



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 25 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:  
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a furniture repair service. It seeks to employ the beneficiary permanently in the United States as a furniture technician. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 April 22, 2009 denial, the primary 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 at 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 ETA Form 9089, 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 ETA Form 9089 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 ETA Form 9089 was accepted on March 18, 2008. The proffered wage as stated on the ETA Form 9089 is \$20.32 per hour (\$42,265.60 per year). The ETA Form 9089 states that the position requires 24 months of training and experience in the job offered.

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.<sup>1</sup>

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on the Internal Revenue Service (IRS) Form 1040 Schedule C.<sup>2</sup> On the petition, the petitioner claimed to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on May 8, 2008, the beneficiary did 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 Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 established that it employed and paid the beneficiary, through an examination of Internal Revenue Service (IRS) forms

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into 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).

<sup>2</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner is taxed as a sole proprietorship for federal tax purposes.

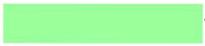
W-2 and 1099 issued to the beneficiary by the petitioner in response to a request from the AAO. However, we will not accept the submitted IRS forms 1099 because based on the petitioner's response, through counsel, the petitioner admits that the IRS form 1099 represents work performed independently by the beneficiary and that the petitioner just acted as a pass-through performed independently when the customers paid for this work. Therefore, the submitted IRS form 1099 carries no weight in establishing the petitioner's ability to pay the proffered wage. The petitioner has submitted handwritten IRS forms W-2 issued to the beneficiary by the petitioner for \$39,427.39 (2008), \$39,433.25 (2009), \$41,530.13 (2010), and \$44,030.00 (2011). Through an analysis of the record at hand and evidence provided by the petitioner in response to the AAO's request; the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2011. For 2008, 2009, and 2010, the beneficiary has not established that it paid the beneficiary the full proffered wage; however, the amounts paid to the beneficiary for those years will be included in an analysis of the petitioner's adjusted gross income.

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, United States Citizenship and Immigration Services (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 (1<sup>st</sup> 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). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term



tangible asset is a "real" expense.

*River Street Donuts* at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The petitioner is being treated as a sole proprietorship for federal income tax purposes, which is 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 (AGI), 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 (7<sup>th</sup> 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 three. The proprietor’s tax returns reflect the following information:

	<u>2008</u>	<u>2009</u>	<u>2010</u>
Proprietor’s AGI (Form 1040, line 37):	\$116,854	\$94,441	\$92,092

In taking the difference between the wages paid to the beneficiary and the petitioner’s adjusted gross income, we find the following:

Tax Year	2008	2009	2010
AGI	\$116,854.00	\$94,441.00	\$92,092.00
Wages Paid	\$39,427.39	\$39,433.25	\$41,530.13
Proffered Wage	\$42,265.60	\$42,265.60	\$42,265.60
Proffered Wage Difference	\$2,838.21	\$2,832.35	\$735.47

The sole proprietor's adjusted gross income more likely than not, appears to establish the petitioner's ability to pay the difference between the wages paid to the beneficiary and his adjusted gross income for 2008, 2009, and 2010. Thus, the AAO is persuaded that from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary and its net income. The director's decision concerning the petitioner's ability to pay the proffered wage is withdrawn.

However, beyond the decision of the director, 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 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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 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.

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In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: High School.
- H.5. Training: 24 Months.
- H.6. Experience in the job offered: 24 Months.
- H.7. Alternate field of study: No.
- H.8. Alternate combination of education and experience: No.
- H.9. Foreign educational equivalent: Yes.
- H.10. Experience in an alternate occupation: No.
- H.14. Specific skills or other requirements: Able to match & create deep rich colors, create faux, glazed and spattered finishes, use sandpaper and compound to raise and lower sheen, and bring a dull finish to like. Understand wood finish furniture, color mixing and matching finishes.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a [REDACTED] from September 4, 2000 until February 6, 2005. Further, the beneficiary indicated that he possessed the required 24 months of training. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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 an experience letter dated July 22, 2008 from [REDACTED] [REDACTED] letterhead stating that the company employed the beneficiary as a furniture technician from September 4, 2000 until February 2005. The record did not contain any evidence of the beneficiary's 24 months of training at the time of the director's decision on April 22, 2009.

On, January 11, 2012, the AAO issued a Request for Evidence (RFE) asking the petitioner to submit evidence concerning the beneficiary's 24 months of training. In response to the AAO's request, the petitioner submitted another letter from [REDACTED] dated February 11, 2013. [REDACTED] claims that the company provided the 24 months of training to the beneficiary. The training consisted of on the job training for 24 to 30 months while employed with [REDACTED] Services.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition...It is incumbent on the petitioner to resolve any

inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Upon review of the original experience letter from [REDACTED] and the second letter dated February 11, 2013, an inconsistency is noted which has cast doubt as to where the truth in fact lies. Specifically, the first letter provides that the beneficiary was merely employed as a furniture technician from 2000 to 2005. Now, [REDACTED] is claiming that the beneficiary was trained and employed as a worker from 2000 to 2005 in order to conform to the requirements of the ETA Form 9089. The letter does not provide the specific dates of the beneficiary's training, or the dates on which he was actually working and gaining experience in the proffered position. Additionally, the record contains no independent objective evidence supporting [REDACTED] claims.

Thus, based on a review of the record at hand, we find it more likely than not, that the beneficiary did not complete 24 months of training as require in the ETA Form 9089. The letters from [REDACTED] appears to merely correct a deficiency noted by the AAO in the record. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The letters from [REDACTED] are not corroborated by independent objective evidence pointing to where the truth lies concerning the required 24 months of training as a furniture technician.

The petition will be denied for the above stated reason and was 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. The director's decision will be withdrawn; however the petition will remain denied and undisturbed.