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JAN 18 2005



FILE: WAC 03 013 52730 Office: CALIFORNIA SERVICE CENTER Date:

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 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 company that sells equipment, fixtures, and supplies.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a refrigeration technician. 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 or that the beneficiary had the required work experience as outlined in Form ETA 750. Accordingly, the director denied the petition.

On appeal, counsel states that the petitioner does possess sufficient funds to pay the beneficiary and the beneficiary does have the two years required work experience. Counsel submits new documentation.

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

The regulation 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 regulation at 8 C.F.R. § 204.5(l)(3) also 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 worker.* If the petitioner 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 . . . The minimum requirements for this classification are at least the two years of training or experience.

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<sup>1</sup> The name of the petitioner's business is not shown on the Form I-140; however, the business is identified elsewhere in the record as California Cash Register, and CCR Market Equipment Fixtures & Supplies.

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 12, 2001. The proffered wage as stated on the Form ETA 750 is \$23.11 per hour, which amounts to \$48,068 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted three City of Los Angeles Tax Registration certificates, a seller's permit from the California State Board of Registration, and unaudited statements of income for the years 1999 and 2000. The petitioner left blank the spaces on the petition for number of employees, date of establishment, gross and net annual income.

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 March 12, 2001, 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 also requested an Internal Revenue Service printout or pay stubs for the beneficiary; Form DE-6, California Quarterly Wage Reports for all the petitioner's employees for the last four quarters, as well as a list of job titles and duties of each employee listed on the DE-6 Forms, and finally, all schedules and tables that accompany any submitted tax forms.

In response, the petitioner submitted an unaudited statement of income for 2001; IRS Form 1040A for the beneficiary's Federal income tax returns for 1999, 2000, and 2001; Form 540, the beneficiary's state income tax return for 2001; four W-2 forms for the beneficiary for the years 1999, 2000, 2001, and 2002; and a Form DE-6, for the quarter ending on December 31, 2002.

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 May 28, 2003, denied the petition.

On appeal, counsel submits Federal tax returns for the petitioner for the years 2001 and 2002. Counsel states that this evidence was not available at the time the petition was submitted or when evidence was requested by the service center. Counsel also submits Form DE-6, Quarterly Wage reports, for the last five quarters from March 31, 2002 to April 1, 2003. Finally counsel states that the beneficiary's correct date of entry to the United States is December 1998.

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. With regard to the W-2 forms submitted by the petitioner, the years 1999 and 2000 are before the priority date of March 12, 2001, and therefore are not relevant to the proceedings. The W-2 forms for the years 2001 and 2002 are relevant evidence and establish that the petitioner paid the beneficiary \$14,735 in 2001, and \$15,839 in 2002. Since the proffered annual salary is \$48,068, the petitioner did not pay the beneficiary a sum equal to or greater than the proffered salary at the time the priority date was established.

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).

On appeal, counsel describes the petitioner's federal income tax documents for 2001 and 2002 as new evidence that was not available when the petition was submitted, or at the time when the director requested the documentation in his request for further evidence. Counsel's explanation of the late submission of the petitioner's federal income tax returns for 2001 and 2002 is not persuasive. The 2001 federal income tax form was due on April 15, 2002; however, there is no evidence in the record of a late filing of the petitioner's tax returns or a request for an extension of time to file the documents for either year. Without documentary evidence to substantiate them, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, 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). In his request for further evidence, the director requested evidence as to the petitioner's ability to pay the proffered wage from March 12, 2001 to the present. The director stated that the evidence could include copies of annual reports, federal tax returns with appropriate signatures, or audited financial statements. However, the petitioner did not submit such documents in its response, nor did it provide any explanation for why such documents were not submitted. While the director also requested the beneficiary's W2 forms, and the petitioner did provide these documents, these documents would not be relevant evidence with regard to establishing the petitioner's net income for 2001 and 2002.

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 or an explanation of why the documents were not available at the time the petitioner responded to the director's request for further evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal for either tax year 2001 or 2002. Therefore, the petitioner cannot establish its ability to pay the proffered wage based on its net income reflected on its federal income tax returns.

In addition, the unaudited financial statements that counsel submitted with the petition 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, and as such, are not probative of a petitioner's ability to pay the proffered wage.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. See *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 (7<sup>th</sup> Cir. 1983). This is the reason that a review of the ability to pay the proffered wage includes consideration of the sole proprietors' household expenses, as well as the adjusted gross income set forth on page one of the tax return.

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 proprietors are a couple filing jointly who list an aunt and an uncle as dependents on their Form 1040A. The petitioner must illustrate that it can pay the remainder of the proffered wage for each year, after subtracting the wages it actually paid the beneficiary during those years as documented by the beneficiary's W2 forms. In the instant petitioner, the remaining salary to be paid would be \$33,333 in 2001 and \$32,229 in 2002. As stated previously, the petitioner did not provide sufficient explanation for the late submission of its federal income tax returns, and, thus, the two income tax returns submitted by the petitioner on appeal are not considered in this proceeding. Without the federal income tax returns for the petitioner for the year 2001 and onward, as well as an accounting of the sole proprietors' annual household expenses, the petitioner, as a sole proprietor, cannot establish its ability 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 during the salient portion of 2001 or subsequently during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage as of the priority date.

With regard to the second issue raised by the director, namely, the beneficiary's work experience, Form ETA 750 indicates that the beneficiary needed two years of work experience to qualify for the position. The petitioner did not indicate any training or educational requirement beyond graduation from high school. The director requested the following documentation in his request for further evidence: evidence on the previous employer's letterhead showing the name and title of the person verifying the information, and stating the beneficiary's title, duties, and hours of work and the dates of employment, IRS W-2 forms or pay stubs for the beneficiary; and verifiable evidence for work experience outside the United States that can establish that the applicant has meet the ETA 750 labor certification requirements.

In response, the petitioner submitted a letter from [REDACTED] owner of [REDACTED]. This letter stated that the beneficiary had worked for [REDACTED] from December 1998 to March of 1999. Mr. [REDACTED] provided no proof of employment, such as salary stubs. [REDACTED] Nunez Portales, [REDACTED] Mexico City, Mexico, wrote a second letter. According to the uncertified translated version of the letter, the beneficiary worked for this company from March 9, 1997 to November 16, 1998 as a refrigeration technician.

The petitioner also provided W-2 forms that documented the employment of the beneficiary by the petitioner for the years 1999, 2000, 2001, and 2002.

In his decision, the director questioned the uncertified English translation of the letter from PANAMCOAZTECA, and noted that this letter lacked further substantiation of the beneficiary's work experience with the company, such as a work identification, or pay stubs. The director also noted that the letter from Valmon Appliance did not state the beneficiary's title, duties, and hours worked on a weekly basis. The director further noted that Form ETA 750 indicated that the beneficiary was working for [REDACTED] in Zamora, Mexico, during the same period of time that he was working for PANAMCOAZTECA. Finally the director questioned the beneficiary's arrival date into the United States, because the I-140 petition stated that the beneficiary arrived in the United States on October 5, 1998, while the letter from [REDACTED] indicated that the beneficiary was still working in Mexico in November 1998.

On appeal, counsel submits a new letter from PANAMCOAZTECA, the beneficiary's previous employer in Mexico, along with a certified translation. The new letters from manager of a local [REDACTED] states that the beneficiary worked for the company from March 9, 1998 to November 16, 1998 as a commercial and industrial refrigeration technician for approximately 60 hours a week. The petitioner also submitted a letter from [REDACTED] administrative subdirector, [REDACTED] Mexico [REDACTED] states that the beneficiary was employed by the hospital from April 15, 1995 to March 6, 1998, as chief general technician in charge of servicing and repairing refrigerators, air conditioners, and electrical appliances. Counsel also submits a document from the [REDACTED] that states that the beneficiary completed studies in a vocational program of electrical mechanic technician. This document does not indicate how many years or hours of studies the beneficiary undertook to complete his training, or when he completed the training. In addition, counsel submits a new letter from [REDACTED] that states the beneficiary worked as a refrigeration technician for approximately 48 hours per week, from December 1998 to March 1999. Finally counsel states that no wage documentation exists for the beneficiary from [REDACTED] Lynwood, California, as the beneficiary was paid in cash.

Upon review of the record, the petitioner has not established that the beneficiary has the requisite two years of work experience, as outlined in the regulations. This is due primarily to the conflicting nature of the documentation submitted to establish the beneficiary's work history, both in Mexico and in the United States. As correctly noted by the director in his decision, the ETA Form 750 indicates that the beneficiary started working for [REDACTED] in Zamora in 1997 for approximately forty hours a week. The same form does not indicate when the beneficiary stopped working for this company. On appeal, the petitioner submits a letter from the [REDACTED] a that states the beneficiary worked for the hospital from April 15, 1995 to March 6, 1998 as its chief general technician. The petitioner provided no further explanation of the beneficiary's work with the hospital, such as whether this employment was part-time or full-time, or proof of employment. This letter further confuses the record, rather than clarifies it, with regard to the beneficiary's actual work experience during 1995 to 1998. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, the two letters described above are given no weight in these proceedings.

With regard to the second PANAMCOAZTECA letter submitted by counsel on appeal, this letter contains more specific information as to the beneficiary's work schedule and duties while working as a refrigeration

technician for nine months, from March to November 1998. The AAO finds the contents of this letter detailed and specific enough to establish that the beneficiary has nine months of relevant work experience as a refrigeration technician in Mexico.

In addition, the director's comments with regard to the beneficiary's entry date into the United States in October 1998, as stated on Form ETA 750, and the documentation of the beneficiary's work experience in Mexico in December 1998, with either [REDACTED] or both companies, appear well founded. Although counsel asserts that the beneficiary entered the United States in December 1998, rather than October 5, 1998, this assertion is not sufficient to establish the beneficiary's entry date into the United States. Without documentary evidence to substantiate them, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the record is not clear as to when the beneficiary began working in the United States.

With regard to the beneficiary's work experience in the United States, the petitioner has not provided sufficient evidentiary documentation to establish another fifteen months of relevant work experience before the priority date of March 12, 2001. It is noted that the work the beneficiary performed for the petitioner after the priority date would not count toward the requisite two years of work experience. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. Any work the beneficiary performed as a refrigeration technician from the priority date of March 12, 2001 to December 2001, and throughout the year 2002 would not count toward the requisite two years of work experience. With regard to the beneficiary's work in the United States, the owner of Valmon Appliance states that the beneficiary worked for him from December 1998 to March of 1999 for forty-eight hours a week; however, on appeal, counsel states that the petitioner can not substantiate this assertion because Valmon Appliance paid the beneficiary in cash. 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). Thus, the three months of work experience with Valmon Appliance is not counted toward the requisite two years of experience. In addition, although the W2 wage forms submitted by the petitioner establish that the beneficiary worked for the petitioner during the years 1999, 2000, and 2001, based on the wages paid, the record is not clear as to whether the beneficiary worked on a full-time or part-time basis. Therefore, the petitioner has not provided sufficient documentation with regard to the beneficiary's work experience in the United States prior to the priority date to establish additional relevant work experience as a refrigeration technician. Thus, the petitioner has provided sufficient documentation to only establish nine months of relevant work experience in Mexico prior to the priority date.

Without more persuasive evidence, the petitioner has not established that the beneficiary had two years of work experience at the time the original petition was filed. 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 with regard to the petitioner's ability to pay or to the beneficiary's qualifications to perform the duties of the position.

**ORDER:** The appeal is dismissed.