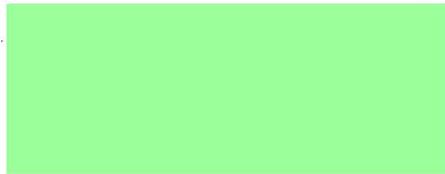


(b)(6)

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



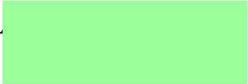
U.S. Citizenship
and Immigration
Services



DATE:

OFFICE: TEXAS SERVICE CENTER

FILE:



JAN - 4 2013

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,

Rena Santos 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 a hair salon. It seeks to employ the beneficiary permanently in the United States as a hair braider. 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 September 28, 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.

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.

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). 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 July 12, 2002. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour (\$16,640 year). The Form ETA 750 states that the position requires two years of experience as a hair braider.

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 in 1997 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on June 10, 2002, the beneficiary claimed to have worked for the petitioner since December 1999.

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 the full proffered wage from the priority date, on July 12, 2002 onwards. The record contains no evidence of wages paid by the petitioner to the beneficiary.

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

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 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 sole proprietor supports a family of two. The proprietor's tax returns reflect the following information for the following years:

Tax Year	Form 1040 Line No.	Adjusted Gross Income
2002	Not submitted.	-----
2003	Not submitted.	-----
2004	36	\$133,825
2005	37	\$124,976
2006	37	\$136,112
2007	37	\$126,553
2008	37	\$132,865

The record contains Schedule C, Profit or Loss for a Business for 2002 and 2003, but contains no IRS Forms 1040 for those two years. Therefore, the sole proprietor's adjusted gross income is not known for those years. Furthermore, the employer identification number (EIN) on each of the submitted Schedules C, including for 2002 and 2003, is 52-2247460; whereas, the petitioner's EIN is 52-1953725. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In the director's decision, he noted that the record contains no information regarding the sole proprietor's personal liabilities and household expenses.

On appeal, counsel submits a summary of the sole proprietor's current monthly expenses, which total \$6,198.67 monthly, or \$74,384.04 annually. In support of his statement, counsel also submitted copies of receipts corresponding with the monthly expenses listed in the letter. The record contains evidence of the sole proprietor's current expenses; however, it does not contain information regarding expenses as of the priority date. Even assuming that the 2009 expenses were comparable to expenses for other relevant years; it remains that the record does not contain evidence of the sole proprietor's adjusted gross income in 2002 and 2003. Thus, the submitted tax returns do not establish the petitioner's ability to pay continuously from the priority date.

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 did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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.

Evidence of the Beneficiary's Qualifications

Beyond the decision of the director, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the July 12, 2002 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

In the instant case, the labor certification states that the offered position requires two years of experience in hair braiding and styling. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a hair braider and stylist for 35-40 hours per week at [REDACTED] from September 1998 through September 1999 and also as a hair braider and stylist with the petitioner since December 1999 for 35-40 hours per week.

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 a January 9, 2008 letter from the petitioner that states that the beneficiary's position will continue to be available and that she is an outstanding worker. It does not state how many hours a week she works or what duties are performed.

The record also contains an April 15, 2001 letter from [REDACTED] stating that the beneficiary worked as a hair braider for two years at the [REDACTED]. It does not state when the employment began or ended or how many hours a week she worked; however, the letter does state that when she first arrived at the salon, she did not speak English. She indicates that the beneficiary learned English and ". . . went on to win a [REDACTED] in 1997 for 'Braider of the Year.'"

The record also contains a July 17, 2007 letter from [REDACTED] stating that in 1998 and 2005 the beneficiary won the [REDACTED].

The labor certification as filed with the DOL states that the beneficiary's experience at [REDACTED] was for one year; whereas, the letter from that organization states that she worked there for two years. The record contains correspondence between the DOL and the petitioner indicating that the DOL questioned whether the beneficiary possessed two years of experience at the time of her hire with the petitioner. Additionally, it appears that the petitioner initially stated that the beneficiary's employment was only part-time. In response to DOL's inquiry, the petitioner submitted an amended Part B of Form ETA 750 that changed 1998 to 1997, as the year her employment with [REDACTED] began. The petitioner also submitted a July 18, 2007 letter to DOL indicating that at the time the labor certification was filed the beneficiary worked part

time. However, the letter indicated, she is currently working on average, 35-40 hours per week.

The record does not contain evidence to establish that the beneficiary worked at the petitioner full time as a hair braider for two years prior to July 12, 2002. The record indicates that she began in December of 1999 as a part-time worker. The petitioner indicates in her July 18, 2007 letter that gradually the beneficiary built up a customer base that eventually led to a full time position. However, it is not evident when that took place.

Furthermore, the labor certification states that the position with [REDACTED] the petitioner, requires two years of experience for the position of hair braider and stylist. Thus, the beneficiary would have had to already possess that experience at the time she was hired. Thus, the experience at [REDACTED] is relevant. As noted above, the letter from [REDACTED] states that the beneficiary worked for her for two years but doesn't state when the employment began and ended. The labor certification states that she began in September of 1998, and the unofficial amendment of the labor certificate states that she began in September of 1997. However, as noted above, Ms. [REDACTED] letter indicates that the beneficiary's work at that salon occurred prior to the time the beneficiary learned English and won the [REDACTED]

There is no primary evidence, such as a certificate, to indicate when the beneficiary might have won the Golden Scissors Award. However, [REDACTED] states that it was in 1997 and [REDACTED] states that it was in 1998.

Given all the above, the record contains inconsistencies regarding when the beneficiary was employed at the [REDACTED]. See *Matter of Ho, supra*. It is also not evident when the beneficiary's work with the petitioner transitioned from part-time work to full-time work. The petitioner has not resolved the inconsistencies with independent, objective evidence. 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.

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).

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.