



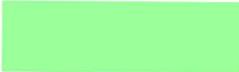
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 09 2014**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner subsequently filed a motion to reopen which the director dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an immigration law office. It seeks to employ the beneficiary permanently in the United States as a legal assistant. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director's decision denying the petition concluded that the petitioner had not established its ability to pay the beneficiary's proffered wage from the priority date onward.

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, an issue in this case is whether the petitioner has the ability to pay the proffered wage from the priority date onward.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 2, 2007, the priority date. The proffered wage as stated on the ETA Form 9089 is \$20.00 per hour (\$41,600.00 per year). The ETA Form 9089 states that the position requires 12 months of experience in the job offered as a legal assistant.

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 1997 and to currently employ four workers. On the ETA Form 9089, signed by the beneficiary on December 7, 2007, the beneficiary claimed to have worked for the petitioner from August 24, 2004 until October 1, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142, 144 (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, 614-15 (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. On appeal, the petitioner has stated that the beneficiary has worked for the petitioner as a volunteer and has not received any wages for her work.

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex.

¹ 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, 766 (BIA 1988).

1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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*, 539 F. Supp. at 650.

In *Ubeda*, 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. *Id.*

In the instant case, the sole proprietor supports himself with no additional dependents. The proprietor's tax returns reflect the following adjusted gross income² for the following years:

Year	Adjusted Gross Income	Estimated Yearly Expenses	Amount remaining to pay the beneficiary's proffered wage
2007	\$53,318.00	\$13,788.00	\$39,530.00
2008	\$28,724.00	\$14,544.00	\$14,180.00
2009	\$(12,716.00)	\$15,660.00	\$0.00
2010	\$(2,014.00)	\$16,494.00	\$0.00
2011	\$33,623.00	\$16,914.00	\$16,709.00
2012	\$16,876.00	\$17,805.00	\$0.00

This demonstrates that for 2007, 2008, 2009, 2010, 2011 and 2012, the sole proprietor's adjusted gross income fails to cover the yearly expenses and the beneficiary's proffered wage of \$41,600.00.

On appeal, the petitioner asserts that its business line of credit is sufficient to pay the beneficiary's proffered wage and that each year its accountant provides a budget based on the earnings and expenses of the prior year. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as

² We note that the director misstated the petitioner's adjusted gross income for 2008, 2010, 2011 and 2012.

evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. On July 22, 2014, we issued the petitioner a request for evidence (RFE) to provide an opportunity to submit a detailed business plan and audited cash flow statements. In response to our RFE, the petitioner submitted a business plan to establish that this line of credit should be considered toward the petitioner's ability to pay the proffered wage. We note several discrepancies with this business plan.

First, the payroll expenses in the financial forecast are listed at \$40,000. It is unclear how many employees are counted within this salary figure and how the petitioner expects to be able to double that amount upon hiring the beneficiary. The Form I-140 states that the petitioner employs four other workers. Page five of the business plan states that the petitioner has two staff attorneys, including the sole proprietor, and that it employs a staff of five legal assistants. The petitioner has also stated that in the past several independent contractors have been employed part-time to assist with client intake, interpretations and translations, conducting research, and preparing immigrant and non-immigrant applications to submit to USCIS. It is unclear whether the wages paid to these independent contractors has been factored into this financial forecast.

Second, the financial forecast for 2009, 2010 and 2011 states disbursements from the credit line that come very close to reaching the \$250,000 available credit when adding the beneficiary's proffered wage of \$41,600.00 to the disbursements made. Specifically, if the petitioner were to use the line of credit to pay the beneficiary's salary in 2009, 2010, and 2011, the total disbursement in each year would be \$242,949.00, \$249,159.00, and \$241,349.00, respectively. This casts doubt on whether the petitioner can realistically pay the beneficiary's proffered wage in addition to his other employees as well as other business expenses.

Further, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The petitioner also submitted an accountant's compilation report, dated July 28, 2014, which states that their office has compiled the accompanying forecasted statements of income of the petitioner's business from 2007 to 2014. 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. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of

management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 Sonegawa*, 12 I&N Dec. at 614-15. 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 Form I-140 states that the petitioner has been in business since 1997 and currently employs four workers. The petitioner has not provided any objective evidence of its historical business growth or of its reputation in the industry. The record does not contain any evidence of uncharacteristic business expenses in 2007, 2008, 2009, 2010, or 2012, and the record reflects low amounts of adjusted gross income for these years. 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.

Regarding the petitioner's request for oral argument before the AAO, the regulations provide that the requesting party must explain in writing why oral argument is necessary. USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, counsel has not identified any unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Beyond the decision of the director,³ 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 Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 12 months of experience in the job offered. As noted in our RFE, the beneficiary's experience with the petitioner as a legal assistant may not be used as qualifying experience for the position offered.⁴ The petitioner has not challenged this fact.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains several experience letters from attorney [REDACTED] stating that the beneficiary volunteered in his office from July 1, 2003 to July 31, 2004 and that she worked approximately 35 hours per week. This employment is not stated on the labor certification. 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 a letter from the beneficiary who states that she worked as an intern for attorney [REDACTED] and that she started as a client greeter, answering phones and filing documents and that she was soon given more responsibilities. The beneficiary states that with Mr. [REDACTED]

³ 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).

⁴ The regulation at 20 C.F.R. § 656.17(i)(3) states the following:

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
- (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

assistance, she learned [REDACTED]. She also states that she learned [REDACTED] and used it at her work. She states that she “became proficient in both [REDACTED] and [REDACTED] around the middle of 2003.” We note that the beneficiary’s affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

The letter from Mr. [REDACTED] dated July 30, 2014, states that the beneficiary worked for him as an intern from July 2003 until July 2004 and that his practice “was becoming more concentrated in the area of bankruptcy.” The letter from Mr. [REDACTED] dated October 4, 2013 states that the focus of his law practice is on civil litigation and bankruptcy. Neither of the letters submitted by Mr. [REDACTED] state that the beneficiary gained experience using [REDACTED]. 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Although it appears that the beneficiary may have had 12 months of experience as a legal assistant, the record does not indicate that she had working knowledge of [REDACTED].

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.