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U.S. Citizenship
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FILE:

SRC-04-082-50668

Office: TEXAS SERVICE CENTER

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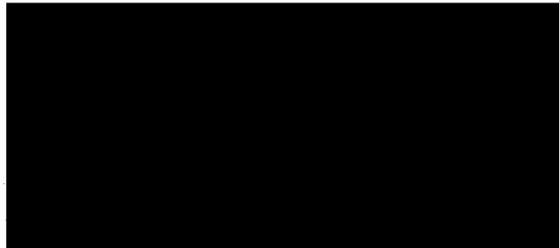
IN RE:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel, or a business in the "hospitality industry." It seeks to employ the beneficiary permanently in the United States as a manager, lodging facilities. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's April 21, 2005, denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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. See 8 CFR § 204.5(d). 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on March 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23,950 per year, 40 hours per week. The labor certification was approved on April 4, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on January 23, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: December 30, 1998; gross annual income: \$220,000.00; net annual income: left blank on the form; and current number of employees: 7; salary: \$460.57 per week.

On December 16, 2004, the Service Center issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional evidence that the employer had the ability to pay the proffered wage, including the W-2 statements or 1099s for the beneficiary for the years 2001, 2002, and 2003. In response, the petitioner submitted unaudited financial statements, no W-2 forms, and explained that the petitioner's tax returns had not been filed as "operations are voluminous and the prior accountant had difficulty coordinating all the necessary documents for the proper filing. But, the present account is now ready to file."

Based on the petitioner's failure to demonstrate its ability to pay the beneficiary the proffered wage, the director determined that the evidence submitted in response to the RFE was insufficient, and denied the case on April 21, 2005. The petitioner appealed and the matter is now before the AAO.

We will first examine the petitioner's ability to pay, and then consider the petitioner's additional arguments on appeal. The evidence in the record of proceeding regarding the petitioner's ability to pay includes the petitioner's Forms 1040, and Forms 4562 U.S. Federal Tax Returns for the years 2001, 2002, 2003, and 2004 along with financial statements for the years 2001, 2002, 2003, 2004, and Forms 940 the Employer's Annual Federal Unemployment (FUTA) Tax Return for the years 2002, 2003, and 2004, as well as Forms 941 for the Budget and Almeda Inns (other entities owned by the petitioning entity's owner) for the quarters ending March 31, 2002, June 30, 2002, September 30, 2002, December 31, 2002, March 31, 2003, June 30, 2003, September 30, 2003, and December 31, 2003.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary did not list that he was employed with the petitioner, but rather listed that he has been "self employed" from April 1995 to the present (March 26, 2001).² The petitioner did not submit any W-2 forms, 1099s, or other evidence of compensation for the beneficiary.

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. Reliance on federal income tax returns as a basis for determining a petitioner's

² As noted in the petition's denial, the beneficiary lists on his Form G-325A filed with his I-485 Adjustment of Status application that he has been employed with the petitioner since September 1995. Further, the G-325 reflects that he has resided at [REDACTED] September 1998, which is the same address as the petitioning hotel entity. It would appear that the beneficiary lives on-site. We note that the proffered wage must be paid to the beneficiary in the form of wages, and the proffered wage cannot be reduced by lodging benefits.

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).

The petitioner is a sole proprietor,³ 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 (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.

In the instant case, the sole proprietor supports a family of six, including himself, his wife, and two dependent children, and his parents in Houston, Texas. The tax returns⁴ reflect the following information for the following years:

Post Oak Inn	Petitioner's AGI (1040)	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2004	-\$177,515	\$205,775	\$17,400	-\$3,234
2003	-\$67,033	\$218,122	\$0	\$59,400
2002	-\$149,778	\$217,680	\$2,781	\$36,289
2001	\$71,412	\$260,632	\$0	\$76,873

³ We note that in a letter dated September 6, 2002, submitted to the state workforce agency in Texas at the labor certification stage, the owner indicates that the [REDACTED] still has five persons working for the hotel, two persons are regular employees and the other three are members who have ownership interests in the hotel." It is unclear who the other two individuals are with ownership interests, but may change the nature of the ownership structure so that the business may not be a "sole proprietorship." Further, if profits are shared with other individuals, this would change the amounts available to pay the proffered wage.

⁴ On appeal, the petitioner submitted a letter from a "tax practitioner," which provided that "early in 2003 the general manager of this venture [seafood wholesale and retail restaurant] ran off with all the records and remaining funds. Without the records it was not possible to file a true and accurate tax return for the years 2002 or 2003. Early in 2005 we found the ex-general manager and obtained all the records. Immediately an accounting of the records were done and each of the tax years not filed were filed."

If we reduced the owner's adjusted gross income (AGI) by \$23,590, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of \$47,462 in 2001, the only year that the petitioner can demonstrate payment of the proffered wage. In every other year, 2002, 2003, and 2004, the owner showed a negative AGI. Based on the above analysis, the petitioner cannot demonstrate that it can pay the beneficiary the proffered wage.

The petitioner's tax returns do reflect that he owns a number of businesses as set forth below.⁵

2004

Business	Gross receipts	Wages Paid	Net Profit
Almeda Inn	\$192,745	\$11,695	-\$63,349
Pasadena Motor Inn	\$272,411	\$40,342	-\$89,122
Best Reed (sold 8/6/04)	\$35,275	\$0	-\$36,559

2003

Business	Gross receipts	Wages Paid	Net Profit
Almeda Inn	\$231,373	\$10,828	-\$33,779
Pasadena Motor Inn	\$278,553	\$21,954	-\$42,808
Best Reed (sold 8/6/04)	\$58,848	\$0	-\$4,563
Pier 99 (Seafood Restaurant)	\$11,899	\$12,538	-\$60,898

2002

Business	Gross receipts	Wages Paid	Net Profit
Almeda Inn	\$246,275	\$13,752	-\$4,718
Best Reed (sold 8/6/04)	\$47,279	\$0	-\$4,812
Pier 99 (Seafood Restaurant)	\$82,210	\$52,516	-\$176,737

2001

Business	Gross receipts	Wages Paid	Net Profit
Almeda Inn	\$252,631	\$11,261	-\$712
Budget Inn	\$83,563	\$7,147	\$1,463
Pier 99 (Seafood Restaurant)	\$0	\$0	-\$1,775

None of the petitioner's businesses reflect positive net profits in any year.

⁵ We note that the other business' profitability or lack thereof would be accounted for in the petitioner's AGI, but will examine the other businesses.

The petitioner additionally forwarded financial statements for the Post Oak Inn for the years ending December 31, 2002, 2003, and 2004; as well as statements for the Alameda Inn for the years ending December 31, 2002, 2003, 2004; the Budget Inn for the years ending 2002, 2003, 2004; for the Best Reed Motel for the years ending 2002, 2003, 2004; and the Pasadena Motor Inn for the years ending 2003, 2004.

8 C.F.R. § 204.5(g)(2) provides that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The certified public accountants provided a letter with each of the financial statements submitted, which provides in pertinent part: "we have compiled the accompanying statements . . . a compilation is limited to presenting in the form of financial statements information that is the representation of the owner. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them." Further, the letter notes: "the owner has elected to omit substantially all of the disclosures and the statement of cash flows – income tax basis ordinarily included in financial statements prepared on the income tax basis of accounting." As the financial statements were unaudited, they are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel contends that the statements show total assets of \$790,000, we note that the unaudited financial statement reflects only \$461.97 in liquid assets, the other assets listed are fixed, and not in a form immediately available to pay the proffered wage, such as the actual property, land, hotels, furniture and equipment, among other items. The petitioner has not identified any specific fixed asset that it would sell in order to obtain funds to pay the beneficiary's proffered wage.

On appeal, the petitioner additionally submitted Forms 940, the Employer's Annual Federal Unemployment (FUTA) Tax Return for the years 2002, 2003, and 2004, as well as Forms 941 for the Budget and Alameda Inns for the quarters ending March 31, 2002, June 30, 2002, September 30, 2002, December 31, 2002, March 31, 2003, June 30, 2003, September 30, 2003, and December 31, 2003. Forms 941 reflect the total amount of deposits made from the deductions taken from the wages of the employees to pay each employee's FICA and social security tax deductions. Further, while the Forms 941 do show that the petitioner has paid some amounts in wages, these forms do not evidence that the petitioner has paid the beneficiary. Generally, wages used to pay others may not be used to demonstrate that the employer can pay the beneficiary the proffered wage.

Additionally, on appeal, counsel submitted another financial statement from a second source, a "tax practitioner," for the year ended 2004, as well as a statement reflecting through April 20, 2005. These statements similarly have been "compiled" and the tax practitioner provides, "I have not audited or reviewed the accompanying financial statements." We note the same objection as above, that under 8 C.F.R. § 204.5(g)(2), the statements provided have not been audited in requirement with the regulations. Further, while the "compilation" shows "cash on hand" and "cash in the bank," no bank statements, or other evidence were submitted in support to verify assets. Additionally, in comparison, the reports provided by the CPA firm show very little current assets in the bank between all the companies for the year ended 2004 (the total current assets based on the statements submitted by [REDACTED] was \$581.80, in contrast to the "tax practitioner's" report which provides cash in bank "\$41,892.00" and "total current assets for the year of \$79,730). The reports that Kirby and Kerr, the CPA firm were broken down by each Inn, in contrast the "tax practitioner's" report, which appears to be consolidated for all businesses, but does not provide clearly what the information represents, or where the information was obtained. However, both formats provided are unaudited and, therefore, not in compliance with 8 C.F.R. § 204.5(g)(2). We note the differences between the two reports only to highlight unexplained discrepancies.

On appeal, counsel contends that the “Service appears to have been overwhelmed by the financial information provided . . . For example, the Service states “the petition was filed on January 23, 2004 with *multiple* income tax returns for various lodging facilities from the year 2001. In fact, only a single Individual Tax Return for [REDACTED] as sole proprietors was submitted.” We have considered the petitioner’s other business ventures listed on his tax returns above, which all demonstrate negative net profits.

Counsel contends that the service erred in not considering the financial information submitted in response to the RFE as he notes that CIS contends that: “acceptance of these documents by CIS is discretionary.” To reiterate the paragraph stated above the regulation 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 . . . Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or *audited* financial statements.

The petitioner submitted financial statements that were compiled, and unaudited, which were not in compliance with the regulation, and, therefore, acceptance of such documentation by CIS would be discretionary.

Counsel notes that the tax practitioner’s statement indicates that “the petitioner/sole proprietors have not suffered cash losses, but rather primarily “depreciation” for income tax purposes as the financial statements indicate.” Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. *See* Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. We note that the depreciation argument has previously been addressed by courts, and dismissed. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Therefore, we do not find the depreciation argument compelling and cannot conclude that the petitioner has shown the ability to pay the beneficiary the proffered wage from the priority date to the time that the beneficiary obtains permanent residence.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

Additionally, a second point although not raised in the director's denial, was the petitioner's failure to document that the beneficiary had all of the required education, training, and experience as required in the certified ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(1)(3):

(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 beneficiary must demonstrate that he had the required skills by the priority date of March 30, 2001. On the Form ETA 750A, the "job offer" for Manager Lodging Facility states that the position requires four years of experience in the job offered with job duties including: "Manage and maintain motel and lodging facilities. Show and rent or assign accommodations. Register guests. Collect rents and record data pertaining to rent funds and expenditures. Resolve occupants complaints. Purchase supplies and arrange for outside services, such as fuel delivery, laundry, maintenance and repair, and trash collection." The petitioner listed that a high school education was required in 14, and did not list any other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed prior experience as: (1) Hotel Supreme, Navsari, No. 8, Kabilpore, Gujarat, India, Manager Lodging Facilities, from 1998 to 1993. The beneficiary did not list the exact day and month that he began and ended her employment; and (2) self employed, April 1995 to the present.

As evidence to document the beneficiary's qualifications, the petitioner submitted a letter from the Hotel Supreme which states that "Mr. Mukesh Patel was employed as a Manager Lodging Facilities at Hotel Supreme, Gujrat, India. He was employed from 1998 to 1993."

The letter submitted is deficient in that it does not list whether the position was full-time or part-time, or the number of hours worked per week, as well as the exact start date, month, day, year format, or exact end date, month, date, year, of his employment. Based on the one letter provided, we cannot conclude that the beneficiary has met the experience requirements set forth on the labor certification of four years as a Manager Lodging Facilities. If the beneficiary began employment in December 1998 and ended employment in January 1993, and/or any of the experience was part-time, the beneficiary would not have four years of experience. The letter as provided is not sufficient to confirm the beneficiary's prior experience for the position.

Therefore, the petition was properly denied for failure to demonstrate that the petitioner could pay the beneficiary the proffered wage beginning on the priority date until the beneficiary obtains permanent residence. In addition, the petitioner has not demonstrated that the beneficiary met all the requirements of the position offered.

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.