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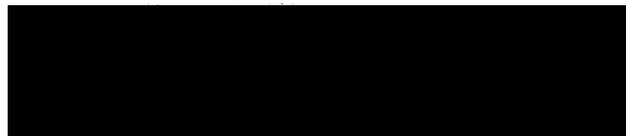


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **DEC 28 2004**
WAC-02-118-50006

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape designer and installer. It seeks to employ the beneficiary permanently in the United States as a landscaper/gardener. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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. The director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position. The petition was denied accordingly.

On appeal, counsel submits a brief statement and additional evidence.

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 first issue to be discussed in this case is whether or not the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 14, 1997. The proffered wage as stated on the Form ETA 750 is \$12.66 per hour, which amounts to \$26,332.80 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its Forms C, Profit or Loss from Business, without the sole proprietor's complete individual income tax returns, for 1999 and 2000. No evidence was submitted concerning the beneficiary's qualifications to perform the duties of the proffered position.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 8, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested complete tax returns from the priority date to the present as well as any

evidence of wages paid to the beneficiary. The director also requested evidence that the beneficiary was qualified to perform the duties of the proffered position.

In response, the petitioner submitted the sole proprietor's complete Forms 1040, U.S. Individual Income Tax Returns for 1999, 2000, and 2001, with accompanying Forms C, Profit or Loss from Business.

The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$16,552	\$41,211	\$23,734
Petitioner's gross receipts or sales (Schedule C)	\$115,825	\$344,272	\$408,771
Petitioner's wages paid (Schedule C)	\$0	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$6,000	\$65,319	\$44,790
Petitioner's net profit from business (Schedule C)	\$18,783	\$46,005	\$25,538

No evidence was submitted to establish that the beneficiary was qualified to perform the duties of the proffered position.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 14, 2003, denied the petition. The director determined that the adjusted gross income barely covered the proffered wage and left no additional income for the sole proprietor to live on. Additionally, the director pointed out that the petitioner failed to submit evidence of its ability to pay the proffered wage in 1998; failed to submit evidence of actual employment of and payment of wages to the beneficiary; and failed to submit evidence that the beneficiary is qualified to perform the duties of the proffered position. Finally, the director discussed "partnership" returns purportedly received from the petitioner; however, the record of proceeding, as currently constituted, does not contain any partnership tax returns pertaining to the instant petition.

On appeal, counsel asserts that the director erred in denying the petition because the sole proprietor's individual income tax returns and partnership tax returns show ample funds to pay the proffered wage and care for his family. In addition, counsel states that evidence was provided for 1998 through the partnership tax return. Finally, counsel states that the beneficiary was employed by the petitioner but paid in cash and was therefore responsible for reporting it on his own. Counsel submits a letter to prove the beneficiary's qualifications to perform the duties of the proffered position.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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 has previously employed the beneficiary. The beneficiary indicates on Form G-325, Biographic Information sheet, submitted in connection with his Form I-485, application to adjust status to lawful permanent resident, that he has worked for the petitioner since 1996 to present. The beneficiary's individual income tax returns indicate that he is self-employed in landscaping and does not provide the source of his income. No evidence to corroborate actual employment with and receipt of wages from the petitioner was submitted into the record of proceeding. Additionally, the petitioner indicates that it paid no wages to employees and \$6,000, \$65,319, and \$44,790 in 1999, 2000, and 2001, respectively in wages to non-employees. The visa petition indicates that the petitioner employs one employee. It

has not shown who received its cost of labor expenses. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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. 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.

In the instant case, the sole proprietor supports a family of one. The petitioner failed to submit evidence of its ability to pay the proffered wage in 1997 or 1998. While the director erred in not requesting evidence pertaining to 1997, ultimately the petitioner bears the burden of proving its case. Section 291 of the Act, 8 U.S.C. § 1361. The director did, however, request the petitioner's tax return for 1998 but the petitioner failed to submit it. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return for 1998. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not demonstrated its ability to pay the proffered wage in 1997 or 1998.

In 1999, the sole proprietorship's adjusted gross income of \$16,552 is less than the proffered annual wage of \$26,332.80. Since the adjusted gross income does even not cover the proffered wage, no further consideration needs to be given to the probability of the sole proprietor supporting himself on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2000, the sole proprietorship's adjusted gross income of \$41,211 leaves the sole proprietor with \$14,878.20 to live on for the year. Since no evidence of the sole proprietor's living expenses are in the record of proceeding, no evaluation of the probability of the sole proprietor's ability to sustain himself on \$14,878.20 can be made.

In 2001, the sole proprietorship's adjusted gross income of \$23,734 is less than the proffered annual wage of \$26,332.80. Since the adjusted gross income does even not cover the proffered wage, no further consideration needs to be given to the probability of the sole proprietor supporting himself on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 1997, 1998, 2000, or 2001. The AAO is concerned that both the director and the petitioner discuss partnership returns as a potential additional source of the sole proprietor's income applicable to proving the petitioner's continuing ability to pay the proffered wage. The record of proceeding does not contain any partnership tax returns.¹ Thus, the AAO cannot assess this evidentiary issue since the record of proceeding does not contain any "1065 US Partnership income taxes for the years 1998, 1999, 2000, and 2001" as claimed by counsel.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997 through 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is November 14, 1997. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Not Needed
	Grade School	Not Needed
	High School	Not Needed
	College	Not Needed
	College Degree Required	N/A
	Major Field of Study	N/A

The applicant must also have four years of training in order to perform the job duties listed in Item 13, which states the following:

¹ The sole proprietor's individual income tax returns do not report additional income from a separate partnership business. If counsel is suggesting that the sole proprietor has additional income from a separate partnership business, presumably the sole proprietor would report that income on his individual income tax return as well as the partnership filing.

Plans and executes small scale landscaping operations and maintains grounds and landscape of private and business residences [sic]: Participates in preparing and grading terrain, applying [sic] fertilizers, seeding and sodding lawns, and transplanting shrubs and plants, using manual and power operated equipment. Plants lawns and plants and cultivates them using gardening implements [sic] and power operated equipment. Plants new and repairs established lawns using seed mixtures and fertilizers recommended for particular soil type lawn location. Locates and plants shrubs, trees and flowers selected by property owner or [sic] those recommended for particular [sic] land scape affect [sic]. Mows and trims lawns, u [sic] using hand mower or power mower, [t]rims shrubs and cultivates gardens. Cleans grounds, using rakes, brooms, and hose [s]prays anda [sic] shrubs, and applies supplemental liquid and dry nutrients to lawn and trees. May dig trenches and install drain tiles. May make repairs to concrete and asphalt walk and drive ways.

Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, a job description is provided without any identifying information concerning a past employer, such as a name or address, or dates of past employment. As noted above, however, the beneficiary indicated on his Form G-325, Biographic Information sheet, submitted in connection with his Form I-485, application to adjust status to lawful permanent resident, that he has worked for the petitioner since 1996 to present. No other employer is listed.

As noted above, no evidence was provided concerning the beneficiary's qualifications until this appeal despite the director's efforts to request one from the petitioner. It is noted that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. However, since the record of proceeding has registered other inconsistencies, the AAO will exercise favorable discretion and consider the letter submitted into evidence for the first time on appeal.

The letter provided on appeal is written by [redacted] owner [redacted] Landscaping, and provides Mr. [redacted] address and phone number. It is dated May 8, 2003² and states that the beneficiary worked for his company from October 1996 to May 2001 for 40 hours per week. The letter describes the duties performed by the beneficiary that reflect the duties of the proffered position.

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

² The visa petition was filed in 2002. Thus, there is evidence that *Soriano* could apply to this letter since clearly it post-dates the filing of the visa petition and the director's request for evidence.

(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.

The AAO finds the letter pertaining to the beneficiary's qualifications to be acceptable evidence of four years of training as a landscaper/gardener. According to the guiding regulation, the training letter must provide the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The letter in the record of proceeding provides the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

However, the AAO is concerned that the beneficiary failed to mention [REDACTED] Landscaping as a former employer on his Form G-325, Biographic Information sheet, submitted in connection with his Form I-485, application to adjust status to lawful permanent resident or his ETA 750B. Such an omission of a point so critical to his qualification for an employment-based visa is substantial.

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.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Thus, while the letter on appeal seems to technically meet the regulatory requirements for establishing the beneficiary's qualifications, the information provided concerning the beneficiary's representations of his past employment carry too many inconsistencies and omissions to overturn the director's portion of his decision concerning this issue.

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 appeal is dismissed.