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20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6

FILE: WAC 00 002 50149 Office: CALIFORNIA SERVICE CENTER Date: **JAN 25 2005**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

**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 employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a marine canvas manufacturer. It seeks to employ the beneficiary permanently in the United States as a canvas worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that the position met the requirements of the classification sought. The AAO concurred with the director's decision on appeal due to the petitioner's lack of providing a brief and additional evidence as promised by the petitioner.

On motion, counsel submits a brief and previously submitted 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.

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

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

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

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. The filing date of the petition is the initial receipt in

the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is December 5, 1996.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education 12 Yrs	College Degree Required 0 Yrs	
Experience Job Offered 1Yr.	Related Occupation 0 Yrs.	Related Occupation 0 Yrs

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of canvas worker must have one-year experience as a canvas worker.

On August 23, 2000, the director requested that the petitioner provide an original labor certification (Form ETA 750) issued by the Department of Labor and to provide evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence, to be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director also informed the petitioner of the following:

The petition is being filed under E31, a skilled worker (requiring at least two years of specialized training or experience. However the ETA 750 indicates that only one year of experience is required. Therefore, the beneficiary does not qualify as an E31.

The petitioner may request that the petition be reclassified as an EW-3, any other worker (requiring less than two years training or experience).

In response, the petitioner, through counsel, submits the original labor certification, a description of the position of canvas worker with SVP (Specific Vocational Preparation) number, and a definition of SVP with its various levels. Counsel states:

Your letter mentioned above indicated that we have filed for the wrong classification. It appears that there was a mistake on the part of the DOL. On the original ETA 750A bottom right hand corner, the DOL indicated that the Occupational Code for this position is 739.381-010 which is the code for canvas worker. I have enclosed a copy of the description of this code. At the bottom of

this description, the Specific Vocational Preparation (SVP) 7 code indicates that the minimum experience for this position is 2 years experience which our client possess[es]. Apparently DOL failed to note an amendment in item #14 from 1 to 2 years of experience on the ETA 750A.

On February 27, 2001, the director denied the petition noting that it is "not the Service's prerogative to assume the Dept. of Labor made a mistake. It is bound by the requirements on the ETA 750." The director also noted that the minimum qualifications/experience required is less than two years; therefore, the position cannot be classified as a skilled worker under 203(b)(3)(a)(i) of the INA.

On motion, counsel submits previously submitted documentation and states:

On August 23, 2000 the Service requested additional evidence whereby in addition to the new evidence the Service determined that the applicant did not qualify as an E31 and requested to be reclassified as EW3, any other worker. On the response it was explained to the Service that the EDD and DOL had certified the ETA 750 A and B as a skilled worker assigning the occupational code requiring spv7 which carries two years or more experience. However, item #14 of the ETA 750A was not corrected to show 2 years rather than one year. (This appears to have been an involuntary omission by the certifying officer, rather than the true experience requirement indicated in the occupational code assigned carrying the requirement of two years experience.)

Pursuant to Immigration Law procedures addressing post certification denial issues, indicates that amendments to certifications once the labor certification has been approved by the DOL certifying officer (CO) through issuance of the final determination, DOL policy bars amendment of the approved labor certification, except to correct mistakes made by the certifying officer, e.g. the spelling of the employer's or alien's name. In this case, the certification was approved as a skilled worker, without changing in item #14 of the ETA 750 A to show 2 years rather than 1 year experience. The certification also was approved under a **specific** occupational code carrying **specific** SPV 7 requirement of two years or more experience. It is reasonable to believe that the intent by both EDD officer and DOL certifying officers by giving the code assigned and the amendment made was to override the one year entered on item #14.

If changes occur in the facts surrounding the certification, it is the INS role to evaluate the changes to decide whether they affect the validity of the certification. If the changes do not affect the validity of the certification, no changes to the certification are needed. In the present case, the change needed from one year to two years on item #14 of the ETA 750 A, do not represent invalidity of the certification. Rather, [it] affects the preference category that

INS should classify the I-140 petition of that of a skilled worker or unskilled worker. The Service failed to review the amendments previously made by employer an[d] approved by the EDD prior to certification, including the establishment of experience required for the qualification to the job offer according to the occupational code assigned and determined the overriding of the one year experience. The certifying officer, Mrs. [REDACTED] at time of certifying Form ETA 750 A and B affirmed the approving of the amendments made by the employer including the experience requirement submitted prior to certification to the EDD. But for, the omission of the change that should had [sic] been made either at the EDD level or the DOL level by entering the number 2 instead of number 1 showing on item #14 of the ETA 750A, the I-140 application would have no reasons for denial. The Service could have infer[red] that the omission was more of a "typo" rather than a requirement governing in the ETA 750 A rendering applicant not classifiable as a skilled worker under 203(b)(3)(A)(i) of the INA. . .

The AAO is not persuaded by counsel's statement. Nowhere in the record is there any documentation containing responses to the assessment letters from the Employment Development Department where the employer requests that the experience requirement be changed from one year to two years. The determination of whether a worker is a skilled worker or other worker is based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor. *See* 8 C.F.R. § 204.5(1)(4). Furthermore, 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Beyond the decision of the director, it is noted that the evidence submitted does not appear to clearly substantiate the petitioner's continuing ability to pay the beneficiary's proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

The first issue with the petitioner's ability to pay the proffered wage concerns the ETA 750. Under item ten, Total Hours Per Week, the ETA 750 shows 7.50 for basic hours and no overtime. If this is indeed the case, the petitioner is not offering the beneficiary a full-time, permanent position as required by 20 C.F.R. § 656.3.

The second issue deals with the lack of evidence in the record to establish the petitioner's ability to pay the proffered wage. The beneficiary's proposed wage offer is \$7.25 per hour, or \$2,827.50 per year (7.50 hours per week) or \$14,137.50 per year (7.50 hours per day). The petitioner must establish the ability to pay this proposed wage as of the visa priority date of December 5, 1996 and continuing until the beneficiary obtains lawful permanent resident status. In a letter, dated December 3, 1997, to

petitioner as a sewer "for the last three years." However, there is no evidence in the record of the beneficiary's Forms W-2, Wage and Tax Statements. It is noted that the director did not request copies of the beneficiary's Forms W-2 with her request for evidence. It is also noted that although the petitioner provided copies of its 1996 through 1999 Forms 1040, U.S. Individual Income Tax Returns, these copies were not complete, but consisted primarily of Schedules C, Profit or Loss From Business, for the years 1996 through 1998.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on December 5, 1996.

The petitioner's 1996 Schedule C reflected a gross receipts of \$64,784, wages paid of \$0, and a net profit of \$3,774. The petitioner's 1997 Schedule C reflected gross receipts of \$93,147, wages paid of \$21,639, and a net profit of \$8,833. The petitioner's 1998 Schedule C reflected gross receipts of \$78,370, wages paid of \$0, and a net loss of -\$37,372. The petitioner's 1999 tax return reflected an adjusted gross income of \$47,366, gross receipts of \$150,286, wages paid of \$41,020, and a net profit of \$7,223.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 1996 through 1999.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. In addition, they 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). The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. In the present case, there is no evidence in the record of the petitioner's household expenses or evidence that the petitioner possesses other resources, such as personal bank accounts, CD's, etc., with which to pay the proffered wage.

The evidence in the record does not establish the petitioner's continuing ability to pay the proffered wage from 1996, at the time of the priority date.

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.