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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: OFFICE: TEXAS SERVICE CENTER

FILE:

NOV 26 2012

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a residential construction business. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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 December 1, 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). Here, the Form ETA 750 was accepted on April 8, 2004. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour, which equals \$41,600.00 per year.

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 on January 5, 2003 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on January 21, 2004, the beneficiary did not claim to work for the petitioner.

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 any wage from the priority date 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).

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).

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 (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.

The record before the director closed on September 11, 2009 with the receipt of the petitioner's response to a request for evidence (RFE) from the director. At that time, the petitioner's 2009 tax return was not yet due and its 2008 return would be the most recent available. The petitioner, however, submitted a copy of a request for an extension to file its 2008 tax return. The tax returns in the record list no spouse or dependents, and show that the sole proprietor supports only himself. Although the director's RFE requested that the petitioner submit a list of monthly household expenses, a list was not submitted. Instead, counsel asked that the director "please refer to Mr. [redacted] individual tax returns for assets such as a home and auto as evidenced by the depreciation and amortization schedule for each year's return." 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The proprietor's tax returns reflect the following information for the following years:

Proprietor's 2004 adjusted gross income (Form 1040, line 36)	\$37,574
Proprietor's 2005 adjusted gross income (Form 1040, line 37)	\$72,116
Proprietor's 2006 adjusted gross income (Form 1040, line 37)	\$78,340
Proprietor's 2007 adjusted gross income (Form 1040, line 37)	\$45,106

In 2004, the sole proprietor's adjusted gross income of \$37,574 fails to cover the proffered wage of \$41,600. 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.

Similarly, in 2007, the sole proprietor's adjusted gross income of \$45,106 covers the proffered wage, but only \$3,506 remains for the sole proprietor to sustain himself. Without a list of monthly household expenses, the AAO cannot determine whether the sole proprietor's adjusted gross income is sufficient to cover his expenses and to pay the proffered wage for any year.

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 began conducting business only one year before the labor certification was filed. The petitioner claims to have one employee, but based on the information in the record, appears to have independent contractors perform all labor.² The petitioner's tax returns do not establish a consistent history of growth. There is no evidence in the record of the petitioner's reputation within its industry or of any uncharacteristic business expenditures or losses. 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.

On appeal, counsel asserts that the director abused his discretion by not considering the amounts listed on each tax return for contract labor when evaluating the petitioner's ability to pay the proffered wage. Counsel also challenges the director's reliance solely on tax returns when determining the petitioner's ability to pay, citing a decision from the Seventh Circuit of the United States Court of Appeals. Finally, counsel asserts that the director abused his discretion by not

² The director's RFE asked for copies of the petitioner's quarterly wage reports. The response letter from counsel explained that "[redacted] does not have Quarterly Employee Wage Reports because he pays outside contract labor."

allowing the petitioner additional time to respond to the RFE, so that other evidence of the petitioner's ability to pay the proffered wage could be collected.

In response to the director's RFE, counsel advised the director that the beneficiary will replace contract labor used by the petitioner and, therefore, amounts listed on the petitioner's tax returns for contract labor should be considered funds available to pay the proffered wage. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. As the director stated, wages already paid to others are generally not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the contractors involve the same duties as those set forth in the Form ETA 750. If these contractors performed other kinds of work, then the beneficiary could not have replaced them. On appeal, counsel provided no additional evidence regarding the positions of the contractors to demonstrate that their wages should be considered in determining the petitioner's ability to pay.

Counsel cites the decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009) to support her assertion that income tax returns do not provide a clear financial picture of a business and that the director should have considered other factors in his analysis of the petitioner's ability to pay. It is noted that the instant case did not arise in the Seventh Circuit. Therefore, in this case, the AAO is not bound by the decision in *Construction and Design*. See *N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). Nonetheless, the decision in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage which is described above. Counsel also relies on the decision in *Construction and Design* to support her assertion that the director should have provided the petitioner additional time to respond to the RFE.

The director's RFE requested that the petitioner submit a lengthy list of items. The RFE provided the petitioner 33 days in which to respond. No date was stated on the top of the RFE, but a cover sheet provided for the petitioner's response lists the date September 11, 2009. The RFE was addressed to the petitioner and a courtesy copy was addressed to counsel. In a letter dated September 4, 2009, counsel requested additional time to respond to the RFE. Counsel then responded to the RFE within the 33-day timeframe with a separate letter and evidence. The response included most of the requested evidence or explained why the requested evidence was not applicable. The requested identification documents of the sole proprietor, his monthly household expenses, and additional evidence of assets which could be used to pay the proffered wage were not included in the response. Counsel explained that the proprietor, [REDACTED] was on vacation and noted that she had previously asked the director "for a reasonable extension . . . based upon the fact that the Request for Evidence was sent to this firm's prior address." Counsel concludes her response to the RFE by stating, "Based on the enclosed response, I respectfully request that you approve the Form I-140 petition filed by [REDACTED]"

In her brief on appeal, counsel states that more evidence was intended to be submitted by the petitioner in response to the RFE, such as evidence of expected business growth, assets and living expenses for the sole proprietor. Counsel explains in her brief that the RFE allowed only 33 days for the petitioner to respond, despite the director requesting a large amount of evidence. Counsel further explains that the RFE was mailed to the old address of her law firm, even after a letter informing USCIS of the firm's new address was submitted. She states that because of the time it took for the U.S. Postal Service to forward the RFE to the new address, the petitioner was left with only two weeks to respond before the deadline. "Evidence that was intended to be submitted if more time were permitted or if [USCIS] had properly sent the Request for Evidence to the correct addresses is critical in this case to support the . . . issue in this case."

As noted above, it appears that the RFE was mailed both to the petitioner and to counsel. Thus, even if there was a delay in routing the letter to counsel's new address, the original was sent to the petitioner. Moreover, the director's December 1, 2009 decision was issued over two months after the petitioner's September 11, 2009 response to the RFE. The petitioner does not contend that additional information was submitted to the director in the interim which was not considered. The director noted in his decision that 8 C.F.R. § 103.2(b)(14) provides that when a petitioner "does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be made based on the record." This indicates that the director viewed the petitioner's response to the RFE as a request for a decision based on the record, and it appears that the closing sentence of counsel's response letter in fact requests a decision of approval. In addition, 8 C.F.R. 103.2(b)(8)(iv)³ specifically states that "[a]dditional time to respond to a request for evidence or notice of intent to deny may not be granted."

The petitioner's appeal was filed within 30 days of the denial and requested an additional 30 days to submit a brief. The AAO received the petitioner's brief on February 18, 2010. Thus, the time that elapsed between the petitioner's request for an extension to respond to the director's RFE and the submission of the petitioner's brief on appeal was over five months. Despite this significant amount of time, counsel did not provide the AAO with the evidence that she states was intended to be submitted to the director if an extension were granted. Counsel also did not provide the petitioner's 2008 Form 1040 on appeal, which should have been available by the time the brief was submitted.⁴

³ 8 C.F.R. 103.2(b)(8)(iv) *Process*. A request for evidence or notice of intent to deny will be communicated by regular or electronic mail and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond. The request for evidence or notice of intent to deny will indicate the deadline for response, but in no case shall the maximum response period provided in a request for evidence exceed twelve weeks, nor shall the maximum response time provided in a notice of intent to deny exceed thirty days. Additional time to respond to a request for evidence or notice of intent to deny may not be granted.

⁴ Extensions for filing IRS Form 1040 are generally no more than six months. The 2008 Form 1040 with an extension of six months was due October 15, 2009. <http://www.istaxes.com/supforms/f4868.pdf>.

The director did not abuse his discretion by not allowing the petitioner an extension of time to respond to his RFE. Moreover, the director correctly determined that the petitioner did not have the continuing ability to pay the proffered wage at the time of the priority date, based on the record before him. The petitioner has failed to submit evidence on appeal which overcomes the director's decision and that decision is affirmed.

Beyond the decision of the director, the petitioner has also failed to establish 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 years of experience in the job offered of stonemason. On the labor certification, the beneficiary lists the following employment experience:

Employer	Position	Dates	Hours per week
Self-employed	Stonemason	11/2001 to Present	40
[REDACTED]	Stonemason	1999 to 2001	40
[REDACTED]	Dishwasher	1999 to 2000	Not Stated
[REDACTED]	Stonemason	04/1995 to 03/1998	40
[REDACTED]	Stonemason	05/1992 to 10/1993	40

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 an affidavit from the beneficiary stating that he worked for [REDACTED] on two separate occasions from May 1992 to October 1993 and from April 1995 to March 1998 as a stonemason. The affidavit also states that he was unable to get an employment letter from the company because they are no longer in business.

The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record contains additional evidence of the beneficiary's experience including letters and pay statements from [REDACTED] and letters from businesses and individuals for whom the beneficiary worked as a self-employed contractor. The pay statements from [REDACTED] cover various pay periods from December 18, 2000 to October 28, 2001. The letters from [REDACTED] are dated April 13, 2001, signed by [REDACTED] President, and appear to have been prepared for the purpose of obtaining from the DOL a waiver on the restriction for labor certifications for Schedule B occupations.⁵ The first letter asks for the beneficiary, [REDACTED] to obtain a waiver from the Schedule B occupation of "STONEMASON."⁶ The letter also states, "After several conversations with her, I feel she would be a valued long-term asset to my company." The references to [REDACTED] as "her" and "she" are an indication that this was a standard letter used by [REDACTED] for a variety of Schedule B waiver requests. The second letter from [REDACTED] only describes the nature of their business and contains no references to the beneficiary. Therefore, these letters do not meet the regulatory requirements for employment experience letters.

The beneficiary's file contains a Form I-140 petition filed by [REDACTED] on October 26, 2000. The petition was filed for a visa classification that does not require a labor certification and states the proposed employment is in the position of landscape foreman. Based on the general nature of the letters from [REDACTED] and the fact that the letters and the previously filed I-140 describe future employment, it is not clear that the position held by the beneficiary while working for [REDACTED] was a stonemason.

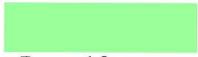
Finally, counsel provided several letters from business and individuals who have employed the beneficiary as an independent contractor. A receipt for the beneficiary's business owner's insurance policy for the year from May 12, 2005 to May 12, 2006 was also submitted. The letters attest that the beneficiary began working as a landscaper and stonemason at [REDACTED] in 2001. However, it is not possible to discern from the letters the total amount of experience the beneficiary accrued by the priority date, nor is it clear how much time the beneficiary devoted to stonemason activities versus the time he worked as a landscaper.

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.

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.

⁵ Schedule B and the restriction on labor certifications for Schedule B occupations previously found at 20 C.F.R. §§ 656.11 and 656.23 did not continue after new DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

⁶ The occupation of stonemason was not listed in Schedule B. 20 C.F.R. § 656.11 (April 1, 2004).



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ORDER: The appeal is dismissed.