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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: JAN 04 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

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 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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). 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 January 5, 2010 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien 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 Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered as a cook.

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 was structured as a sole proprietorship in 2001 and 2002 and as an S corporation from 2003 through 2009. On the petition, the petitioner claimed to have been established in January 2000 and to currently employ 20 workers. On the Form ETA 750B, signed by the beneficiary on September 27, 2004, the beneficiary claimed to work for the petitioner beginning in February 1993 and continuing at least until the date the form was signed, on September 27, 2004.

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 submitted the beneficiary's Forms W-2 for 2001 through 2008. The beneficiary's Forms W-2 demonstrate that the beneficiary was compensated by the petitioner as shown in the table below.

- In 2001, the Form W-2 stated wages of \$18,468.04.
- In 2002, the Form W-2 stated wages of \$18,124.90.
- In 2003, the Form W-2 stated wages of \$16,002.75.

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).

- In 2004, the Form W-2 stated wages of \$18,620.00.
- In 2005, the Form W-2 stated wages of \$20,136.00.
- In 2006, the Form W-2 stated wages of \$22,640.00.
- In 2007, the Form W-2 stated wages of \$23,094.00.
- In 2008, the Form W-2 stated wages of \$23,040.00.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date. The petitioner must demonstrate its ability to pay the difference between the proffered wage and wages already paid to the beneficiary from 2001 onward.

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 record before the director closed on May 22, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available.

For the years 2001 and 2002, the petitioner was structured 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 himself and two dependents. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the Form 1040, line 34 stated adjusted gross income of \$81,880.
- In 2002, the Form 1040, line 36 stated adjusted gross income of \$88,541.

The petitioner did not submit a list of his personal monthly expenses which would enable the AAO to analyze the petitioner's continuing ability to pay the proffered wage.²

For the years 2003 through 2009, the petitioner was structured as an S corporation. The petitioner submitted the petitioner's unaudited financial statements for the years 2001 through 2006, 2008, and 2009. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that the petitioner submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, the petitioner has not demonstrated its ability to pay the proffered wage from the priority date, April 27, 2001, onward.

On appeal, the petitioner asserts that the director's denial was without basis. In a letter dated March 5, 2010, the petitioner states, "I have submitted all information and evidence that has been requested, regarding my employee, [the beneficiary]." The petitioner included copies of his personal federal tax returns, Forms 1040, for 2001 through 2003, a copy of the petitioner's unaudited financial statement for 2009, and copies of mortgage and bank statements from 2009. No further explanation or evidence was provided.

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

² On April 23, 2009, the director sent a Request for Evidence (RFE) requesting a list of the sole proprietor's recurring household expenses for each year the petitioner was structured as a sole proprietorship. In the May 22, 2009 response, the petitioner failed to provide a statement indicating his monthly expenses. On appeal, the petitioner submitted copies of two mortgage statements dated December 1, 2009 and January 1, 2010. No documentation or statement of expenses was provided for the years 2001 and 2002.

(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 petition shows that the petitioner has been in business since 2000 and employs 20 workers. Although the sole proprietor's adjusted gross income reported on Form 1040 is greater than the proffered wage in 2001 and 2002, the petitioner failed to provide details of the sole proprietor's monthly expenses which would allow the AAO to conclude whether it had the ability to pay the proffered wage for those years. The petitioner failed to submit the petitioner's federal tax returns, annual reports, or audited financial statements for 2003 through 2008. No evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. The petitioner also failed to provide evidence of any factors that may have impacted the petitioner during the relevant years. 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.

Beyond the decision of the director,³ the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner appears to be a different entity from the employer listed on the labor certification with a different Federal Employer Tax Identification Number (FEIN).⁴ A labor certification is only valid for the particular job opportunity

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁴ In the instant case, the employer listed on both the Form ETA 750 labor certification and the Form I-140 is [REDACTED]. According to the evidence in the record, the petitioner was structured

stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Also beyond the decision of the director, the petitioner has also not established 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 as a cook. On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience:

- As a Cook with [REDACTED] from April 1992 to October 1998.
- As a Cook with [REDACTED] from October 1993 to January 2001.

as a sole proprietorship in 2001 and 2002 and as an S corporation from 2003 through 2009. The labor certification was filed on April 27, 2001. The petitioner's 2001 and 2002 federal tax returns and the beneficiary's Forms W-2 for 2001 and 2002 list the FEIN for [REDACTED]. [REDACTED] Form I-140 was filed on August 20, 2007 and lists the petitioner's FEIN as [REDACTED]. The beneficiary's Forms W-2 for 2003 through 2008 also list the FEIN as [REDACTED]. No explanation for the difference in FEIN has been provided.

- As a Cook with [REDACTED] beginning in July 2000.⁵

The beneficiary also listed experience as a Cook with [REDACTED] the petitioner, in Fallbrook, California beginning in February 1993 and continuing at least until the date the labor certification was signed, on September 27, 2004. No other experience is listed.

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(I)(3)(ii)(A). The record contains a letter dated May 13, 2009 written by [REDACTED] [REDACTED] that she was the former owner of the ([REDACTED])

The letter states that the beneficiary was an employee at the [REDACTED] from 1994 to 2000, beginning as a dishwasher and eventually working as a line cook. However, the letter failed to include the company's address, the beneficiary's specific duties, and does not indicate whether the beneficiary was employed full- or part-time. The letter also failed to indicate the specific dates of the beneficiary's employment and the timeframe he worked as a line cook.

The AAO also notes that there are inconsistencies in the record. The labor certification indicates that the beneficiary began working for [REDACTED] the petitioner, in February 1993. The letter from [REDACTED]; states that he began working in 1994. Further, based on the employment dates listed on the labor certification, the beneficiary's work experience for the above listed companies overlap, as noted in the table below.

- From February 1993 to October 1993, the beneficiary worked full-time at both [REDACTED]
 - From October 1993 to October 1998, the beneficiary worked full-time at [REDACTED]
 - From October 1998 to July 2000, the beneficiary worked full-time at [REDACTED]
 - From July 2000 to January 2001, the beneficiary worked full-time at [REDACTED]
- [REDACTED] The beneficiary also began working for [REDACTED] on a full-time basis in July 2000.

The record also contains a Form I-9, Employment Eligibility Verification, signed by the beneficiary on August 15, 1994. The alien registration number and social security number (SSN) listed on the Form I-9 do not match the beneficiary's information. Further, the beneficiary claims on the Form I-9 to be an alien lawfully admitted for permanent residence.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁵ The "Date Left" field relating to this experience was left blank.

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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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.