

Identifying information deleted to  
prevent disclosure of warrants  
in violation of privacy



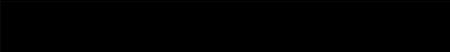
U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



B6

FILE: WAC 03 012 50959 Office: CALIFORNIA SERVICE CENTER Date: **JAN 27 2005**

IN RE: Petitioner:   
Beneficiary: 

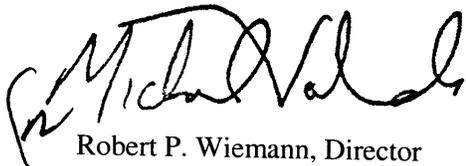
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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 roofing company. It seeks to employ the beneficiary permanently in the United States as a journeyman roofer. 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, that the job offered was a full time position, and that the beneficiary had the requisite experience. Accordingly, the director denied the petition.

On appeal, counsel submits a new statement from the petitioner and resubmits previous 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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, 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 5, 2001. The proffered wage as stated on the Form ETA 750 is \$23.27 per hour, which amounts to \$48,401 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1989, to have a gross annual income of \$22,117 in 2001, and to currently employ no workers. In support of the petition, the petitioner submitted its federal income tax forms for 2000 and 2001 with accompanying schedules.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 13, 2003, 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 with accompanying schedules, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In his request for further evidence, the director also questioned the beneficiary's work experience.

Furthermore, the director noted that the petitioner was a sole proprietor, and requested that the petitioner submit a statement of monthly expenses for the petitioner's family that included the family's household living expenses, such as housing, car payments, insurance, and utilities. The director stated that if a sole proprietor would use personal assets to pay the wage, evidence must be submitted to verify that the petitioner is in possession of sufficient assets to pay a continuous wage. Finally, the director requested Form DE-6, a state of California quarterly wage and withholding tax document, for all employees for the last four quarters.

In response, the petitioner submitted a letter from Vinny Le, Operations Manager, Westminster Roofing Co. Inc., that stated the company had employed the beneficiary as a roofer from March 1997 to November 2000. The petitioner also submitted a letter from Chuck Hedlund, written on the petitioner's letterhead. Mr. [REDACTED] identified as an accountant, and stated the following:

Our Schedule C for 2002 includes a deduction in the amount of \$57,048 for labor. We expect to replace this expense with wages paid to the petitioner. It is also anticipated that with his expertise our sales will increase significantly. . . .

Presently we have no employees[, and] therefore cannot submit copies of [p]ayroll [t]ax [r]eturns.

In order to handle our planned expansion we have formed a corporation and will payroll the petitioner through the corporation upon approval of his petition.

The petitioner also submitted a document entitled "Payroll Estimate" that provides a breakdown of the employee and employer deductions for an annual wage of \$48,301.76. The petitioner also resubmitted its 2001 IRS income tax form, which indicates the petitioner listed an expense of \$57,048 under Schedule C, Part III, line 39, Other costs.

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, namely, March 5, 2001, and, on May 21, 2003, denied the petition. The director examined Mr. Le's letter of employment verification and further noted that the petitioner had not established that the beneficiary had four years of experience as a roofer prior to the priority date. Finally the director noted that the petitioner's gross adjusted business income indicated that the petitioner was not contracted continuously throughout the year for roofing services. As a result, the director stated that he was not convinced that the job offered to the beneficiary was a permanent full time position.

On appeal, counsel resubmits the petitioner's 2000 and 2001 federal income tax returns, with accompanying Schedules C; the petitioner's 2001 document with regard to vehicle/unreimbursed expenses; the petitioner's accountant's letter of March 25, 2003; and a new letter from the petitioner. This latter document states that the beneficiary will be a very valuable employee for the petitioner's company, and asks that Citizenship and Immigration Services (CIS) consider that the petitioner's business will increase dramatically based on the beneficiary's experience in the roofing business.

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. As stated on the ETA Form 750, the petitioner did not employ or pay the beneficiary prior to or following 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, 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); *Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner submitted its 2000 and 2001 federal income tax returns with the original petition. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date and continuing. Since petitioner's federal income tax return for 2000 is not dispositive of the petitioner's ability to pay the proffered wage after the priority date of March 5, 2001, it will not be considered in these proceedings. With regard to the petitioner's 2001 federal income tax return, the petitioner filed as

married, but filing separately and listed no dependents. The 2001 tax return document reflects the following information:

Proprietor's adjusted gross income (Form 1040)	\$ 22,117
Petitioner's gross receipts or sales (Schedule C)	\$159,189
Petitioner's wages paid (Schedule C)	\$ 0
Petitioner's net profit from business (Schedule C)	\$ 23,770

The petitioner had to establish that it had sufficient funds to pay the beneficiary a salary of \$48,401 in 2001. The petitioner's 2001 adjusted gross income of \$22,117 is not sufficient to cover the proffered wage as of the priority date of March 5, 2001.

In addition, 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 (7<sup>th</sup> 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 his 2001 federal income tax return, the petitioner indicated he is married and filing separately, and he listed no dependents. Although the petitioner submitted documentation on vehicle expenses, he submitted no further information on any of his personal expenses. Such a listing would have to be considered in the analysis of the petitioner's ability, as a sole proprietor, to pay the proffered wage. Without more persuasive evidence as specifically requested by the director, the petitioner has not established its ability, as a sole proprietor, to pay the proffered wage in 2001.

In addition, the record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage subsequently during 2002. Although the petitioner's federal income tax return for 2002 could have been submitted after April 15, 2003, a date prior to May 8, 2003, when the petitioner's response to the director's questions was due, the petitioner did not submit any additional federal income tax information. Thus, there is no further information in the record as to whether the petitioner would have been able to pay the proffered wage in 2002.

As noted by the petitioner's accountant, Part III of Schedule C indicates that the petitioner listed \$57,048 as "other costs." This petitioner's accountant in his letter described this sum as a deduction for labor for the tax year 2001. However, the statement provided by Mr. Hedlund contains unclear and unsubstantiated statements. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any

inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Mr. [REDACTED] refers to a Schedule C for 2002, although the Schedule C submitted to the record is for the year 2001. It is also noted that although the petitioner stated that it had no employees, the letter from Mr. [REDACTED] is written on the petitioner's letterhead and refers to the petitioner's future activities as "our" activities. Thus, it is not clear whether the petitioner has additional employees. Finally, the accountant stated that "we" had formed a corporation and would payroll the petitioner through the corporation. While the accountant may have meant that the petitioner had formed a corporation and that the beneficiary would be paid through the corporation, there is no information submitted to the record with regard to this corporation and its assets.

Without more complete clarification of the "other costs" expense, and any new corporate entity, it is not possible to judge whether the petitioner has the ability to pay the proffered wage. 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). Based on such unsubstantiated assertions and confusing statements, Mr. [REDACTED] statement is given no weight in this proceeding.

Furthermore, although Schedule C of the petitioner's 2001 federal income tax return does reflect an expense item identified as "other costs"; there is no information in the record as to how an expense listed as "other costs" would be converted into a 2001 or 2002 salary for the beneficiary. It is unclear whether this sum was spent in the year 2001 for labor provided by either the self-employed petitioner, or someone else, or is a projected expense based on the possible employment of the beneficiary.

Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing through 2002. Without more persuasive evidence, the record only reflects that in 2001, the petitioner showed a net income of only \$22,117, and did not, therefore, demonstrate the ability to pay the proffered wage from the priority date and onward.

With regard to the second issue raised by the director, namely, the beneficiary's work experience, Form ETA 750, Part A, indicates that the beneficiary needed four years of work experience in roofing and a tenth grade education to qualify for the position. The director requested the following documentation in his request for further evidence: evidence of the beneficiary's previous employment through the submission of letters 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. The director also stated that the petitioner could submit IRS W-2 forms or pay stubs for the beneficiary.

In response, the petitioner submitted a letter on company letterhead from Vinny Le, Operations Manager, Westminster Roofing Company, Garden Grove, California. Mr. Le stated that the beneficiary was employed by the company as a roofer from March 1997 to November 2000. In his decision, the director noted that the beneficiary's U. S. employer had not identified the number of hours worked by the beneficiary, or provided any further evidence of work, such as a work identification, tax returns, or pay stubs. The director determined that the petitioner had not established that the beneficiary had the requisite four years of work experience that the petitioner required.

On appeal, counsel submits no further documentation with regard to the beneficiary's work experience in Mexico or in the United States prior to the priority date of March 5, 2001.

Upon review of the record, the petitioner has not established that the beneficiary has the requisite work experience. First, the beneficiary's total work experience time in the United States is not sufficiently established in the record. As correctly noted by the director, the previous U.S. employer did not provide sufficient documentation of employment, such as pay stubs, or a work identification. Although the beneficiary described this position as a 40 hour a week job in the ETA Form 750, Part B, the employer's subsequent documentation does not establish whether the beneficiary worked on a full time, part time, or hourly basis. It should be noted that even if the beneficiary's total work experience as a roofer in the United States had been adequately documented, March 1997 to November 2000 is a period less than four years. The beneficiary would have still lacked four months of work experience to fulfill the requisite four years of work experience. Second, although the ETA Form 750, Part B, indicates that the beneficiary worked as a roofer for Antonio Hernandez in Acapulco, Mexico, from August 1987 to December 1996, the petitioner submitted no documentation to further substantiate this employment. 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).

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. The ETA 750 indicated that the petitioner required the beneficiary to have four years of experience in the roofing industry and a tenth grade education. The petitioner has not provided sufficient documentation with regard to the beneficiary's work experience in the United States or in Mexico to establish four years of work experience as a roofer, or a tenth grade education prior to the priority date. Thus, the petitioner has not established that the beneficiary has sufficient experience to perform the job.

Finally, the director's question as to whether a full time permanent position exists for the beneficiary is well founded. The instant petition established that the petitioner's business was established in 1989, and that it had no employees, other than the self-employed petitioner. The record contains no information on the present or anticipated business volume upon which to establish a level of work sufficient to maintain a full time permanent employee. On appeal, the petitioner states that the beneficiary will be a very valuable employee for the petitioner's company, and asks that CIS consider that the petitioner's business will increase dramatically based on the beneficiary's experience in the roofing business. However, the petitioner provides no detail or documentation to explain how the beneficiary's employment will significantly increase profits for his business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Treasure Craft of California*. Nevertheless, the AAO will not make a finding on this issue, as the ability to pay and the beneficiary's experience issues already warrant dismissal of the petition.

In addition, the petitioner has to establish that it has the ability to pay the proffered wage and that the beneficiary is qualified to perform the job at the time of the priority date. With regard to employment-based visa petitions, a petitioner must establish the elements for the approval of the petition at the priority date for the labor condition application. Despite the contention that the beneficiary will increase profits, a petition may not be approved if the beneficiary does not have the requisite experience at the priority date, or the petitioner

does not have sufficient financial resources, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.