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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: **MAY 30 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over a white background.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter came before the Administrative Appeals Office (AAO) on appeal, and the AAO dismissed the appeal on September 14, 2009. The matter is now before the AAO on a motion to reopen and a motion to reconsider.<sup>1</sup> The motions will be granted, and the prior decision dismissing the appeal shall be affirmed.

The petitioner is a roofing and waterproofing business. It seeks to employ the beneficiary permanently in the United States as a roofer. 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). 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 denied the petition accordingly. The AAO subsequently affirmed the director's decision.

The record shows that the motions are properly filed, timely, and make 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 October 22, 2007, the director denied the immigrant visa petition, finding that the petitioner had not demonstrated the continuing ability to pay the beneficiary the proffered wage from the priority date in 2001, until the beneficiary obtains lawful permanent residence. The petitioner appealed the director's decision, on November 23, 2007. However, on the Form I-290B, Notice of Appeal or Motion, the petitioner did not identify any erroneous conclusion of law or statement of fact as a basis for the appeal. Therefore, the AAO summarily dismissed the appeal.

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>2</sup>

On motion, the petitioner references a deficiency in its ability to pay for one year, 2005, while the director found that the petitioner failed to demonstrate the ability to pay for each year from 2001 through 2005. On motion, the petitioner also references documents, which were already considered by the director when he rendered his October 22, 2007 denial. Further, the petitioner states that it

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<sup>1</sup> The designated attorney on the Form G-28, Notice of Entry of Appearance as Attorney or Representative, is on the list of suspended and expelled practitioners and is disbarred by the State of California. Therefore, the AAO will not recognize the attorney in this proceeding. See 8 C.F.R. §§ 1.1(f), 103.2(a)(3), 292. We also note that on February 19, 2013, we sent the petitioner a letter requesting a Form G-28 for its new counsel. As no response was received, the petitioner will be considered self-represented.

<sup>2</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).

could not provide documents such as copies of Internal Revenue Service (IRS) Forms W-2 for the beneficiary because it did not employ the beneficiary at any time from 2001 through 2005. Rather, the petitioner asserts that it paid the beneficiary as an independent contractor. However, in filing its initial petition, the petitioner submitted copies of IRS Forms W-2, which it issued to the beneficiary in both 2001 and 2002. The director discussed these documents in his decision to deny.

As set forth in the director's October 22, 2007 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation 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 \$16.00 per hour (\$33,280.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The evidence in the record of proceeding shows that the petitioner's business is structured as a sole proprietorship. On the petition, the petitioner did not list its date of establishment or number of current workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

The petitioner previously submitted copies of IRS Forms W-2 indicating payments that it made to the beneficiary in 2001 and 2002 according to the below table.

- In 2001, the Form W-2 stated wages paid to the beneficiary of \$14,040.00.
- In 2002, the Form W-2 stated wages paid to the beneficiary of \$8,760.00.

Therefore, the petitioner must demonstrate its ability to pay the beneficiary the difference between wages paid and the proffered wage for 2001 and 2002, which is \$19,240.00 and \$24,520.00 respectively, and the full proffered wage from 2003 onwards.

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 three in Mira Loma, California. The sole proprietor submitted a list of his family's estimated expenses, which amount to approximately \$1,950.00 per month and \$23,400.00 per year. The proprietor's tax returns reflect the following information for the following years:

- For 2001, the petitioner's Form 1040 states that his adjusted gross income is \$24,121.00.
- For 2002, the petitioner's Form 1040 states that his adjusted gross income is \$29,148.00.
- For 2003, the petitioner's Form 1040 states that his adjusted gross income is \$12,853.00.
- For 2004, the petitioner's Form 1040 states that his adjusted gross income is \$24,017.00.
- For 2005, the petitioner's Form 1040 states that his adjusted gross income is \$33,895.00.

Therefore, for the years 2001 and 2002, the sole proprietor did not demonstrate that he had sufficient adjusted gross income to pay the difference between the proffered wage of \$33,280.00 and wages paid as well as his family's estimated expenses. For the years 2003 through 2005, the sole proprietor did not demonstrate that he had sufficient adjusted gross income to pay the proffered wage of \$33,280.00 as well as his family's estimated expenses.

On motion, the petitioner states that it did not want to violate employment laws by hiring the beneficiary. Accordingly, the petitioner asserts that it has employed the beneficiary as an independent contractor since filing the petition. The petitioner claims that it had previously demonstrated its ability to pay the beneficiary the proffered wage in all years except for 2005, but the AAO does not find this statement to be correct as evidenced by the above listed figures and as stipulated in the director's prior decision.

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 (Reg'l Comm'r 1967). 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. 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 failed to demonstrate that he had enough adjusted gross income to pay the difference between the proffered wage and wages paid as well as his family's estimated expenses for 2001 and 2002 and failed to demonstrate that he had sufficient adjusted gross income to pay the proffered wage as well as his family's estimated expenses for 2003 through 2005. The sole proprietor did not submit copies of his bank account statements during the relevant time period. The petitioner also submitted no evidence of its reputation in the industry or of any uncharacteristic business expenditures or losses. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director,<sup>3</sup> the AAO finds that the petitioner has also not established that the beneficiary is qualified for the offered position. 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'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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*

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<sup>3</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

*Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered as a roofer as of the April 30, 2001 priority date.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. 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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

On the labor certification, the beneficiary signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. Part B.15 of Form ETA 750 does not indicate that the beneficiary has experience in the job offered or in any other job.

The petitioner submitted a letter dated May 15, 2003 from an individual with an illegible signature and no professional title on [REDACTED] letterhead, stating that the beneficiary worked for that company in Lake Forest, California from January 1995 through December 1999. The letter lists the beneficiary's duties, but does not list the beneficiary's employment title while working there. The AAO finds that this letter does not meet the requirements of 8 C.F.R. § 204.5(g)(1) because it does not contain the name and title of the author. Moreover, the beneficiary did not list this claimed experience on the Form ETA 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 evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification as of the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Based on a review of the underlying record and the arguments submitted on motion, the AAO finds that the Form I-140 petition was properly denied and that the appeal to the denial of the Form I-140 petition was properly dismissed.

The AAO's decision of September 14, 2009 dismissing the appeal to the denial of the Form I-140 petition will be affirmed for the above stated reasons, with each considered as an independent and alternative basis for denying the Form I-140 petition. 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 motions to reopen and reconsider are granted. The prior decision of the AAO dismissing the appeal is affirmed.