

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



FILE:

[Redacted]
WAC 02 284 54888

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 06 2005**

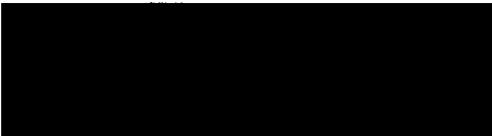
IN RE:

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 construction firm. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary possessed the requisite work experience specified on the labor certification. The director also found that the petitioner had not established that it had the requisite intent to permanently employ the beneficiary in a full-time position and denied the petition accordingly.

On appeal, counsel contends that the petitioner has demonstrated its intent to make a realistic job offer and has demonstrated that the beneficiary qualifies for the certified position.

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(l)(3) 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 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 show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, Form ETA 750 was accepted for processing on June 1, 1999. The proffered wage as stated on Form ETA 750 is \$23.42 per hour or \$48,713.60 per year. On Form ETA 750B, signed by the beneficiary in March 1999, the beneficiary does not claim to have worked for the petitioner. The beneficiary lists two previous employers. He claims that he worked 40 hours per week as a painter for Arie Misrachi of N. Hills, California, from March 1994 to November 1997. The beneficiary also states on the ETA 750B that he worked 40 hours per week for Nissim Dalva of North Hollywood, California, from December 1997 to October 1998.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 states that an applicant for the certified position must have two years of work experience in the job offered as a painter.

On Part 5 of the petition, filed September 30, 2002, the petitioner claims to have been established in 1982, have a gross annual income of one to two million dollars, a net annual income of one to two hundred thousand dollars, and to currently employ twelve workers. The petitioner is structured as a sole proprietorship.

In support of its continuing financial ability to pay the proposed wage offer of \$48,713.60 per year, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1997, 1998, and 1999. They show that the sole proprietor filed jointly with his spouse and declared two dependents during these years. In 1999, the sole proprietor's adjusted gross income was \$53,879, including business income of \$30,326.

In support of the beneficiary's prior qualifying work experience as a painter, the petitioner initially provided an original letter, dated July 25, 2002, from [REDACTED] Owner." [REDACTED] claims that the beneficiary "worked with this company as a painter, as full time position since December 1996 until October 1998."

On December 20, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the proffered salary and relating to the beneficiary's prior employment experience. The director requested the petitioner to resubmit signed copies of the federal tax returns, as well as copies of the beneficiary's tax returns and Wage and Tax Statements (W-2s) for the period from March 1994 to the present. The director also requested copies of the beneficiary's four most recent pay stubs.

In response, the petitioner submitted an affidavit from the beneficiary, dated January 31, 2003. He states that he did not pay taxes from 1994 to 1997 because he did not have a secure job or a Social Security number. The petitioner also provided some additional copies of tax returns previously offered including a signed copy of the sole proprietor's 1999 tax return.

The director issued a second request for additional evidence on April 23, 2003. He advised the petitioner that its ability to pay the proffered salary must be demonstrated at the time of the priority date and continuing until the beneficiary obtains lawful permanent residence. He further informed the petitioner that the evidence must include federal tax returns or audited financial statements. The director instructed the petitioner to provide this evidence from 2000 to the present and that CIS only had documentation up until 1999. The director also requested the dates that the petitioner has employed the beneficiary and proof of his work history from October 1998 to the present, including the beneficiary's four most recent pay stubs.

In response, the petitioner submitted a letter, dated March 25, 2003, from [REDACTED] of [REDACTED] and [REDACTED] an accounting firm. [REDACTED] states that the sole proprietor has not yet filed his 2000 and 2001 tax returns because he is in the middle of a divorce and needs to resolve this tax filing issues with his spouse. The petitioner provided copies of Form 1099-Misc for 2000, 2001 and 2002 issued by the petitioner to the beneficiary as a record of compensation for services rendered. The 2000 Form 1099 faded and difficult to read, but appears to indicate that

the petitioner paid the beneficiary approximately \$27,000 in compensation. In 2001, the beneficiary received \$26,812 in compensation, and in 2002, the petitioner paid the beneficiary \$34,650. The petitioner did not provide any further proof of the beneficiary's work history since October 1998.

The director requested additional evidence for the third time on July 30, 2003. The director requested the petitioner to provide evidence of its ability to pay the proffered wage through either federal tax returns, annual reports, or audited financial statements. The director requested this evidence for the period from 1999 to 2002, and specifically requested copies of the petitioner's tax records for 2000, 2001, and 2002. Additionally, the director instructed the petitioner to submit evidence of the beneficiary's prior work experience in the form of letters from his previous employers, [REDACTED] and [REDACTED] describing the beneficiary's title, duties, dates of employment and number of hours worked per week.

With regard to the petitioner's financial documentation requested by the director, the petitioner submitted a copy of the sole proprietor's individual tax returns for 2000 and 2001, as well as an additional copy of the 1999 return. The 2000 and 2001 returns reflect that the sole proprietor's filing classification was "married filing separate return" and claiming one dependent. They indicate that the sole proprietor reported adjusted gross income of \$44,793 in 2000, including business income of \$7,429. In 2001, the sole proprietor reported \$25,586 in adjusted gross income, including \$6,402 in business income. Financial documentation for 2002 was not provided. Rather, the petitioner supplied a copy of an Internal Revenue Service (IRS) application for an extension of time to file the sole proprietor's 2002 tax return.

In response to the director's third request for evidence asking for employment verification letters from [REDACTED] and [REDACTED] the petitioner supplied another letter, dated September 12, 2003, from [REDACTED]. In this letter, he states that the beneficiary "worked for my company from December 1997 until October 1998 as a full time painter. He worked 40 hours weekly from 8:00 am to 5:00 pm."

The director denied the petition for two reasons. Because the petitioner had employed the beneficiary as an independent contractor and shown payment of compensation through Form 1099s rather than Wage and Tax Statements, the director concluded that the petitioner had not established that he intended to employ the beneficiary as a full-time permanent worker. The director also denied the petition because he determined that the evidence failed to establish that the beneficiary had accrued two full years of work experience as a painter as of the visa priority date of June 1, 1999. The director noted that one letter from [REDACTED] Painting showed approximately ten months of employment from December 1997 to October 1998 and was not supported by any evidence of actual wages paid to the beneficiary.

On appeal, counsel asserts that the record contains sufficient evidence in the form of a statement from the sole proprietor that he is willing to sponsor the beneficiary and pay him the prevailing wage as soon as he attains a work permit or legal status. In support of this contention, counsel submits on appeal, a copy of a May 24, 2004 letter from the sole proprietor, a copy of a letter, dated May 24, 2004, from [REDACTED], of [REDACTED] and [REDACTED] copies of IRS informational returns for 2001-2003 used to submit with Form 1099s, copies of bank statements covering 2001, 2002, and 2003, and a copy of a bank statement covering the period from December 19, 2000 to January 18, 2001. This last bank statement shows a beginning balance of \$9,620.16 on December 19, 2000. The balance of the statement period ending December 31, 2001 is \$121,209.32. The balance of the statement period

ending December 31, 2002 is \$150,115.33 and the ending balance as of the December 31, 2003 statement is \$42,448.46.

Counsel also claims that employment letters, from [REDACTED] and [REDACTED] were already submitted along with Form 1099s, and were sufficient to establish the beneficiary's qualifying experience. In support of this claim, on appeal, counsel resubmits a copy of the September 12, 2003, letter from [REDACTED] Counsel also provides a letter, dated May 24, 2004, from [REDACTED] signed by [REDACTED] Owner." [REDACTED] states that he employed the beneficiary "as a painter from March 1994 through November 30, 1997." Accompanying these letters are two Form(s) 1099-MISC. One is a 1997 Form 1099-MISC issued by [REDACTED] to the beneficiary, showing that he was paid \$3,335 in compensation, in 1997. A Form 1099 from [REDACTED] also shows that [REDACTED] paid the beneficiary \$1,100 in compensation in 1998.

At the outset, the AAO does not agree with the director that because the petitioner has employed the beneficiary as an independent contractor, it necessarily means that there is no intent to employ the beneficiary when he is legally eligible. The record in this case reflects that the Immigrant Petition for Alien Worker has never been approved. Therefore, the obligation to employ and pay the proffered wage begins with an alien's entrance into the United States pursuant to the issuance of an immigrant visa or adjustment of status to permanent residence. *See* 20 C.F.R. § 656.20(c)(2). This part of the director's decision to deny the petition will be withdrawn.

Conversely, with regard to the evidence submitted in support of the beneficiary's qualifying past experience as a painter, it is reasonable to conclude that the letters from [REDACTED] and [REDACTED] along with the Form(s) 1099-MISC do not sufficiently corroborate that the beneficiary acquired two full years of experience as a painter as of the priority date of June 1, 1999. First, the contradiction in the letters provided by [REDACTED] was never clarified or addressed. His earlier 2002 letter states that he employed the beneficiary from December 1996 until October 1998. The 2003 letter affirms the dates as December 1997 until October 1998. It is the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). If the second letter is to be believed because it conforms to the beneficiary's dates of employment as stated on the ETA 750B, then, as the director stated, this represents approximately ten months of employment. The 1998 Form 1099, submitted on appeal, shows that the beneficiary received \$1,100 or \$110 per month for his services. This does not appear to support the description of the beneficiary's full-time employment with [REDACTED] [REDACTED] letter does not specify whether the beneficiary worked for him full or part-time, but the \$3,335 shown on the Form 1099 for 1997, submitted on appeal, also fails to suggest that this sum represented full-time employment for the eleven months ending November 30, 1997, as specified by the letter, because it represents only \$303 per month. Based on the evidence contained in the record and submitted on appeal, it cannot be concluded that the petitioner has satisfactorily resolved the questions raised by this employment verification documents or that the beneficiary's requisite qualifying two years of work experience as a painter has been demonstrated.

Beyond the decision of the director, it is further noted that the evidence fails to demonstrate the petitioner's continuing ability to pay the proffered wage of \$48,713.60 pursuant to 8 C.F.R. § 204.5(g)(2). 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). 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 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). 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.

Here, although consideration of the sole proprietor's adjusted gross income and other available funds such as those presented on the bank statements submitted on appeal, may be considered, it is noted that in 1999, even without considering the inclusion of any household expenses, the proffered wage of \$48,713.60, represented 90% of the sole proprietor's adjusted gross income. No other evidence was submitted to be considered as an alternative source of funds. The bank statements mentioned above do not cover any part of 1999. It cannot be concluded that the petitioner's financial data established its continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely 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.