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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

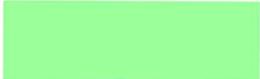


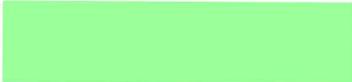
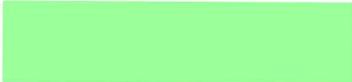
U.S. Citizenship
and Immigration
Services



Date: **MAR 07 2013**

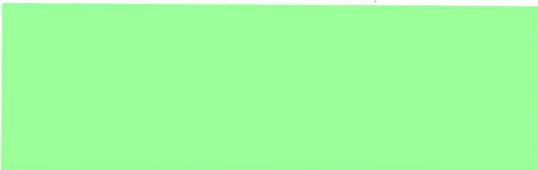
Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Thank you,

Rachel PiTroio
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner is a design and fabrication business. It seeks to employ the beneficiary permanently in the United States as an artistic welder/sander/painter. 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).¹

As required by statute, the petition is accompanied by an ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. See 8 C.F.R. § 204.5(d).

The director determined that the petitioner had not established that the beneficiary possessed the minimum experience required to perform the proffered position as of the priority date. The director denied the petition accordingly.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, the petitioner submits a brief; documents from the DOL describing its backlog elimination program; a copy of the analyst findings dated November 22, 2006,³ which the DOL issued to the petitioner; a copy of the petitioner's amendments to Form ETA 750 dated November 29, 2006 which were submitted in response to the analyst findings of November 22, 2006; an employment letter dated January 5, 2009 from [REDACTED] owner of [REDACTED] with the English translation; documents from the Foreign Labor Certification Data Center Online Wage Library; a copy of a second analyst findings dated December 7, 2006,⁴ which the DOL issued to the petitioner; a copy of the petitioner's amendments to Form ETA 750 dated December 15, 2006,

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

³ The cover page of the DOL's Analyst Findings is dated July 8, 2005. However, the page on which the DOL actually enumerates the required items is dated November 22, 2006.

⁴ The cover page of the DOL's Analyst Findings is dated July 8, 2005. However, the page on which the DOL actually enumerates the required items is dated December 7, 2006.

which were submitted in response to the analyst findings of December 7, 2006; a copy of recruitment instructions dated February 14, 2007, which the DOL issued to the petitioner; a copy of the employer's recruitment report dated April 26, 2007, which the petitioner submitted in response to the DOL's recruitment instructions; and three newspaper advertisements in which the petitioner advertised the proffered position in accordance with the DOL's recruitment instructions.

As set forth in the director's February 11, 2009 denial, the single issue in this case is whether the beneficiary possesses the minimum experiential requirements, which are set forth on Form ETA 750 as of the priority date.

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 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 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.

In the instant case, as initially filed, the labor certification states that the offered position of "assistant"⁵ has the following minimum requirements:

⁵ The labor certification, as constituted in the record, actually identifies the offered position as "assistant." However, as explained below, the DOL accepted several amendments to the labor certification, one of which was the title of the offered position. The new position title which was accepted by the DOL is "artistic welder/sander/painter." The amendment process is explained in detail below.

EDUCATION

Grade School: None specified

High School: None specified

College: None

College Degree Required: None

Major Field of Study: Not Applicable

TRAINING: None Required.

EXPERIENCE: Four (4) years in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

With respect to the beneficiary's qualifications for the proffered position, the labor certification contained no education, training, or experience listed for the beneficiary.

On October 24, 2008, the director issued a request for evidence (RFE), asking the petitioner to supply evidence demonstrating that "the beneficiary had at least four years of experience as a welder, sander or painter as per [the petitioner's] amended statement regarding Form ETA-750." The director noted that such evidence must take the form "of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the beneficiary, including specific dates of the employment and specific duties." The director also noted that Part B of Form ETA 750 contained no experiential information for the beneficiary and asked for an explanation for this deficiency. Additionally, the director requested additional corroborating evidence of the beneficiary's claimed experience (e.g., Forms W-2, Forms 1099, copies of the beneficiary's tax returns, etc.).

On January 16, 2009, the petitioner responded through counsel, providing a copy of the DOL's analyst findings dated November 22, 2006. Therein, the DOL requested the correction of a number of items on Form ETA 750, notable among these being the title of the position, the job duties, experience required for the position, and positions that the beneficiary has held that qualify him for the proffered position. The DOL noted that the petitioner may submit its responses via facsimile. In response to the November 22, 2006 analyst findings, the petitioner amended Form ETA 750, changing the title of the proffered position from assistant to "welder, sander, painter." The petitioner amended the duties associated with the proffered position to correspond with welding, sanding, and painting. At that time, the petitioner also amended the required experience, changing the requirements from six months to one year, corresponding with the more complex nature of the position as it was described at that time. The petitioner also amended the proffered wage.

Along with its response to the director's RFE, the petitioner provided a copy of the DOL's analyst findings dated December 7, 2006. Therein, the DOL requested that the petitioner amend the proffered wage again to correspond with the prevailing wage, which the DOL determined to be correct based upon the new position title and O*Net SOC Code 27-1013. The DOL also informed the petitioner that, based upon the duties associated with the proffered position, the position as described corresponded with a Standard Vocational Preparation (SVP) rating of 7, which carried a higher experiential requirement than that which the petitioner was requiring. The petitioner was also

directed to provide verification of the beneficiary's occupation. On December 15, 2006, the petitioner amended Form ETA 750 in response to the December 7, 2006 analyst findings. Therein, the petitioner changed the proffered wage to correspond with the DOL's prevailing wage for artists, including painters, sculptors, and illustrators. The petitioner also amended the experiential requirements for the proffered position, changing these from one year to two years to correspond with the duties previously listed and the SVP of 7 which was identified by the DOL. The petitioner also amended the title of the position to artistic welder, sander, and painter to correspond with the O*Net SOC code 27-1013, which was assigned to the case by the DOL.

In addition to the amendments enumerated above, the petitioner provided an employment letter for the beneficiary dated January 5, 2009 from [REDACTED] owner of [REDACTED]. In his letter, [REDACTED] attests that his business employed the beneficiary as a painter and welder from March 1991 until November 1994. [REDACTED] states that the beneficiary began his employment as a painter and welder assistant, but was promoted to welder in September 1992. [REDACTED] also enumerated the duties, which the beneficiary performed while working for his company, duties which correspond with those associated with the proffered position.

On February 11, 2009, the director denied the instant petition, determining that, as submitted with the instant petition, Form ETA 750 required four years of experience in the job offered and that the petitioner did not provide evidence which demonstrates that the beneficiary possessed four years of such experience. The director noted that several amendments had been made on the actual Form ETA 750, which were certified by the DOL. However, the director noted that the change to the required experience was not one of the certified changes registered on the hard copy of Form ETA 750.

On appeal, counsel reiterates the course of events articulated above and further supplies the recruitment data, which the petitioner supplied in response to the DOL's recruitment instructions. In its recruitment instructions dated February 14, 2007, the DOL acknowledged the petitioner's amendment to the proffered wage (\$494.80 per week), amendment to the title of the proffered position (fine artist, including painters, sculptors, and illustrators), including the new O*Net SOC Code (27-1013), and further directed the petitioner in the proper method of recruiting for candidates for the proffered position. The petitioner also supplied the employer's recruitment report dated April 26, 2007, which the petitioner submitted to the DOL in response to its recruitment instructions. The recruitment report included three advertisements that were placed in local newspapers. The advertisements describe a position for an "artistic welder, sander & painter" which requires two years of experience and pays \$494.80 per week.

The evidence submitted on appeal demonstrates that the petitioner complied with the DOL's requirements for filing and amending Form ETA 750. All of the amendments which the petitioner made were performed in response to directions issued by the DOL. The recruitment data corroborates counsel's assertions on appeal, to wit, that the proffered position requires two years of experience in the job offered, as opposed to four. Therefore, the petitioner has demonstrated that the proffered position requires two years of experience in the job offered and that this was the

requirement for the position when the DOL certified Form ETA 750 on May 24, 2007. Further, the petitioner provided a letter from [REDACTED] dated January 5, 2009 attesting to the beneficiary's experience as a painter and welder for his company from March 1991 until November 1994. Therefore, the petitioner has demonstrated that the beneficiary qualifies for the proffered position.

The AAO, therefore, withdraws the director's decision. However, the AAO is remanding the case back to the director because the petitioner has not demonstrated the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$494.80 per week (\$25,729.60 per year).

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 provided no documentary evidence demonstrating that it employed or paid the beneficiary any wages at any time.

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).

In this matter, 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 \$20,000.00 where the beneficiary's proposed salary was \$6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, during 2001 and 2002, the sole proprietor supported a family of three. However, from 2003 onwards, the petitioner supported a family of two. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$35,792.00.

- In 2002, the proprietor's IRS Form 1040, line 35, stated adjusted gross income of \$42,478.00.
- In 2003, the proprietor's IRS Form 1040, line 34, stated adjusted gross income of \$52,877.00.
- In 2004, the proprietor's IRS Form 1040, line 36, stated adjusted gross income of \$57,519.00.
- In 2005, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$57,449.00.
- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$70,638.00.

However, the petitioner has not demonstrated the ability both to pay the beneficiary the proffered wage and support his family for any of the years identified. As a sole proprietor, the petitioner must demonstrate not only the ability to pay the beneficiary the proffered wage out of his adjusted gross income, but also the ability to support his household. In order to demonstrate that the petitioner has such ability, the petitioner must submit a complete list, itemizing the sole proprietor's recurring, monthly, personal expenses. In the instant situation, the petitioner provided no such evidence, and the director did not request such evidence in his October 24, 2008 RFE.

Therefore, the AAO will withdraw the director's decision and remand the case to the director to request and consider evidence of the petitioner's ability to pay the proffered wage, such as the sole proprietor's recurring, monthly, personal expenses, including but not limited to mortgage, rent, utilities, electricity, telephones, television, clothing, insurances, automobiles, credit cards, loans, food, and tuition. The director should also request the petitioner's federal tax returns, audited financial statements, or annual reports from 2007, 2008, 2009, 2010, and 2011. Additionally, the director may request evidence of the sole proprietor's personal, unencumbered, and liquefiable assets that could reasonably be applied towards paying employee wages. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director of for issuance of a new, detailed decision.