



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JAN 16 2013 OFFICE: TEXAS 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:

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 Director, Texas Service Center denied the employment-based immigrant visa petition. The director also invalidated the underlying ETA Form 9089, Application for Permanent Employment Certification, based on a finding that the petitioner had misrepresented a material fact. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a retail sales store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is January 4, 2006. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner misrepresented a material fact on the labor certification when the petitioner indicated that no familial relationship existed between the beneficiary and the petitioner. Because of this misrepresentation, the director invalidated the labor certification and denied the petition for lack of a valid labor certification.

The appeal is properly filed 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.¹

Section C.9 of the ETA Form 9089 asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien." The petitioner answered the question "No." The beneficiary, the petitioner, and counsel all signed the labor certification under penalty of perjury.²

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 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).

² The ETA Form 9089 was submitted to the DOL by attorney [REDACTED], who also submitted a response to the director's Notice of Intent to Deny. The petition and appeal were filed by attorney [REDACTED]. Both attorneys are associated with the firm [REDACTED] and listed on the Form G-28, Notice of Appearance as Attorney or Representative.

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On March 13, 2009, the director issued a Notice of Intent to Deny (NOID), which stated that a familial relationship appeared to exist between the spouse of the petitioner and the beneficiary, and that the beneficiary and the petitioner lived at the same address. The director also requested evidence that the petitioner disclosed the familial relationship between the petitioner and the beneficiary to the DOL prior to the issuance of the labor certification.

The petitioner's NOID response contained an affidavit stating:

- The petitioner is a sole proprietor;
- He exclusively handles interviewing and hiring for the business;
- His wife and the beneficiary are siblings;
- His wife is not an owner or officer of the petitioner; and
- The beneficiary did not work for the petitioner and did not participate in the interviewing of applicants for the position, nor does the beneficiary have any ownership interest in the petitioner.

Counsel's letter in response to the NOID stated that the "family relationship was not disclosed to the Department [of Labor] in this case." Counsel explained that it was "unclear from the record whether or not this was an oversight," but "we believe that the relationship was not disclosed to the Department of Labor because there is NOT a blood relationship between the owner of the business . . . and the Beneficiary." (Emphasis original.)

The director's decision denying the petition cited *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986), which states:

An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 CFR 656.30(d)(1986).

The director distinguished *Matter of Silver Dragon* from the instant petition because it was filed for the brother-in-law of the petitioner's owner, rather than a shareholder, but concluded that "the issue is the same . . . whether the position was truly available to all qualified applicants." The director determined that the position was not open to all qualified applicants and that the labor certification would not have been approved if all facts were presented to the DOL. The director then invalidated the labor certification pursuant to 20 C.F.R. § 656.30(d)³ and denied the petition for lack of a valid labor certification. See 8 C.F.R. § 204.5(l)(3)(i).

³ *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described in § 656.32. Additionally, after issuance, a labor certification is

On appeal, counsel argues that the director exceeded his authority when he invalidated the labor certification. Counsel states that the alleged misrepresentation in this case was not willfully made. Additionally, counsel argues that the alleged misrepresentation was not material.

I. Counsel's Arguments Regarding Willfulness and Materiality

Counsel explains in her brief that the petitioner marked question C.9 of the ETA Form 9089 to show there was not a familial relationship between the beneficiary and the petitioner due to either "oversight" or because there was not a "blood" relationship between the beneficiary and the petitioner. Counsel's assertion that the petitioner answered question C.9 due to oversight simply references the previous response submitted to the director's NOID. In that response, counsel stated that she "always personally confirms whether family relationships exist in a labor certification case, errs on the side of disclosing all family relationships and has personally handled dozens of Department of Labor audits on this issue without any problems." The AAO is not persuaded by counsel's claim that providing a negative answer to question C.9 was an oversight on the part of the petitioner and/or counsel. The failure to apprise oneself of the contents of an immigration document before signing it is generally not recognized as a defense to misrepresentation. *See Hanna v. Gonzalez*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993)). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding the alternative argument that it was not oversight, but rather a belief that there was not a familial relationship because there is not a blood relationship that caused the petitioner to answer "no" to question C.9, counsel explains:

Usually, in the context of an employment based case, a "family" relationship is defined as spouse, parent, son, daughter or sibling and not a brother-in-law (see, e.g., instructions at p. 5 of Form I-864)[.] To date, the [DOL] has not provided specific guidance regarding their definition of "family." Absent such guidance, it is reasonable to rely on USCIS definitions.

subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

This argument is not persuasive. Counsel cites no authority as the basis for her conclusion that it is reasonable to use the instructions on a USCIS form as guidance in interpreting a term used on a DOL form. The DOL regulations specifically address this issue at 20 C.F.R. § 656.17(l), stating in pertinent part:

Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document *any family relationship* between the employees and the alien.

(Emphasis added).

The fact that the regulation states that "any family relationship" between the employees and the alien must be documented indicates that the DOL is interested in knowing about more than just "blood" relationships.

Counsel also argues on appeal that the fact that the beneficiary and the petitioner are brothers-in-law is not a material issue. In her brief, counsel states

As the [director] notes in [his NOID], a prospective employee's interest in a corporation is a material fact to be considered and clearly willful concealment of such a fact would constitute a willful misrepresentation of a material fact. In the instant case, it is undisputed that the alien has no ownership interest in the Petitioner's company, hence even if DOL were to conclude that the family relationship in this case should have been disclosed, the lack of disclosure would not be deemed material.

Counsel cites no authority for her conclusion that “even if DOL were to conclude that the family relationship in this case should have been disclosed, the lack of disclosure would not be deemed material.” This argument overlooks the central issue when a familial relationship is present in a labor certification case: the *bona fides* of the job offer. By not disclosing the beneficiary’s relationship to the petitioner when asked, the DOL did not have accurate information concerning the *bona fides* of the job offer during the labor certification process.

Accordingly the AAO affirms the director’s conclusion that he petitioner willfully misrepresented a material fact on the labor certification.

II. The Petitioner’s Ability to Pay the Proffered Wage

Beyond the decision of the director,⁴ the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner’s ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁵ If the petitioner’s net income or net current assets is not sufficient to demonstrate the petitioner’s ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner’s business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).

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

⁴ 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).

⁵ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff’d*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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 contains the sole proprietor's 2005, 2006 and 2007 tax returns. The tax returns show that the sole proprietor and his wife have two dependents. Since the priority date is January 4, 2006, the tax returns from 2005 are not considered in the ability to pay determination. The 2006 tax return shows that the sole proprietor's adjusted-gross income was \$81,873. The 2007 tax return shows that the sole proprietor's adjusted gross income was \$88,872.

The director requested that the sole proprietor submit a list of personal monthly expenses, copies of bills or statements to support the claimed expenses, and evidence of assets that could be used to pay the proffered wage.

In response to the director's request, the sole proprietor submitted tables summarizing his average monthly expenses for the years 2006, 2007 and 2008. Copies of certain bills such as telephone, gas, electricity and mortgage were also provided. Finally, statements from three bank accounts were submitted as evidence of liquid assets available to pay the proffered wage. For the year 2006, the sole proprietor listed his monthly rent/mortgage expenses as \$2,500 per month, totaling \$30,000. For the year 2007, his monthly rent/mortgage expenses were \$2,500 in January and \$2,600 each following month, totaling \$31,100. For the year 2008, his monthly rent/mortgage expenses were \$2,759.15 per month, totaling \$33,109.80.

The supporting documentation of the sole proprietor's monthly expenses indicates that the amounts listed for the rent/mortgage expenses were significantly underreported on the tables. For example, the single mortgage statement submitted in response to the director's request shows that the total amount due for November 1, 2007 was \$3,629.37 and the amount paid on October 1, 2007 was \$3,629.37. If the sole proprietor's monthly payments were \$3,629.37 each month in 2007, the total amount paid would equal \$43,552.44. This is \$12,452 more than reported on the table of expenses for 2007. Similarly, a bank statement from November 2008 shows that an automatic payment of \$3,617.80 was made to Countrywide Mortgage on November 3, 2008. If the sole proprietor paid \$3,617.80 each month in 2008, the total would be \$43,413.60. This is \$10,303.80 more than the reported on the table for 2008.

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).

Moreover, under the headings, "Transportation (Gas)" and "Debt (Credit Cards/Loans)" the sole proprietor reported "N/A" for each month. An affidavit from the sole proprietor explained that these expenses were reported as "Business Expenses" on Schedule C of the 2006 and 2007 Form 1040, and will be reported as business expenses on Schedule C of the 2008 Form 1040. The AAO does not find the sole proprietor's claim that all expenses incurred for transportation are business expenses to be credible. In fact, the 2006 and 2007 Schedule C lists no expenses for "car and truck" in Part II. In 2006, the sole proprietor completed a Form 4562 to claim depreciation on a GMC Yukon placed in service January 17, 2006. The Form 4562 indicates the Yukon is for business use and another vehicle is available for personal use.⁶ Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The bank statements in the record are not persuasive evidence of liquid assets available to pay the proffered wage. The bank statements are from four different accounts. One account is a checking account in the name of [REDACTED]. For this account, a statement covering the period from October 1, 2008 to November 2, 2008 was submitted. The second account is a savings account in the name of [REDACTED]. Three months of statements for this account were submitted, but notably, the ending balance as of the last of the three statements (October 24, 2008 to November 11, 2008) was \$0.00. The third and fourth accounts are joint checking and savings accounts in the names of [REDACTED] and [REDACTED]. Only one statement for these joint accounts was submitted, which covers the period from November 3, 2008 to November 30, 2008. The account statement lists a \$50,000 installment loan borrowed on November 25, 2008, and a separate \$10,000 line of credit. Bank statements from one or two months do not support the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in

⁶ Question 36 in Part V asks, "Is another vehicle available for personal use?" This question was answered, "yes."

the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Because the list of expenses the sole proprietor submitted to the director appears to be inaccurate and understate his actual expense, and because there is insufficient evidence of the sole proprietor's liquid assets which could be used to pay the proffered wage, the AAO is unable to conclude that the sole proprietor's adjusted gross income is sufficient to cover the expenses of his family of four and to pay the proffered wage.

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

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.

ORDER: The appeal is dismissed.