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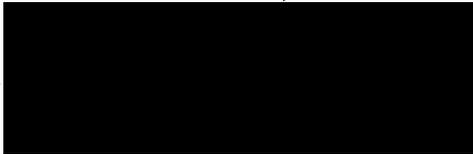
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: [Redacted]
WAC-03-037-51139

Office: CALIFORNIA SERVICE CENTER

Date: FEB 02 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

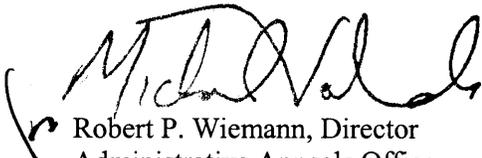
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed.

The petitioner sells wine. It seeks to employ the beneficiary permanently in the United States as a store manager. 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 denied the petition accordingly. The director also determined that the beneficiary was not qualified for the proffered position.

On appeal, the petitioner 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.

The first issue to be discussed in this case is whether or not the petitioner established its 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 March 6, 2001. The proffered wage as stated on the Form ETA 750 is \$49,000 per year.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's 2001 Form 1040, U.S. Individual Income Tax Return with the petitioner's accompanying Schedule C, Profit or Loss from Business statement. Additionally, copies of Forms W-2, Wage and Tax Statements for the years 1994 through 2001, issued to the beneficiary from the petitioner were submitted with the petition.¹ The W-2 forms show that the petitioner paid the beneficiary wages in the amount of \$19,356.25 in 2001.

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 February 4, 2003, the director requested additional

¹ Any evidence preceding the priority date in 2001 is not necessarily dispositive to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 the sole proprietor's complete tax returns and monthly expenses and the petitioner's quarterly wage reports.

In response, the petitioner re-submitted its sole proprietor's 2001 individual income tax return and submitted its 2002 individual income tax return along with the petitioner's Schedule C profit and loss statement. The petitioner also submitted an unaudited profit and loss statement for 2003 as well as the sole proprietor's itemized list of monthly expenses, which amounts to \$1298.78 per month or \$15,585.36 per year. Counsel stated that the sole proprietor objected to submitting its quarterly wage reports for fear of exposing himself civil liability to other staff members and pointed out that the W-2 forms show wages paid to the beneficiary and Item 26 in Part II of the petitioner's Schedule C statement reflects total wages paid to all employees. Finally, counsel states that the sole proprietor holds wine inventory worth \$849,805 that could be used to pay the proffered wage, and submits a corroborating inventory list.

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

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	-\$20,241	\$37,988
Petitioner's gross receipts or sales (Schedule C)	\$217,647	\$339,246
Petitioner's wages paid (Schedule C)	\$23,342	\$25,035
Petitioner's net profit from business (Schedule C)	-\$20,266	\$44,031

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 June 2, 2003, denied the petition.

On appeal, counsel states that nothing in 8 C.F.R. 204.5(g)(2) or the Act, "nor any other legal source" requires petitions to be accompanied by evidence that "convinces" Citizenship and Immigration Services (CIS) of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Also, counsel states that the petitioner's burden of proof does not include persuading CIS of the merits of its petition but rather presenting evidence to show the legal requirements for the benefit sought have been met. Counsel states that the beneficiary is the petitioner's only employee² so the figures on Schedule C reflecting wages paid were all to the beneficiary and reduces the proffered wage obligation accordingly. Counsel states that the sole proprietor did not go bankrupt although reporting a loss in 2001 and figures on tax returns are merely "tax accounting fictions." Finally, counsel asserts that the director erred in not discussing the sole proprietor's personal assets in its wine inventory. The petitioner submits IRS-generated copies of the beneficiary's W-2 forms corroborating the figures presented in the W-2 forms previously submitted.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the

² This is inconsistent with counsel's point about failing to provide quarterly wage reports in response to the director's request for evidence.

proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

The unaudited profit and loss statements that counsel submitted in response to the director's request for evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 established that it employed and paid the beneficiary \$19,356.25 in 2001. Since the proffered wage is \$49,000, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$29,643.75 in 2001. Since no evidence of wages paid to the beneficiary was submitted for 2002, the petitioner is obligated to demonstrate its ability to pay the full proffered wage in that year.

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). Thus, regardless of counsel's assertion that tax figures are fiction, it is established by regulation and case law precedent that tax returns and the data contained therein are competent and probative evidence of a petitioning entity's continuing ability to pay a proffered wage beginning on a priority date.

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. In 2001, the sole proprietorship's adjusted gross income is -\$20,241. Thus, it is impossible that the sole proprietor could support himself on -\$20,241, particularly after further reducing that by his annual stated expenses of \$15,585.36, and in addition to paying the remaining proffered wage of \$29,643.75. In 2002, the sole proprietorship's adjusted gross income is \$37,988. Reducing that by his annual stated expenses of \$15,585.36 leaves \$22,402.64, which is less than the proffered wage of \$49,000 per year. Thus, the petitioner does not demonstrate that it has the continuing ability to pay the proffered wage out of its net income.

Counsel asserts that the sole proprietor's personal assets in the form of the petitioner's wine inventory should be considered as a source of additional income from which to pay the proffered wage. The director noted that the wine inventory was "an unaudited internally compiled and generated inventory statement." The AAO concurs with the director's assessment. The unaudited wine inventory is simply not an asset that could practically support the petitioner's continuing ability to pay the proffered wage beginning on the priority date.³ The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established by a preponderance of evidence that it has the continuing ability to pay the proffered wage beginning on the priority date and this portion of the director's decision is affirmed.

The second issue to be discussed in this case is whether or not the beneficiary is qualified for 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 March 6, 2001. 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. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany 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 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 store manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

³ Assets which have bolstered sole proprietorship petitions have included cash in financial institutions or other assets that are easily liquifiable and would not damage the petitioning entity's existence or continued financial sustenance through liquidation.

14.	Education	
	Grade School	8
	High School	4
	College	0
	College Degree Required	Blank
	Major Field of Study	Blank

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

Manages retail store selling imported wines. Formulates pricing policies on merchandise according to requirements for profitability of store operations. Coordinates sales promotion activities and prepared merchandise displays and advertising copy. Performs sales, takes inventory, reconciles cash with sales receipts, keeps operating records for accountant. Answers customer complaints and inquiries. Locks and secures store. Orders wines to replace merchandise or orders new wines in response to market demand.

Alternatively, an applicant could have four years of experience in the related occupation of assistant manager of a wine store. Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he has been employed with the petitioner as an assistant manager of its wine imports and sales since November 1994 performing the following job duties: "Assists in managing daily operations of wine store. Helps store manager to prepare merchandise displays and advertising copy, take inventory, reconcile cash with sales receipts, and keeping records. Performs sales work."

With the initial petition, the petitioner submitted W-2 forms to evidence the beneficiary's experience gained with the petitioner. Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on February 4, 2003. The director requested evidence of the beneficiary's qualifications in the form of an employer's letter, IRS-generated W-2 forms, or pay stubs or tax returns.

In response to the director's request for evidence, the petitioner provided copies of handwritten W-2 forms and two pay stubs in 2002. In addition to denying the petitioner based upon the petitioner's inability to pay the proffered wage, the director also denied the petition on June 2, 2003 on the basis that the petitioner failed to provide requested evidence to prove the beneficiary's qualifications to perform the duties of the proffered position.

On appeal, counsel submits copies of IRS-generated W-2 forms for 1994 through 2001 and asserts that the director erred in failing to accept the handwritten W-2s and petitioner and beneficiary attestations made under the penalty of perjury.

The regulation at 8 C.F.R. § 204.5(1)(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.

The AAO finds that the petitioner has met its burden of proof through submission of its W-2 forms, both the handwritten ones and the IRS-generated ones. These forms illustrate that the beneficiary has been employed by the petitioner since 1994. There is no indication of adverse information concerning the beneficiary's attestation on the ETA 750B. An individual income tax return for 2001 and pay stubs submitted by the beneficiary in connection with his application to adjust status to lawful permanent resident indicates that he is employed by the petitioner in the capacity of "office manager." While the petitioner should have presented a letter verifying the exact capacity of employment in which it employed the beneficiary, the AAO is exercising favorable discretion and accepting the W-2 forms, attestations, and individual income tax return job title as preponderance of true evidence that the petitioner has been employing the beneficiary as an assistant manager of its wine store for at least four years. Thus, this portion of the director's decision is withdrawn and it is determined that the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position.

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 director's decision is affirmed in part and withdrawn in part. The appeal is dismissed.