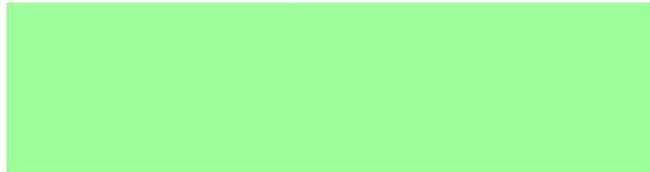


(b)(6)

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

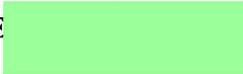


U.S. Citizenship
and Immigration
Services

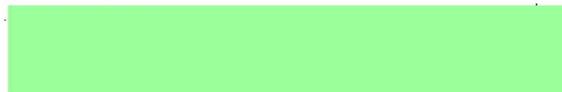


DATE: **JAN - 4 2013**

OFFICE: TEXAS SERVICE CENTER

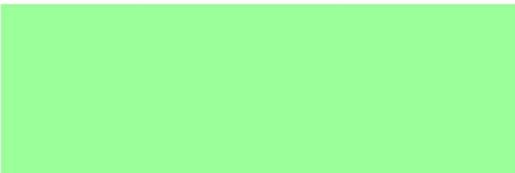
FILE 

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.

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,

Kiera Polos for

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 is in the business of watch and clock repair, as well as retail sale of perfume and watches. It seeks to employ the beneficiary permanently in the United States as a repairer of watches and clocks. 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).¹ 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 also determined that the beneficiary's qualifications did not meet the minimum requirements as set forth on the labor certification. 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.

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.²

As set forth in the director's October 15, 2009 denial, at 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; and whether or not the beneficiary possesses the minimum education and experience required to perform the offered position by the priority date.

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 beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 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).

¹ The petitioner claims that the original Form ETA 750 was submitted to the Texas Service Center and subsequently lost. The record contains a photocopy of that certificate and also a duplicate copy of Form ETA 750 requested by the service center and supplied by the DOL.

² 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Educational Requirements as Set Forth on Form ETA 750

In the instant case, the educational requirements set forth on the labor certification are in question. As noted above, the original Form ETA 750 appears to have been lost. The director notes in his decision that the photocopy submitted by the petitioner, and the duplicate copy provided by the DOL are not identical. Item 14 of the photocopy of Form ETA 750 submitted by the petitioner unambiguously states that a college degree is not required. However, in the duplicate copy provided by the DOL there is an "X" marked in "College Degree Required (specify)" block and an "X" marked in the "Major Field of Study" block. It is also noted that the "College" block is blank, and the blank for "Training No. Yrs." contains a "0" and an "X" under "Type of Training." In his decision, the director appears to discount the photocopied Form ETA 750 and found that the duplicate Form ETA 750 supplied by the DOL requires a college degree in an unnamed field of study. The director denied the petition, in part, because there is no evidence in the record to establish that the beneficiary holds a college degree.

On appeal counsel asserts that the labor certification does not require a college degree. Counsel indicates that the director failed to acknowledge items in the record that support her assertion. Counsel points to the previously submitted decision by the DOL's Board of Alien Labor Certification Appeals, [REDACTED] (BALCA Feb. 26, 2009). The decision withdraws DOL's previous denial of the instant labor certification and remands the matter to the Certifying Officer for further action. The decision states the following on page two, "The Employer required a high school education, five years experience in the job offered and good checkable references along with the ability to speak and read English."

It is not evident why the two versions of the Form ETA 750 contain inconsistencies; however, the photocopy submitted by the petitioner appears to be a more recent version. It is dated March 24, 2009 and reflects an amendment in the rate of pay. The duplicate version from the DOL contains the original rate of pay with no amendment. At issue in the submitted BALCA decision is whether the petitioner adequately advertised the position after the prevailing wage was amended upwards. This fact would indicate that the version of the document on which the director made his decision was not the final version of the document. Additionally, counsel is correct in that the narrative on page two of the BALCA decision does not include a college degree as a requirement for the position. The manner in which the duplicate copy of Form ETA 750 describes the required education is ambiguous. Where grade school and high school is required, the document indicates the number of years required. Under "college" it is left blank. It appears that the use of "X" in this version of the document is consistent with the use of "N/A" for "not applicable". Given all of the above, the preponderance of evidence establishes that no college education is required for the proffered position. Nonetheless, it remains that the evidence does not establish that the beneficiary has met the minimum educational requirements as set forth on the labor certification. However, it is for a reason other than the one stated in the director's decision.

Evidence of the Beneficiary's Education

As noted above, the photocopied Form ETA 750 requires that grade school and high school be "completed." The duplicate copy of Form ETA 750 specifies that 8 years of grade school and 4 years of high school be completed. According to Part B of the photocopied Form ETA 750, the beneficiary indicates that he earned his Secondary School Certificate in 1987 from the [REDACTED] in Karachi, Pakistan and his Higher Secondary Certificate in 1989 from the [REDACTED], also in Karachi. The beneficiary's resume also includes the same information.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed October 19, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed October 19, 2012). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.³ If placement recommendations are included, the Council Liaison

³ See *An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIO

works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁴

According to EDGE, the Secondary School Certificate is awarded after completion of 8 years of primary/middle school education and two years of secondary education. It is comparable to less than completion of senior high school in the United States. EDGE recommends that students with such a credential would be placed in Grade 11 in the United States. Also according to EDGE, the Higher Secondary Certificate (HSC) represents attainment of a level of education comparable to completion of senior high school in the United States.

The record contains a copy of the beneficiary's Secondary School Certificate but not his Higher Secondary Certificate. Thus, without a photocopy of the Higher Secondary Certificate the evidence does not establish that the beneficiary has met the high school education requirement set forth on the labor certification.

Evidence of the Beneficiary's Work Experience

Both versions of Form ETA 750 state that the position requires five years of experience as a watch and clock repairer. The photocopied labor certification states that the beneficiary qualifies for the offered position based on the following experience as a watch and clock repairer:⁵

January 1987 through January 1988 for an undetermined number of hours per week
[REDACTED] Karachi, Pakistan

February 1989 through January 1990 for 20 hours per week
[REDACTED] Karachi, Pakistan

NAL_PUBLICATIONS_1.sflb.ashx.

⁴ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

⁵ The labor certification also lists unrelated cashier and clerk positions.

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May 1996 through present (April 25, 2001) for 40 hours per week
Self-Employed, Carrollton, Texas

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains a March 20, 2009 letter from [REDACTED] Partner, at [REDACTED] [REDACTED] in Karachi, Pakistan, stating that the company employed the beneficiary as a watch repairer from January 1, 1987 through December 31, 1988. However, the letter does not indicate how many hours per week the beneficiary worked.

The record also contains a March 25, 2009 letter from [REDACTED] Owner/President of [REDACTED] [REDACTED] in Karachi, Pakistan, stating that the company employed the beneficiary as a watch and clock repairer from February 1, 1989 through January 1, 1990. The letter does not indicate how many hours a week the beneficiary worked; however, as noted above, the beneficiary indicates he worked there 20 hours per week.

Finally, the record contains a letter from the beneficiary stating that he began freelance work repairing watches and clocks in 1996 until at least May 2001. However, the record contains no documentation to support his statement, such as receipts for work performed, letters from clients detailing the work performed by the beneficiary, the beneficiary's tax returns reflecting income for such work, or any other objective evidence. Furthermore, the beneficiary's letter does not indicate how many hours per week he engaged in this freelance work.

On appeal, counsel correctly notes that the director failed to acknowledge the submission of the beneficiary's letter describing his work experience. Nonetheless, the beneficiary's letter 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)).

Given all of the above, the AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$19.17 per hour (\$39,873.60 per year).⁶ 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 1989 and to employ one worker. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary does 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 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, 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 ever employed the beneficiary.

⁶ As noted above, the original wage was amended upward from \$15 per hour prior to certification.

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 (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 record does not contain the sole proprietor's entire IRS Forms 1040, U.S. Individual Tax Return, for each relevant year. Rather, the record contains Schedules C for 2001, 2003, 2004, 2005, 2006, 2007, and 2008. Without the entire Form 1040, the size of the sole proprietor's family is not evident and the household's adjusted gross income (AGI) is unknown. Thus, it is not possible to calculate whether the sole proprietor has sufficient AGI to cover the proffered wage and his household expenses continuously from the April 27, 2001 priority date.

On appeal, counsel asserts that the director ignored submitted evidence. Counsel specifically mentions an August 7, 2009 letter from [REDACTED] Dallas Operations Manager of [REDACTED]. The letter states that the sole proprietor has had deposits with the bank since 2000. The letter lists current deposits for three separate accounts totaling \$159,135.02. Counsel is correct in her assertion that the sole proprietor's personal assets may be considered in determining the ability to pay the proffered wage. However, the letter from [REDACTED] represents a snapshot of the sole proprietor's assets on August 7, 2009. The record does not contain sufficient evidence

regarding the sole proprietor's financial situation for each year since 2001; thus, it is not possible to make a positive determination on the petitioner's continuing ability to pay. It is noted that in the director's July 8, 2009 Request for Evidence (RFE), the petitioner was advised that the sole proprietor's IRS Form 1040 was required for each relevant year. The petitioner was also advised to submit a statement of monthly expenses for the sole proprietor's household. While the petitioner submitted a sampling of bills, no monthly summary was submitted. As noted above, in response to the RFE, the petitioner failed to submit the requested IRS Forms 1040 in their entirety.

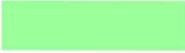
Given all of the above, the record is lacking critical pieces of evidence on which the ability to pay analysis is made. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. 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. 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.

(b)(6)



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ORDER: The appeal is dismissed.