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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

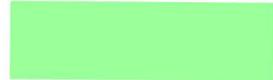


MAY 06 2013

Date

Office: VERMONT 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.

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,

Rachel M. Fazio
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Application to Register Permanent Residence or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR).¹ In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter came before the Administrative Appeals Office (AAO) on appeal, and the AAO dismissed the appeal on March 30, 2011. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted, and the prior decision dismissing the appeal shall be affirmed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a gas and auto service station. It seeks to employ the beneficiary permanently in the United States as "manager, auto service station." As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). United States Citizenship and Immigration Services (USCIS) approved the petition on July 7, 2005. The director determined that the petition had been approved in error as the petitioner had not established that the beneficiary possessed the required two years of experience as an auto mechanic, the job certified by the DOL, as of the priority date. The director revoked the previously approved petition accordingly. The petitioner submitted a timely appeal to the revocation of the approved Form I-140 petition, which was subsequently dismissed by the AAO.

The record shows that the motion is properly filed, 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.

On motion, counsel asserts that USCIS concluded that the revocation of the approved petition was warranted in the instant case merely because [REDACTED] an attorney subsequently convicted of immigration fraud, prepared the original Form I-140 petition and Form ETA 750. Counsel argues that the AAO improperly determined that the petition could not be approved because the Form I-140 petition listed the offered job as "Manager, auto Service station," while the Form ETA 750 listed the

¹ The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out such evidence did not establish that the beneficiary possessed the required two years of experience as an auto mechanic as of the priority date of February 20, 2001, and thus was properly issued for good and sufficient cause.

offered job as “auto mechanic.” Counsel states that this was a “clerical error” with no bearing in the instant case. Counsel claims the AAO failed to cite any case law or regulation to justify the revocation of the approved petition because of the clerical error made in naming the position during the preparation of the petition. Counsel contends that the AAO ignored evidence contained in the record regarding the beneficiary’s work experience including the notes of the USCIS officer who conducted the beneficiary’s second interview on October 24, 2006, and the translation of a letter provided from the son of the late owner of the gas station in Nepal where the beneficiary claimed to have worked. Counsel objects to the AAO’s finding that the probative value of the letter is negligible because it was not accompanied by a certified translation. Counsel states that the letter was signed before a Nepalese attorney and translated by the Executive Director of the Oriental Education Center in Nepal. Finally, counsel asserts that the AAO’s finding that the record did not contain sufficient evidence establishing the petitioner’s continuing ability to pay the proffered wage to the beneficiary since the priority date was not warranted in the instant case because this issue should not have arisen as the proceedings were a revocation of an approved petition rather than the denial of a Form I-140 petition. Counsel states that he is unaware of any case law that would support the dismissal of an appeal to the revocation of an approved petition on grounds that were not mentioned in either the notice of intent to revoke or the final decision revoking the approved petition. Counsel submits a copy of the notes of the USCIS officer who conducted the beneficiary’s second interview on October 24, 2006, as well as a copy of the AAO decision dated March 30, 2011, dismissing the petitioner’s appeal of the revocation of the approved petition.

Counsel’s assertion that USCIS is predisposed to revoking the approved petition in the instant case merely because the individual who prepared the original Form ETA 750 and Form I-140 petition was subsequently convicted of immigration fraud is not supported by any evidence in the record and is considered not persuasive. The director revoked the approved petition based upon the finding that the petitioner had not established that the beneficiary possessed the required two years of experience as an auto mechanic, the job certified by the DOL, as of the priority date. In dismissing the subsequent appeal, the AAO affirmed this finding and also determined that the petition could not be approved because the certified job of “auto mechanic” as listed on the Form ETA 750 is a substantially different position from the offered job of “Manager, auto Service station” as listed at Part 6 of the Form I-140 petition, and the record did not contain sufficient evidence establishing the petitioner’s continuing ability to pay the proffered wage to the beneficiary since the priority date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of 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).

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*, 299 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) (AAO's *de novo* authority is well recognized by the federal courts).

As a threshold issue, and although not noted by the director in either the NOIR or NOR, the petition cannot be approved because the certified job of "auto mechanic" as listed on the Form ETA 750 is a substantially different position from the offered job of "Manager, auto Service station" as listed at Part 6 of the Form I-140 petition.

The Form ETA 750 states a different capacity than the one in which the petitioner intends to employ the beneficiary. The petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The beneficiary must engage in the profession relevant to the Form ETA 750 and applicable to this Immigrant Petition for Alien Worker (I-140). As stated in *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966):

It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). As the petitioner clearly does not intend to employ the beneficiary in the offered job of auto mechanic as listed on the Form ETA 750 and certified by the DOL, but instead intends to employ the beneficiary as a "Manager, auto Service station," a job outside the terms of the Form ETA 750, the petition cannot be approved even if the AAO's prior dismissal of the appeal was withdrawn and the appeal was ultimately sustained.

On motion, counsel states that the clerical error in naming the position "Manager, auto Service station" at part 6 of the Form I-140 petition has no bearing in these proceedings. Counsel claims the AAO failed to cite any case law or regulation to justify the revocation of the approved petition because of the clerical error made in naming the position during the preparation of the petition. However, the error was not limited to simply naming the position as the "Nontechnical description of the job" in Part 6 of the Form I-140 states: "Manage the gas station by making employee hours and ordering supplies etc." The certified job of "auto mechanic" and corresponding duties as listed on the Form ETA 750 are materially and substantially different from the position "Manager, auto Service station" and corresponding duties listed at part 6 of the Form I-140 petition. Therefore, the petition cannot be approved because the petitioner is not offering the beneficiary a job as an auto mechanic, and the AAO has cited relevant precedent decisions and the regulation at 20 C.F.R. § 656.30(C)(2) to support this finding.

The next issue in this case is whether or not the beneficiary possessed the required two years of experience as an auto mechanic as of 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.

In order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting 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).

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). 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.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

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 regulation at 8 C.F.R. § 204.5(g)(1) also states, in part:

Evidence relating to qualifying experience or training shall be in the form of

letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added). Therefore, the AAO may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. The AAO may also consider copies of Forms W-2, Wage and Tax Statement, issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

The Form ETA 750 was accepted for processing by the DOL on February 20, 2001, and states that the position requires two years of experience in the job offered, auto mechanic. At Block 13 of the Form ETA 750, the duties of the offered job of auto mechanic are listed as follows:

Repair and service vehicles for automotive service station: determine the nature of malfunction and extent of damage through conference with cust [sic], manuals, charts and experience: remove, replace and/or repair parts of automobile utilizing mechanic and hand tools.

The Form ETA 750B, signed by the beneficiary under penalty of perjury on February 5, 2001, indicates that the beneficiary was employed as an auto mechanic by [REDACTED] in Kathmandu, Nepal from May 1987 to February 1990. He described his duties in the Form ETA 750 as follows: "Worked as an auto mechanic in the shop; performed all functions of auto mechanic using mechanic and hand tools."

The record contains a letter dated March 11, 1990 containing the letterhead of [REDACTED] in Kathmandu, Nepal that is signed by [REDACTED] who listed his position as manager. [REDACTED]

stated that the beneficiary worked in this establishment as a mechanic from May 1987 to February 1990. However, the probative value of [REDACTED] testimony is minimal because he failed to provide any specific details relating to the beneficiary's duties and the nature of his job as a mechanic at [REDACTED] as required by 8 C.F.R. § 204.5(l)(3)(ii)(A) and 8 C.F.R. § 204.5(g)(1).

The record shows that the beneficiary was interviewed by an officer of USCIS regarding a separately filed Form I-485, Application to Register Permanent Residence, in Fairfax, Virginia on June 19, 2006. The notes of the interviewing officer reflect that the beneficiary testified that he worked for [REDACTED] for approximately a year to a year and an half from 1989 to 1990 and indicated that his duties comprised of tire rotation, changing tires, fixing brakes, and helping other mechanics. The beneficiary's testimony that he not remember working for [REDACTED] for more than a year and a half at his interview conflicted with the claim on the Form ETA 750B that the beneficiary was employed by [REDACTED] from May 1987 to February 1990 as well as the letter of [REDACTED] who stated that the beneficiary worked in this establishment from May 1987 to February 1990.

The record contains a copy of the notes of the USCIS officer who conducted a second interview with the beneficiary on October 24, 2006. Counsel claims that the AAO ignored this evidence in its decision of March 30, 2011. However, a review of that decision reveals that the AAO mistakenly characterized the notes as a statement from the beneficiary dated October 24, 2006, rather than ignoring the evidence. The notes reflected the beneficiary's attempt to resolve the conflicts in testimony regarding his length of employment with [REDACTED]. These notes reflect that the beneficiary stated he was unable to remember the exact dates of his employment with [REDACTED] during his initial interview on June 19, 2006 because of the passage at the time. The beneficiary stated that he was now able to recall the exact dates of his employment at this enterprise, from May 1987 to February 1990, and that his duties consisted of fixing flat tires, helping the mechanics, and oil changes. However, the beneficiary's explanation is not sufficient to overcome his admission at his initial interview on June 19, 2006, that the length of his employment with [REDACTED] was a year to a year and a half even if he was not able to recall the exact dates of this employment. In addition, the beneficiary's characterization of his duties of employment as "fixing flat tires, helping the mechanics, and oil changes" raises questions as to whether this work experience for this enterprise consisted of simple vehicle maintenance rather than work experience as an auto mechanic determining the nature of automotive malfunctions and damage followed by the repairing of vehicles.

The record contains a foreign language affidavit signed by [REDACTED] with an English language translation. The translator noted that the affiant, [REDACTED] stated that he was the son of the owner of [REDACTED] and that he and the beneficiary had worked together in this shop as auto mechanics from 1987 to 1990. [REDACTED] noted that the business closed in 2000 and that his father subsequently passed away in 2001. [REDACTED] provided a listing of the beneficiary's duties as auto mechanic and indicated that the beneficiary also performed some work relating to office administration. However, [REDACTED] acknowledgement that the beneficiary also performed some work relating to office administration creates the inference that the beneficiary was not

necessarily employed as a full-time auto mechanic by [REDACTED]

In addition, the regulation at 8 C.F.R. § 103.2(b)(3) states the following in pertinent part:

Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

On motion, counsel objects to the AAO's finding that the probative value of the letter is negligible because it was not accompanied by a certified translation. Counsel states that the letter was signed before a Nepalese attorney and translated by the Executive Director of the Oriental Education Center in Nepal. The individual who translated the Nepalese letter to the English language may very well be the Executive Director of the Oriental Education Center in Nepal, but the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires the translator to certify both their competence to translate from the foreign language into English and the completeness and accuracy of the English language translation. In the instant case, the translator failed to certify either her competence to translate from the foreign language into English or the completeness and accuracy of the English language translation. Consequently, the probative value of the foreign language letter signed by [REDACTED] with English language translation is negligible without the required certifications from the translator.

The discrepancies noted above impair the credibility of the claim that the beneficiary has two years of experience in the offered job of auto mechanic. Furthermore, the testimony of the beneficiary at his second interview on October 26, 2006 reflects that the beneficiary's duties while employed at [REDACTED] were comprised of "fixing flat tires, helping the mechanics, and oil changes" rather than determining the nature of automotive malfunctions and damage followed by repairing the vehicles. Finally, [REDACTED] acknowledgement that the beneficiary also performed some work relating to office administration raises questions as to whether the beneficiary was employed as a full-time auto mechanic by [REDACTED]. 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). 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. *Id.* at 591.

Taking into account all of the evidence in this case, it is concluded that the petitioner has not established that it is more likely than not that the beneficiary was employed for at least two years as an auto mechanic for [REDACTED] as of the priority date. The nonspecific letter signed by [REDACTED] signed by [REDACTED] the beneficiary's own conflicting testimony, and the uncertified translation of the letter signed by [REDACTED] are not sufficient to establish the beneficiary's prior employment experience. Therefore the petitioner has not established that the beneficiary possesses the experience required to perform the proffered position as set forth on the labor certification. Again, it is noted that the beneficiary must have gained the qualifying experience by

the priority date, i.e., February 20, 2001. *See e.g. Matter of Wing's Tea House*, 16 I&N Dec. at 159. Experience gained while working for the petitioner after the priority date is not relevant. The AAO finds that the petition's approval was properly revoked, and the appeal to the revocation of the approved petition was properly dismissed on this basis.

The next issue to be examined in this proceeding is whether the petitioner demonstrated the continuing ability to pay the beneficiary the proffered wage since the priority date of February 20, 2001.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As previously noted, the Form ETA 750 was accepted on February 20, 2001. The proffered wage for the offered job of auto mechanic as stated on the Form ETA 750 is \$19.11 per hour or \$39,748.80 per year based upon a forty hour week.

The evidence in the record of proceeding indicates that the petitioner is structured as a sole proprietorship. Relevant evidence includes the Schedule C of the petitioner's owner's Forms 1040, U.S. Individual Income Tax Return, for 2001, 2002, and 2003; Forms W-2, Wage and Tax Statement, reflecting wages paid by the petitioner to the beneficiary in 2003, 2004, and 2005; paychecks and paycheck stubs dated January 25, 2006, February 8, 2006, February 22, 2006, March 8, 2006, March 22, 2006, April 19, 2006, May 3, 2006, May 17, 2006, May 31, 2006, and June 14, 2006; the petitioner's business checking account statements for January 31, 2001, February 28, 2001, May 31, 2001, June 29, 2001, and July 31, 2001; and an unaudited financial statement dated April 30, 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Comm. 1967).

On motion, counsel asserts the issue of the petitioner's ability to pay should not have arisen as the proceedings were a revocation of an approved petition rather than the denial of a Form I-140 petition. Counsel states that he is unaware of any case law that would support the dismissal of an appeal to the revocation of an approved petition on grounds that were not mentioned in either the notice of intent to revoke or the final decision revoking the approved petition. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d at 145. While counsel is correct in noting that there is no precedent decision specifically recognizing the AAO's *de novo* authority in revocation proceedings, the holding in *Soltane* recognized AAO's *de novo* authority in those matters in which the AAO has jurisdiction and does not either distinguish or eliminate such authority in revocation proceedings. Further, the petitioner's continuing ability to pay the proffered wage to the beneficiary since the priority date is a specific eligibility requirement pursuant to 8 C.F.R. § 204.5(g)(2) and was held to be an essential element in evaluating whether a job offer is realistic in *Matter of Great Wall*, 16 I&N Dec. 142.

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 record contains Form W-2 statements for 2003, 2004, and 2005, as well as paychecks and paycheck stubs from 2006, reflecting compensation paid to the beneficiary by the petitioner as follows:

- 2003 – \$7,400.00 (\$32,348.80 less than the proffered wage of \$39,748.80).
- 2004 – \$35,520.00 (\$4,228.80 less than the proffered wage of \$39,748.80).
- 2005 – \$10,360.00 (\$29,388.80 less than the proffered wage of \$39,748.80).
- 2006 – \$14,800.00 (\$24,948.80 less than the proffered wage of \$39,748.80).

The evidence in the record does not establish that the petitioner paid the beneficiary the full proffered wage in 2003, 2004, 2005, and 2006. Furthermore, the record contains no evidence that the petitioner paid the beneficiary any wages in 2001 and 2002.

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). 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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. 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. *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 petitioning entity structured as a sole proprietorship 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.

The record is absent any evidence documenting the sole proprietor's annual living expenses. Although the sole proprietor submitted a copy of his Form 1040 tax return for 2000, this document is not probative of the petitioner's continuing ability to pay the proffered wage since the priority date of February 20, 2001. In addition, the petitioner did not submit any other complete tax returns but instead included only the Schedule C of the petitioner's owner's Form 1040 tax returns for 2001, 2002, and 2003. Without evidence of the sole proprietor's annual living expenses and copies of the complete tax returns listing the annual adjusted gross income of the petitioner's owner since the priority date of February 20, 2001, it is not possible to determine whether the petitioner had sufficient adjusted gross income to pay the proffered wage and his own living expenses.

The record contains a copy of the petitioner's unaudited financial statements for the period from April 30, 2000 to April 30, 2001. However, these unsubstantiated statements have not been presented in the context of audited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and

Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. The petitioner's unaudited financial statements are not persuasive evidence and not sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage since the priority date.

The record also contains copies of the petitioner's business checking account statements for January 31, 2001, February 28, 2001, May 31, 2001, June 29, 2001, and July 31, 2001. Nevertheless, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in this account are well below the proffered wage including a negative balance in some months. Finally, it cannot be determined whether the bank records are complete, and there are many intervening months which are omitted. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date.

It must be noted that a review of USCIS electronic records reveals that the petitioner has filed seven separate petitions: EAC 01 268 52481; EAC 02 031 54029; EAC 03 001 54098; EAC 03 100 51906; EAC 03 133 50920; EAC 05 063 51764; and SRC 07 026 51946, on behalf of other beneficiaries. The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to establish that it has the continuing ability to pay the proffered wages of immigrant petitions that it has filed. Assessing the petitioner's ability to pay these combined proffered wages is part of an evaluation as to whether the job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See id* at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2). In this case, the petitioner has not submitted evidence to establish that it had sufficient funds to pay the proffered wage to the beneficiary and the additional sponsored beneficiaries with overlapping priority dates and for which petitions have been simultaneously pending.

As the petitioner is a sole proprietor, his ownership of personal assets may be taken into account when considering the ability to pay the beneficiary the proffered wage. However, the record is absent any evidence relating to sole proprietor's personal assets.

In some cases, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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.

In this matter, no specific detail or documentation has been provided similar to *Sonegawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are present in this matter. The AAO cannot conclude that the petitioner has established that he had the continuing ability to pay the proffered wage of the beneficiary in the instant case and the beneficiaries of the separate petitions discussed above in addition to his household expenses.

Based on a review of the underlying record and argument submitted on motion, the petitioner has not established his continuing financial ability to pay the proffered wage, and the petition could not be approved for this reason even if the appeal were sustained.

The AAO's decision of March 30, 2011 dismissing the appeal to the revocation of approval of the petition will be affirmed for the above stated reasons, with each considered as an independent and alternative basis for revocation of the approved petition.

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 prior decision of the AAO dismissing the appeal shall be affirmed.