

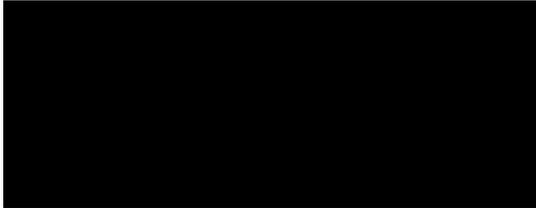
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U.S. Department of Homeland Security  
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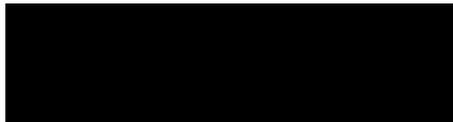
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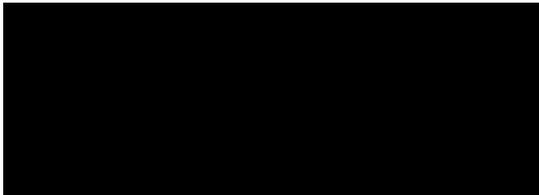
FILE: WAC 02 214 51292 Office: CALIFORNIA SERVICE CENTER Date: AUG 16 2005

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:

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an apartment complex. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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 and that it had not established that the beneficiary has the requisite experience as stated on the approved Form ETA labor certification. The director denied the petition accordingly.

On appeal, counsel submits a brief 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.

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.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 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 Department of Labor. 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 20, 1998. The proffered wage as stated on the Form ETA 750 is \$17.18 per hour, which equals \$35,734.40 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, the petitioner stated that it was established during 1987 and that it employs three workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from June 1994 to December 1997, but did not claim to have worked for the petitioner at any time since the priority date. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Eagle Rock, California.

With the petition, the petitioner submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. As to the beneficiary's experience, the petitioner submitted a letter, dated June 30, 1999, from a general contractor<sup>1</sup> who stated that the beneficiary worked for him "on several jobs in the San Gabriel Valley area" from 1992 to 1995 in all phases of construction. That letter was typed on plain paper rather than the employer's letterhead.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite two years work experience, the California Service Center, on December 21, 2002, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's tax returns for the years 1998 through 2002.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters on the previous employer's letterhead 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 Service Center also noted that the experience verification letters should include beneficiary's title, duties, dates of employment, and the number of hours the beneficiary worked per week. The Service Center also specifically requested Form W-2 Wage and Tax Statements to corroborate the claimed employment.

In response, the petitioner's owner submitted a letter, dated February 18, 2003. In that letter the petitioner's owner stated that he had owned 25% of the petitioner beginning in 1998, and that he purchased the remaining 75% during 2000.

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<sup>1</sup> The general contractor is Giancarlo Massarotto of West Covina, California.

As to the ability of the petitioner to pay the proffered wage, the petitioner provided (1) the petitioner's 1998 and 1999 Form 1065, U.S. Returns of Partnership Income, (2) the petitioner's owner's 2000 and 2001 Form 1040 U.S. Individual Income Tax Returns, and (3) the petitioner's compiled financial statements for 2000 and 2001.

The 1998 and 1999 partnership returns show that the petitioner reports taxes based on the calendar year. They also show that the petitioner was established on December 30, 1985, which conflicts with the assertion, made on the Form I-140 petition, that it was established during 1987. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The first page of the 1998 partnership return shows no ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 partnership return shows that it is the petitioner's final partnership return, that is, that the petitioner has changed owners, or is still held by the same owners under a different type of ownership such that it will no longer be filing a Form 1065, U.S. Return of Partnership Income. The first page of that return shows no ordinary income and no end-of-year current assets or current liabilities.

The petitioner's owner's 2000 individual income tax return includes a Schedule E Supplemental Income and Loss statement showing that the petitioner was held as a sole proprietorship during that year and earned a profit of \$2,294. The return shows that the petitioner's owner had adjusted gross income of \$274,884, including the petitioner's profit.

The petitioner's owner's 2001 individual income tax return includes a Schedule E Supplemental Income and Loss statement showing that the petitioner was held as a sole proprietorship during that year and earned a profit of \$7,203. The return shows that the petitioner's owner had adjusted gross income of \$358,660.

As to the beneficiary's claimed employment experience, the petitioner provided a copy of the employment verification letter previously submitted and a second letter, dated February 19, 2003, from the previous employer's wife. That letter states that the previous employer was recovering from head trauma and was unable to provide additional corroboration of the beneficiary's employment claim at that time. The petitioner did not provide the requested W-2 forms to corroborate that experience and did not provide any explanation of that omission.

The director denied the petition on March 12, 2004, finding 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel cites the petitioner's gross income as an index of the petitioner's ability to pay the proffered wage and states that the petitioner's owner, whom counsel mistakenly characterizes as the petitioner in this matter, covered the petitioner's losses. Counsel asserts that the evidence clearly shows that the

petitioner had gross income of \$282,887 and \$291,211 during 1998 and 1999, respectively. Counsel submits additional copies of the 1998 and 1999 Form 1065, U.S. Return of Partnership Income. Counsel also submits copies of the petitioner's owner's 1998 and 1999 Form 1040 U.S. Individual Income Tax Returns.

As to the beneficiary's experience, counsel submits an additional employment verification letter, dated April 22, 2004, apparently from the same previous employer who provided the first verification.<sup>2</sup> That new employment verification states that the beneficiary worked for that employer as a trainee from August 14, 1989 to November 1, 1991, during which time he was trained to repair and install plumbing fixtures, build and repair wooden structures, paint interiors and exteriors, lay bricks, install and repair drywall and stucco, install, replace and repair electrical fixtures and wiring, and install, replace, and repair roofing materials all in accordance with building plans and building codes. That letter does not state the number of hours the beneficiary worked per week. The requested W-2 forms were not provided. Counsel asserts that the evidence shows that the beneficiary has the requisite two years of experience as stated on the approved Form ETA 750 labor certification.

Although the first pages of the 1998 and 1999 partnership returns submitted are blank from Line 1 Gross Receipts to Line 22 Ordinary Income, a Form 8825 Rental Real Estate and Expenses of a Partnership or an S Corporation is attached to each of those returns. Those forms show, as counsel stated, that the petitioner's gross rents were \$282,887 and \$291,211 during 1998 and 1999, respectively. Those forms also show that during 1998 the petitioner suffered a loss of \$12,672 and during 1999 it suffered a loss of \$4,442.

The petitioner's owner's 1998 and 1999 personal tax returns show that he declared adjusted gross income of \$245,740 and \$399,651 during those years, respectively.

The petitioner's reliance on the unaudited financial statements in this case is misplaced. 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that 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.

Counsel's citation of the petitioner's gross receipts as an index of its ability to pay additional wages is unconvincing. Showing that the petitioner's gross receipts exceeded the proffered wage, or overwhelmingly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>3</sup> or otherwise increased its net income,<sup>4</sup> the petitioner is obliged to show

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<sup>2</sup> Although the signature on the new employment verification contains a marked difference from the signature on the previous employment verification in one of the initial letters, this office finds that the same person signed them.

<sup>3</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>4</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary at any time since the priority date.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

During 1998 and 1999 the petitioner reported taxes on Form 1065, U.S. Return of Partnership Income. On Schedule B of that form the petitioner indicated that it was a limited partnership. The general partners of limited partnerships are obliged to pay the debts and obligations of their companies out of their personal income and assets. Those partners' incomes and assets are at the company's disposal and they are correctly considered in the determination of the petitioner's ability to pay the proffered wage.

A limited partner is not obliged to pay the debts and obligations of the partnership out of his own income and assets. The income and assets of a limited partner would not be correctly considered in the determination of the petitioner's ability to pay the proffered wage.

A limited partnership has one or more general partners and one or more limited partners. In the instant case, both the 1998 and 1999 partnership returns list [REDACTED] not the petitioner's current owner, whose personal tax returns are in evidence, as the general partner designated as the tax matters partner. Whether the petitioner's current owner was also a general partner is not known.<sup>5</sup>

Although the first pages of the 1998 and 1999 partnership returns submitted are blank from Line 1 Gross Receipts to Line 22 Ordinary Income, a Form 8825 Rental Real Estate and Expenses of a Partnership or an S Corporation is attached to each of those returns. Those forms show, as counsel stated, that the petitioner's gross rents were \$282,887 and \$291,211 during 1998 and 1999, respectively. Those forms also show that

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<sup>5</sup> Based on the amount of the petitioner's net loss that was passed through to [REDACTED] and the amount that was passed through to the petitioner's current owner, and the fact that a limited partnership must have at least one limited partner, the current petitioner's owner appears to have been a limited partner during 1998 and 1999. This cannot, however, be determined conclusively.

during 1998 the petitioner suffered a loss of \$12,672 and during 1999 it suffered a loss of \$4,442. The petitioner's owner's 1998 and 1999 personal tax returns show that he declared adjusted gross income of \$245,740 and \$399,651 during those years, respectively.

Because the petitioner suffered a loss of \$12,672 during 1998, the petitioner cannot demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. The 1998 return does not show that the petitioner had any net current assets at the end of that year. The petitioner cannot, therefore, show the ability to pay any portion of the proffered wage out of its net current assets during that year. Although the current petitioner's owner's adjusted gross income was sufficient to pay the proffered wage, the petitioner has not demonstrated that he was a general partner, and his personal income and assets cannot be included in the determination of the petitioner's ability to pay the proffered wage during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner suffered a loss of \$4,442. The petitioner cannot demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. The 1999 return does not show that the petitioner had any net current assets at the end of that year. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year. Although the current petitioner's owner's adjusted gross income was sufficient to pay the proffered wage, the petitioner has not demonstrated that he was a general partner, and his personal income and assets cannot be included in the determination of the petitioner's ability to pay the proffered wage during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 and 2001 the petitioner's owner held it as a sole proprietorship. A sole proprietor, like the owner's of a partnership, is obliged to pay the debts and obligations of his company out of his own income and assets. The income and assets of the petitioner's owner, therefore, are an appropriate consideration in determining the petitioner's ability to pay the proffered wage during those years.

During 2000 the petitioner declared a profit of \$2,294. That amount is insufficient to pay the proffered wage. The petitioner's owner, however, had adjusted gross income of \$274,884 during that year. Although no evidence pertinent to the petitioner's owner's family budget was either requested or provided in this matter, this office is comfortable with the determination that the petitioner's owner could have paid the proffered wage out of his own funds during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a profit of \$7,203. That amount is insufficient to pay the proffered wage. The petitioner's owner, however, had adjusted gross income of \$358,660 during that year. Again, although no evidence pertinent to the petitioner's owner's family budget was either requested or provided in this matter, this office is comfortable with the determination that the petitioner's owner could have paid the proffered wage out of his own funds during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to demonstrate the ability to pay the proffered wage during 1998 and 1999. Therefore the petitioner has failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that ground.

The remaining issue is the sufficiency of the evidence in support of the beneficiary's claim of qualifying employment. The evidence initially provided pertinent to the beneficiary's employment claim was insufficient.

Therefore, the Service Center issued a Request for Evidence in which it requested additional evidence in support of that employment claim and detailed what that evidence should include. On appeal, counsel submits a new employment verification letter purporting to show that the beneficiary worked for a building contractor for over two years. Although the Request for Evidence requested that the letter should state the number of hours the beneficiary worked per week, that information was not included in the letter. The letter does not demonstrate that the beneficiary worked full-time during his claimed employment.<sup>6</sup>

Further, in that Request for Evidence, the Service Center requested that the petitioner provide copies of W-2 forms to corroborate his claim of employment for that contractor. Those forms, in addition to corroborating that the beneficiary worked for the contractor as claimed, would have provided some indication of whether or not that work was full-time. Those forms have never been provided, nor has their absence been addressed. 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).<sup>7</sup>

Further still, the original employment verification letter stated that the beneficiary worked for the contractor from 1992 to 1995. That assertion appears to conflict with the beneficiary's assertion that he worked for the petitioner from June 1994 to December 1997. The second employment verification from the same contractor states that he employed the beneficiary from August 14, 1989 to November 1, 1991. That assertion is different from the previous assertion that the beneficiary worked for that contractor from 1992 to 1995. No explanation for this amendment to the beneficiary's employment claim was provided.

Again, as per *Matter of Ho, supra*, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence, and the petitioner must resolve any inconsistencies in the record with independent objective evidence.<sup>8</sup> Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. The evidence submitted is insufficient to demonstrate that the beneficiary has the requisite two years of qualifying employment experience. The petition was correctly denied on that ground.

An additional issue exists in this case that was not discussed in the decision of denial. Since the priority date the petitioner has changed from a limited partnership to a sole proprietorship. That change constitutes a change in ownership.<sup>9</sup> Given such a change in ownership, the present petitioner, the sole proprietorship, is obliged to show that it is the true successor of the original petitioner, the partnership, within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

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<sup>6</sup> Although the record contains evidence that the beneficiary's previous employer was incapacitated on February 19, 2003, that does not explain the failure to include, in his letter of April 22, 2004, the hours the beneficiary worked.

<sup>7</sup> Similarly, the beneficiary's previous employer's incapacity on February 19, 2003 does not explain his failure to provide the requested W-2 forms with his letter of April 22, 2004.

<sup>8</sup> The requested W-2 forms would likely have sufficed to demonstrate whether the beneficiary's employment claims was legitimate.

<sup>9</sup> This would be so even if the principals remained the same.

No such evidence was submitted in this matter. If the approvability of the petition hinged on this issue, the matter would likely require a remand. Because the issue was not raised by the Service Center, however, the petitioner has not been accorded the opportunity to respond to it. Therefore, this issue forms no part of the basis for today's decision.

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.