the basis of different employment."*

Counsel draws attention to the last sentence above, asserting that it implies a conditional relationship between the ported alien and the labor certification. He notes that the memo does not use "shall" instead of "may," nor does it state that the ported alien "benefits" from the labor certification. Counsel continues, "So, there is no mandated connection between the ported alien and the labor certificate. In fact, the ported alien has, by the act of porting, abandoned the specific job offer of the labor certificate and thus has abandoned the labor certificate and the specific job offer it represents." Thus, counsel concludes, the labor certification remains valid because the specific job remains unfilled, rendering the labor certification unused.

The portability provisions of AC21 cannot be interpreted to permit one labor certification to serve as the basis for lawful permanent residence for multiple aliens. The labor certification on which this petition is based already served as the basis of admissibility of the original beneficiary. There is no legal authority that would allow USCIS to rely on the labor certification of an adjusted alien for a second alien, regardless of whether the first alien ported to another employer.

The AAO also notes that the petitioner has not established that the beneficiary is qualified for the offered position, and that the petitioner has not established its continuing ability to pay the proffered wage from the priority date.

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<sup>9</sup> This memorandum is a reissued and corrected version of the memo of the same name issued on May 12, 2005.

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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires six years of grade school and six years of high school education. On the labor certification signed by the beneficiary on July 15, 2004, he states that he attended [REDACTED] (primary school) from 1982 through 1985, [REDACTED] (elementary school) from 1986 through 1990, and [REDACTED] (high school) from 1991 through 1994.

The record does not contain evidence of the beneficiary's grade school or high school education. Thus, the petitioner has not established that the beneficiary meets the education requirements as stated on the labor certification, and the petitioner has failed to establish that the beneficiary is qualified for the offered position.

The petitioner must also establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>10</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner does not appear to have employed the beneficiary. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered

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<sup>10</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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), *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 (7<sup>th</sup> 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 two.<sup>11</sup> The proprietor's tax returns reflect the following information for the following years:

Year	Adjusted Gross Income
1997	\$191,026
1998	\$330,086
1999	\$80,946
2000	\$145,016
2001	\$271,534
2002	\$325,246
2003	\$244,338
2004	\$201,868

<sup>11</sup> In 1997 and 1998 the sole proprietor supported a family of four.

2005	\$174,251
2006	\$90,238

Although the petitioner's household adjusted gross income covers the proffered wage for each year, the record contains no evidence regarding the petitioner's household expenses; thus, it is not possible to assess whether the petitioner had the ability to pay the proffered wage and sustain himself and his dependents each year. Further, the petitioner did not submit a Schedule C for tax year 2003 related to his provision of legal services.

Additionally, according to USCIS records, the petitioner has filed I-140 petitions on behalf of five other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

**ORDER:** The appeal is rejected.