

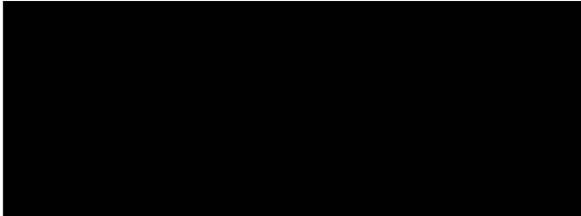
U.S. Department of Homeland Security  
20 Mass, Rm. N.W. A3042  
Washington, DC 20529



U.S. Citizenship  
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B6

FILE: WAC 03 135 53746 Office: CALIFORNIA SERVICE CENTER Date: NOV 22 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 approval 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 an auto mechanic and body shop. It seeks to employ the beneficiary permanently in the United States as a mechanic, fuel injection. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director revoked the petition approval accordingly.

On appeal, the counsel submits additional evidence.

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

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 18, 1997. The proffered wage as stated on the Form ETA 750 is \$18.36 per hour (\$38,188.80 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir.

1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

An issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the Application for Alien Employment Certification, Form ETA-750A, items 14, set forth the minimum education, training, and experience that an applicant must have for the position of a mechanic, fuel injection.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	<u>6</u>
	High School	<u>6</u>
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank
	Training	Blank
	Experience	
	Training	
	Years	<u>2</u>

In the Application for Alien Employment Certification, Form ETA-750B dated May 9, 1997, item 15, set forth work experience that an applicant listed for the position:

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

UNEMPLOYED [a notation] "See Amendment ... illegible"

NAME OF JOB

Blank

DATE STARTED

Month - 05 [May] Year - 1997

DATE LEFT

Month - Present

KIND OF BUSINESS

Blank

DESCRIBE IN DETAIL DUTIES...

Blank

NO. OF HOURS PER WEEK

Blank

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER

[REDACTED]

[REDACTED]  
NAME OF JOB

Automobile Mechanic

DATE STARTED

Month - 02 [February] Year - 1992

DATE LEFT

Month - 04 [April] Year - 1997

KIND OF BUSINESS

Automobile Work Shop

DESCRIBE IN DETAIL DUTIES...

[The original description was amended by addendum dated May 9, 1997, to wit:]<sup>1</sup>

I relined and adjusted brakes, aligns [sic] front end, repair/replace shock absorbers [sic] & solders leaks in radiator. I mend damaged body & fenders by hammering out or filling in dents & welding broken parts. Replaced and adjust headlights and innalls [sic] and repairs accessories such as radios, heaters, mirrors and windshield wipers. I also worked with foreing [sic] cars. [this addendum was signed by [REDACTED], and, dated May 9, 1997].<sup>2</sup>

NO. OF HOURS PER WEEK

48

In response to a request for evidence<sup>3</sup> on June 20, 2003 concerning the beneficiary's prior employment, and, the requisite two years work experience as a mechanic, fuel injection, consistent with the regulation at 8 CFR § 204.5(l)(3)(ii), the director requested the petitioner to submit an employer's job offer letter for the beneficiary.

In response, the petitioner submitted the required letter. The letter in the record of proceeding is dated March 11, 1998, and it was submitted by both the petitioner and beneficiary to correct errors and amend the Form 750. It states in pertinent part [REDACTED] worked as a Mechanic Fuel Injection for Cementos Portland, from 01/89 through 12/92...." The beneficiary is not named [REDACTED] according to the case file. Although the letter appears to be given in support of the beneficiary, it recounts a work history other than found in the ETA 750.<sup>4</sup> Thereafter the director, on June 20, 2003, notified the petitioner that it was making a review of the evidence. Whereupon, the CIS anti-fraud unit of the U.S. Embassy - Mexico City, Mexico was requested to investigate the beneficiary's work experience.

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The original job description did not contain the words "fuel injection," nor indicate that the duties involved fuel injection repair or maintenance.

- There is a letter in the record of proceeding dated March 11, 1998, submitted by both the petitioner and beneficiary. It states in pertinent part [REDACTED] worked as a Mechanic Fuel Injection for Cementos Portland, from 01/89 through 12/92.... The beneficiary is not named [REDACTED] according to the case file. Although the letter appears to be given in support of the beneficiary, it recounts a work history other than found in the ETA 750.

There is another request for evidence issued October 27, 2003 in the record of proceeding to which is attached bank statements of the petitioner.

There is a letter dated March 18, 2003, in which counsel states, "... due to a file maker malfunction our database reflected incorrect beneficiary's previous experience...." It is unclear if the "[REDACTED]" reference and work history was given in error since there is no specific information about where this error occurred other than counsel's statement that he was amending the Form ETA 750B that does not contain the [REDACTED] information.

On March 18, 2003, counsel for petitioner, stated it was amending the certified ETA 750A/B by stating that the beneficiary worked as a fuel injection mechanic in his brother's business, [REDACTED] in Mexico.

The investigator reported on August 24, 2003, that the [REDACTED] was an auto body shop not an auto mechanic shop, and, that it did not have equipment to repair fuel injection equipment. Also, the owner of that shop was the beneficiary's brother.

Therefore, to state the evidence submitted to this point in the case, the petitioner secured a certified Alien Employment Application for a fuel injection mechanic to work on automobiles. That part of the labor certification designated ETA 750 Part B stated the work history of the beneficiary, but it made no mention of fuel injection maintenance or repair, as originally submitted in the ETA 750B or as it was amended. Thereafter a letter from both the petitioner and beneficiary was submitted recounting the work experience of a [REDACTED]. An investigation of the shop in which the beneficiary stated he worked was found to be an auto body shop, not an auto mechanic (repair) shop, and, that shop did not have the necessary equipment to do work on fuel injection systems.

On appeal, counsel submitted an affidavit from the beneficiary's brother who states that when his brother worked there the shop did fuel injection work and that it was his other brother who spoke incorrectly to the investigator. This other brother is [REDACTED]. Then, according to the same notary who took the first affidavit, a series of three witnesses gave affidavits that the beneficiary was a fuel injection mechanic. There is no similar affidavit in the record of proceeding from [REDACTED] refuting the investigator's report. We find this series of statements given to support the appeal in this matter, not credible. We find [REDACTED]'s statement to the investigator, and the findings of the investigator's report, credible under the circumstances of this case. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Even if the record of proceeding did not contain multiple inconsistencies, the AAO concurs with the director's determination that there is no probative evidence establishes that the beneficiary has two years of experience as an mechanic, fuel injection. No trainers or employers affidavit, document, letter, or pay stub contained in the record of proceeding establishes that the beneficiary was employed for two years in an employment capacity with duties similar to the duties of the proffered position.

As found in the record of proceedings, the investigation conducted by the United States Embassy revealed that the employment experience in the certified Alien Employment application submitted with the I-140 was not supported by the facts.

Beyond the decision of the director, petitioner had not established that it had the continuing ability to pay the beneficiary on the priority date of the visa petition. 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 18, 1997. The proffered wage as stated on the Form ETA 750 is \$18.36 per hour (\$38,188.80 per year). The Form ETA 750 states that the position requires two years experience.

With the petition and in response to the director's request for evidence of June 20 and October 27 2003, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor, U.S. Internal Revenue Service Form tax returns for 1997 through, 2001; bank statements; documentation concerning the beneficiary's qualifications as well as other documentation.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$38,188.80 per year from the priority date of September 18, 1997:

- In 1997, the Form 1040 stated adjusted gross income of \$1,486.00.
- In 1998, the Form 1040 stated adjusted gross income of \$18,944.00.
- In 1999, the Form 1040 stated adjusted gross income of \$18,441.00.
- In 2000, the Form 1040 stated adjusted gross income of \$31,816.00.
- In 2001, the Form 1040 stated adjusted gross income of \$55,405.00.

- In 2002, the Form 1040 stated adjusted gross income of \$46,526.00.

The petitioner operates as a sole proprietor. 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).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of six. From the priority date through tax year 2000, the petitioner's adjusted gross income did not exceed the proffered wage. In 2001 and 2002, the sole proprietorship's adjusted gross incomes of \$55,405.00 and \$46,526.00 barely cover the proffered wage of \$38,188.80 per year and his personal living expenses. It is improbable that the sole proprietor could support himself and his family on the difference between the wage and his adjusted gross incomes for those two years.

Counsel advocates the use of the cash balance of the business account to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not met that burden. Counsel's contentions cannot be concluded to outweigh the evidence presented in the six tax returns as submitted by petitioner that show that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor and also pay his personal expenses.

**ORDER:** The petition is dismissed.