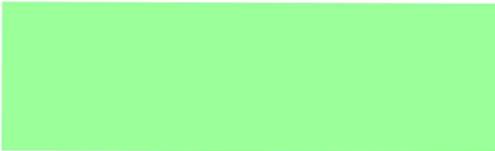




U.S. Citizenship  
and Immigration  
Services

(b)(6)

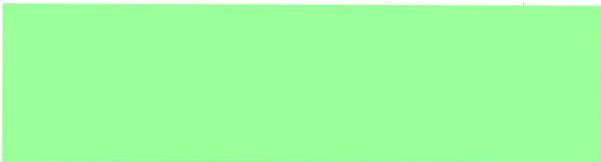


DATE: **MAY 03 2013** OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

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

The petitioner is a general contracting and building business. It seeks to employ the beneficiary permanently in the United States as a finish carpenter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor 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 and the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. 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 denial, the issues in this case are 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 and whether or not the beneficiary has the minimum experience required to perform the offered position by the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$29.80 per hour (\$61,984 per year). The Form ETA 750 states that the position requires two years of 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 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 1987 and to currently employ 3 workers. On the Form ETA 750B, signed by the beneficiary on March 30, 2007, the beneficiary claimed to work for the petitioner since May 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record reflects that the petitioner paid the beneficiary as an independent contractor in 2008, 2009, 2010 and 2011 the amounts of \$12,500, \$9,925, \$19,810 and \$9,368 respectively. 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 April 30, 2001 and onwards.

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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 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).

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 (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).

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 (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 3. The proprietor's tax returns reflect the following information for the following years:

<u>Year</u>	<u>Proprietor's adjusted gross income (Form 1040)</u>	<u>Beneficiary's Form 1099</u>
2001	\$25,597	Not employed by petitioner
2002	\$5,806	Not employed by petitioner
2003	\$16,514	Not employed by petitioner
2004	\$10,403	Not submitted
2005	\$17,339	Not submitted
2006	\$23,812	Not submitted
2007	\$20,274	Not submitted
2008	\$14,622	\$12,500
2009	\$34,613	\$9,925

2010	\$39,070	\$19,810
2011	\$20,671	\$9,368

In 2001 through 2007, the sole proprietor's adjusted gross income in addition to Form 1099 compensations fails to cover the proffered wage of \$61,984. From 2008 through 2011, the sole proprietor's adjusted gross income is insufficient to demonstrate the petitioner's ability to pay the difference between wages paid and the proffered wage. It is improbable that the sole proprietor could support himself and his dependents on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> The AAO notes that net current assets are found on an audited balance sheet, which is not in the record. Therefore, for the years 2001 through 2011, the record does not reflect that the petitioner had sufficient net current assets to pay the proffered wage, or the difference between wages paid to the beneficiary and the proffered wage.

On appeal, counsel asserts that the petitioner co-owns two single-family dwellings, and therefore the petitioner has additional assets not previously considered.

Regarding the sole proprietor's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage.<sup>3</sup> USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, counsel alleges the petitioner is a co-owner, suggesting he may not have authority to unilaterally liquidate the asset. Further, the petitioner has not provided any evidence that the petitioner's sole proprietorship could, or would, liquidate such an asset. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of*

<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>3</sup> The AAO notes that the property in question appears to be the sole proprietor's residence and/or the petitioner's primary place of business, as it is at the same address indicated for the petitioner on Form I-140 and as the beneficiary's worksite. This casts doubt on the assertion that the asset is available to demonstrate the petitioner's ability to pay. *Matter of Ho*, 19 I&N Dec. 582, 591 (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."

*Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the AAO will not consider the petitioner's property in considering his net assets and liabilities.

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not asserted that the totality of the circumstances establish that it can pay the proffered wage. However, the AAO will address this issue. The petitioner's 2001 through 2011 tax returns do not reflect that the petitioner's gross receipts are regularly significant and increasing. The Form I-140 lists 3 employees, but the petitioner's tax returns from 2001 through 2011 do not reflect any salaries or wages or contract labor on Schedule C. The record reflects that the business is in good standing. The record does not include evidence of any unusual events that temporarily disrupted the business or statements from officers demonstrating willingness to forego, and proof that they are able to forego, either all or part of their officer compensation. Considering these factors and the prior discussion of ability to pay the proffered wage, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The AAO will now address whether or not the beneficiary has the minimum experience required to perform the offered position by the priority date. 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.

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

EDUCATION

Grade School: None

High School: None

College: None

College Degree Required: None

Major Field of Study: None

TRAINING: N/A

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: None

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a finish carpenter with [REDACTED] California from March 1998 until October 2001 and on experience as a finish carpenter with [REDACTED] California from May 2004 until the present. No other experience is listed. 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 August 20, 2012, from [REDACTED] stating that the beneficiary worked for him as a carpenter at his home and former restaurant; he installed doors, windows, bar counters, crown and base molding, circular tables and matching pattern booths, and

shelving and storage units at his former restaurant; and in 1999-2000 he remodeled his kitchen cabinets, counter tops, doors and windows and installed wood flooring and, crown molding and special lights. The letter does not state the specific dates that the beneficiary worked or whether the job was full-time or not. In addition, this employment was not listed on the applicant's Form 750B or Form G-325. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Lastly, some of this claimed experience occurred after the April 30, 2001 priority date. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

The record contains an experience letter from [REDACTED] dated August 26, 2012, stating that the beneficiary worked for him as a carpenter at this home in 1999 to 2000; and he installed cabinets, fixed molding and hung windows. However, the letter does not state the specific dates that the beneficiary worked or whether the job was full-time or not. In addition, this employment was not listed on the applicant's Form 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The record contains an experience letter from [REDACTED] dated August 29, 2012, stating that the beneficiary helped him in 1999-2000 to remodel his home, kitchen and living room; and he helped him hang doors, a radius counter top, crown moldings, skylights and cabinets. The letter does not state the specific dates that the beneficiary worked or whether the job was full-time or not. In addition, this employment was not listed on the applicant's Form 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The record contains an experience letter from [REDACTED] dated August 31, 2012, stating that the beneficiary helped him in 1999 to remodel his kitchen and he hung cabinets and doors, put in crown molding, hung the entrance doors, installed new door locks and put in windows. The letter does not state the specific dates that the beneficiary worked or whether the job was full-time or not. In addition, this employment was not listed on the applicant's Form 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Lastly, the record does not include evidence of employment with [REDACTED] California from March 1998 until October 2001.

The AAO notes that none of the above experience is listed on the labor certification except for the experience with [REDACTED] the only experience listed is not supported by the required regulatory evidence; and dates from the letters discussed above overlap with the only experience listed on the alien

labor certification, casting doubt on whether it was full-time work as claimed. *Matter of Ho*, 19 I&N Dec. 582, 591 (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." The AAO also notes that in general the previous letters submitted have some inconsistencies related to the dates employed and the dates of the letters overlap. Further, it is unclear whether any of the writers of the letters were the beneficiary's employer, as required by 8 C.F.R. § 204.5(l)(3)(ii)(A).

Based on the aforementioned reasons, the evidence of prior experience submitted is insufficient to establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

The AAO affirms the director's decision that the petitioner failed to establish that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.

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.