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U.S. Citizenship
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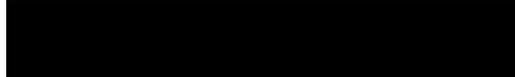
Office: CALIFORNIA SERVICE CENTER

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape services company. It seeks to employ the beneficiary permanently in the United States as a tree-trimming supervisor. 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 the beneficiary had the required work experience as outlined in Form ETA 750. Accordingly, the director denied the petition.

On appeal, counsel states that there is no way to obtain a new letter from the beneficiary's former employer, as the business no longer exists. Counsel submits a new letter of prior experience to establish the beneficiary's work experience.

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(1)(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.

With regard to the beneficiary's work experience, the only issue raised by the director in his decision, 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. On ETA 750 B, the beneficiary stated that he worked from October 1983 to August 1985, and from March 1987 to March of 1988, for ██████████ ██████████ in Santa Ana, California. The beneficiary described his work as follows: "I supervised and trained works [sic] in cutting large trees by cutting branches, Etc. I worked with climbing equipment and cut some palm trees as high as 50 to 60 feet." The record also contains a letter to the Department of Labor Employment Development Department from Centro Latino, Santa Ana, California. The letter requested that the ETA 750 B Item 15a be amended to show that the beneficiary worked for ██████████ ██████████ and that he worked 40 hours a week, and trimmed, cut, supervised and trained other employees. The letter added that the beneficiary was in charge of cutting large palm and tall trees, from October 24, 1983 to August 12, 1985 and from March 1987 to March 1988.

On August 14, 2000, 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. The director also requested IRS W-2 forms for 1983, 1984, 1985, and 1987/1988 while employed with [REDACTED] nc. as a supervisor.

The petitioner submitted the beneficiary's tax documentation from 1985, 1986, 1987, and 1988. The petitioner stated that due to the length of time since 1983 and 1984, the beneficiary was unable to locate the relevant tax documentation for these years. The tax documentation included the beneficiary's W-2 statement for 1985 and his 1040A Personal income tax return. In 1985, the documentation indicates that [REDACTED] Service paid the beneficiary \$6,185. Another employer, Our Lady of Guadalupe [REDACTED] paid the beneficiary \$4,117. The beneficiary's 1986 tax documentation indicated that [REDACTED] paid the beneficiary \$9,767.50, and this sum was the only income reported on the beneficiary's 1040A income tax return. The beneficiary's 1987 W-2 form indicated that [REDACTED] Services paid the beneficiary \$7,183.14, and the beneficiary's tax return for 1987 indicated that the beneficiary's wages for that year were \$7,219. The beneficiary's 1988 W-2 form indicated that [REDACTED] paid the beneficiary \$3,074, and his 1040A tax returns indicate that this sum was his only salary for the year. The petitioner also submitted a letter dated February 9, 1988 from [REDACTED] President, [REDACTED] Service, Inc. Santa, Ana, California. In this letter, Mr. [REDACTED] stated that he was familiar with the beneficiary's employment history with the company. Mr. [REDACTED] further stated that the beneficiary was employed with his company from October 24, 1983 to August 12, 1985 and from March 9, 1987 to the date of the letter. Mr. [REDACTED] described the beneficiary's work as landscaper. In an attached document, Mr. [REDACTED] stated that the information provided in his letter was taken from official company records. In a subsequent request for further evidence, the petitioner submitted an employee list that identified the beneficiary as a foreman that the petitioner hired on September 20, 1994. This document also stated that the beneficiary's hourly rate of pay was \$20.

On October 1, 2003, the director denied the petition. In his decision, the director stated that the petitioner required at a minimum two years of experience as a tree-trimming supervisor. The director noted that the letter from Mr. [REDACTED] the beneficiary's former employer, stated that the beneficiary was a landscaper, and made no reference to the beneficiary ever having held the position of a supervisor or a tree-trimming supervisor. The director determined that based on the documentation submitted, the petitioner had not established that the beneficiary had met the minimum work experience listed don the Form ETA 750B at the time the request for labor certification had been filed. As a consequence, the director determined that the beneficiary was not qualified for the position.

On appeal, counsel states that [REDACTED] Maintenance Service no longer exists and that there is no way to obtain a new employment experience letter for the beneficiary from this business. Counsel then submits a new letter of prior experience for the beneficiary. In this undated letter [REDACTED] owner of [REDACTED] Maintenance, Anaheim, California, states that the beneficiary worked as a supervisor for his company from August 1991 to December 1994. Mr. [REDACTED] further stated that the beneficiary supervised its employees in tree trimming, design and maintenance of gardens and in training new workers using power tools. Neither counsel nor Mr. [REDACTED] provided any further substantiation of the beneficiary's work experience in the early 1990's, such as pay stubs and W-2 forms.

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 in the United States. As noted by the director, the initial letter submitted by the petitioner from ██████████ Maintenance Service ██████████ is limited in its description of the beneficiary's work. Given the age of the letter, it may have been created for other purposes than establishing precise job responsibilities. Nevertheless, it is not sufficient to establish the beneficiary's work experience. On appeal, counsel states that there is no way to obtain a new letter from the beneficiary's previous employer, as the business no longer exists. However, if the former owner of the business or former co-workers are not deceased, notarized affidavits may be used to establish more clearly the nature of the beneficiary's work with ██████████ as well as the hours per week, and wages.

With regard to the W-2 forms submitted by the petitioner for the beneficiary, this documentation as to the beneficiary's work with ██████████ Maintenance Service does not establish the length of time that the beneficiary worked during the years 1985 to 1988. In 1985, it appears that over half of the beneficiary's income derived from the ██████████ Maintenance employment; however the beneficiary also received wages from ██████████ Church in Santa Ana, California, which suggests that the beneficiary's work with ██████████ was not fulltime. In the year 1986, based on the beneficiary's W-2 form and individual income tax form, the beneficiary did not work for ██████████. In the year 1987, it appears that ██████████ was the beneficiary's sole employer and that the beneficiary earned \$7,219; however, again, it is not clear whether the beneficiary worked full time or part time. For the year 1988, the beneficiary's W-2 Form and Form 1040 indicate that he earned \$3,074 for 1988 and his employer was ██████████ however, the beneficiary's wages suggest that this was not a fulltime position. In sum, while there is sufficient documentation in the record to establish that the beneficiary worked for ██████████ Maintenance for several years, the evidence is not persuasive that the cumulative periods of employment and wages represent two years of fulltime work experience. Furthermore, as previously noted by the director, the description of the beneficiary's work with ██████████ is limited and does not indicate any supervisory duties. Although the word "foreman" is mentioned on the petitioner's employee list, this description is inconsistent with the other statements.

It is noted that if the petitioner did hire the beneficiary in 1994, some four years prior to the priority date, this work experience can also be utilized to meet the requisite two years of work experience, if the beneficiary performed similar duties to those listed on the ETA 750. In addition, any evidence provided by the petitioner as to its employment would had to have been included on the original ETA 750 to be given any weight in this proceeding. However, the original ETA 750 submitted by the petitioner does not indicate that the petitioner employed the beneficiary prior to the priority date. With regard to the letter submitted by Cisneros Landscape on appeal, the ETA 750 also does not indicate any such employment of the beneficiary from 1991 to 1994. 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). With regard to the instant petition, the beneficiary listed no specific employer on Form ETA 759B for the time period from 1991 to 1995. The petitioner may not establish the beneficiary's work experience by submitting a letter from an employer who is not listed on the original ETA 750.

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 the requisite two years of relevant work

experience as a supervisory tree trimmer. 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.

Beyond the decision of the director, the petitioner has not established that it is capable of paying the proffered wage as of the priority date and onward.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$18.38 per hour, which amounts to \$38,230 annually.

The tax documents submitted by the petitioner establish that it has filed tax returns as a sole proprietorship for the years 1998, 1999, and 2000, and that it filed as an S Corporation in 2001. In the petition, the petitioner stated it had four employees, and was established in 1982. The petitioner submitted its 1040 individual income tax return for 2000, that indicated the petitioner had three dependents.

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 August 14, 2002, the director requested additional evidence pertinent to that ability. 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 from January 14, 1998 to the present time. The director also requested that the petitioner submit all schedules and tables that accompany the tax returns.

In response, the petitioner submitted the petitioner's tax documentation from 1998 to 2000. Counsel noted that the petitioner had until November of 2002 to submit its 2001 tax return. The petitioner also submitted a letter that stated that the petitioner's president had filed his 2001 personal tax return; however the 2001 corporate return had been not filed. The petitioner also submitted IRS Form 4868, Application of Automatic Extension of Time to File U.S. Individual Income Tax Return. This document requested an extension of time for the petitioner's 2002 tax returns. The petitioner also submitted its 1040 individual income tax returns for 1999, 1998, and 2000.

On April 29, 2003, the director requested additional evidence to support the petitioner's ability to pay the proffered salary. The director requested certified IRS printouts for tax year 2001, as well as copies of the petitioner's business permit, three photos of the business infrastructure, and copies of at least three business transactions, such as business flyers, or accounts receivable documentation. In addition, the director requested further information as to the petitioner's business, including gross and net annual income, and requested that

the petitioner sign under perjury that the petition and all evidence submitted with it is true and correct. The petitioner signed this document on July 15, 2003. The petitioner also provided its business license, articles of incorporation for the petitioner, dated filed on January 5, 2001, and its 1120S income tax return for an S corporation for the year 2001. The petitioner submitted evidence of its business activities, including photographs, the bylaws of the corporation, as well as further documentation on its employees, and its license to engage in the business of landscaping. This document is dated January 20, 2000. The petition also submitted a public notice that stated it had begun to transact business as a corporation on March 30, 2000.

Although the director in his decision did not address the issue of whether the petitioner is capable of paying the proffered wage as of the 1998 priority date and to the present, the AAO will analyze this issue.

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. Although the petitioner indicated in an employee list submitted with the second request for further evidence that it had hired the beneficiary in 1994, there is no evidence in the record to support this assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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 petitioner cannot establish that it employed the beneficiary or that it paid the beneficiary an amount at least equal to the proffered salary from 1998 to the present.

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).

From 1998 to 2000, the petitioner was 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 (7th 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 two sons as dependents on their Form 1040A. The petitioner must illustrate that it can pay the proffered wage for each year, as well as meet its business and personal expenses. With regard to the federal income tax returns submitted as a sole proprietor from 1998 to 2000, the petitioner lists the following amounts of adjusted gross income: \$68,551 in 1998; \$104,966 in 1999; and \$238,144 in 2000. While the petitioner has not provided a monthly breakdown of expenses for himself and three dependents, the large sums of adjusted gross income for 1999 and 2000 appear sufficient to both meet the personal expenses of the petitioner and pay the proffered wage of \$38,230. With regard to the tax year 1998, while the petitioner did not submit any information as to its monthly expenses, it is reasonable that a family of four could be sustained on the remaining \$30,000 left after the proffered wage is subtracted from the petitioner's adjusted gross income of \$68,000. Thus, the petitioner established that it had the capability of paying the proffered wage from 1998 to 2000.

With regard to the tax year 2001, the petitioner filed its corporate income tax as an S Corporation. 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 2001. As previously stated, 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 addition, although the petitioner indicated in an employee list submitted with the second request for further evidence that it had hired the beneficiary in 1994, there is no evidence in the record to support the petitioner's employment of the beneficiary in 2001. 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). Without more persuasive evidence, the petitioner cannot establish that it either employed the beneficiary or that it paid the beneficiary the proffered wage during 2001.

Since the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, as previously stated, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In the tax year 2001, the petitioner filed both an IRS 1040 individual income tax return and an IRS Form 1120S, an S corporation income tax return. For purposes of these proceedings, the AAO will examine the petitioner's corporate net income as it pertains to the petitioner's ability to pay the proffered wage. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's corporate tax return for 2001 shows the following amount of ordinary income: negative \$38,864. This figure fails to establish the ability of the petitioner to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the

proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner provided the following information with regard to tax year 2001:

	2001
Ordinary Income	\$ -38,864
Current Assets	\$ 5,263
Current Liabilities	\$ 50,922
Net current assets	\$ -45,659

These figures fail to establish the ability of the petitioner to pay the proffered wage in 2001. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001 and the petitioner's 2001 corporate income tax return indicates negative net assets of -\$45,659. 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, although the petitioner established that it was capable of paying the proffered wage to the beneficiary for the years 1998 to 2000, it did not establish that it was capable of paying the proffered wage in 2001 and onward. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage as 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 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.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.