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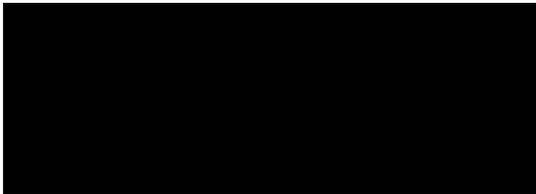
Office: VERMONT SERVICE CENTER

Date: OCT 19 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a business related to paint and wallpaper sales, and its application. It seeks to employ the beneficiary permanently in the United States as a paperhanger. 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 February 15, 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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment

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).

system on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$19.46 per hour,² 40 hours per week, which is equivalent to \$40,476.80 per year. The labor certification was approved on September 10, 2003. The petitioner filed an I-140 Petition for the beneficiary on June 17, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: 1975; gross annual income: \$400,043.00; net annual income: \$1,096.00; and current number of employees: 5.

The Service Center issued a Request for Evidence (“RFE”) on October 15, 2004 requesting that the petitioner provide the petitioner’s 2001, 2002, and 2003 federal tax returns, or the owner’s Forms 1040 along with Schedule C if a sole proprietorship; W-2 Forms for the beneficiary if previously employed by the petitioner; and evidence to document that the beneficiary had the required experience as set forth in the certified Form ETA 750. The petitioner submitted a response, including its tax returns. The Service Center denied the petition on February 15, 2005, based on the petitioner’s failure to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence. 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, for the years 2001, 2002, and 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 April 10, 2001, the beneficiary did not list that he was employed with the petitioner, but rather listed that he has been self-employed from July 1997 to the present (April 10, 2001). The petitioner did not submit any W-2 Forms 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 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, 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

² The petitioner initially listed the wage as \$18.00 per hour, but was required to change the wage to \$19.46. The change was handwritten and approved by DOL prior to DOL certification.

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 two, including himself, and his wife in Danbury, Connecticut. The tax returns reflect the following information for the following years:³

Tom's Paint & Wallpaper	Petitioner's AGI (1040)	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2003	\$26,244	\$400,043	\$97,224	\$1,096
2002	\$17,816	\$474,680	\$95,896	-\$4,259
2001	\$21,481	\$494,582	\$65,994	-\$1,900

If we reduced the owner's adjusted gross income (AGI) by \$40,476.80, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of -\$14,232.80 in 2003, -\$22,660.40 in 2002, and -\$18,995.80 in 2001. Based on the above analysis, the petitioner cannot demonstrate that it can pay the beneficiary the proffered wage in any year and support himself and his wife.

The petitioner did not submit any other documentation regarding personal expenses, or personal assets to demonstrate other sources of income, or how much income is necessary for the owner to support himself and his wife.

On appeal, counsel contends that the "Service Center failed to consider all the assets and income of this non-corporate petitioner and failed to factor in depreciation when determining ability to pay the proffered wage. Schedules to the petitioner's income tax also show that the petitioner's business pays out \$97,224 from its gross receipts of approximately \$400,000 as wages. That figure is far in excess of the prevailing wage rate."

Regarding counsel's assertions, the petitioner has not forwarded any information related to the petitioner's assets and income other than the figures stated on the 2001, 2002, and 2003 Federal 1040 Tax Returns. That income is considered as set forth above, as are wages paid, and gross receipts. In general, wages paid to other employees cannot be used to demonstrate the ability to pay the wage proffered to the beneficiary. The petitioner has submitted no documentation to demonstrate that any of the \$97,224 in wages paid were actually paid to the beneficiary.

With respect to depreciation, 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.

³ No tax return was submitted for the year 2004, which may not have been available at the time that the petitioner submitted its appeal.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. 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, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage, which even if accepted, would not demonstrate the petitioner's ability to pay the proffered wage. Based on the foregoing, the petitioner cannot demonstrate its ability to pay the proffered wage.

Further, although not raised in the director's denial, the petitioner has not demonstrated that the beneficiary has met the requirements as set forth 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).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered,⁴ as a paperhanger, with duties including: "Covers interior walls and ceilings with decorative wallpaper or fabric using handtools. Measures and computes amounts of materials necessary. Strips old covering, smooths walls and cracks. Removes old paints and varnishes, applies sizing, mixes and applies glues, cuts and applies covering and smooths coverings." The petitioner listed no educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed on April 10, 2001, the beneficiary listed his prior work experience as: (1) Self-employed Wallpaper Hanger, 21 Chappelle St., Danbury, CT 06810, 40 to 60 hours per week; and (2) that he was employed for Ron Rawse, Washington, CT, as a painter, from 1992 to 1997, 40 to 60 hours per week.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(1)(3), which 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

⁴ The ETA 750A Form as drafted reads that the position would require two years in the job offered "and" two years in a related occupation in painting or wallpaper. The petitioner did not list "or" in box 14 to show that the related occupation would be alternate experience, rather than additional experience.

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.

To document the beneficiary's experience, the petitioner submitted a letter from [REDACTED], of Painting by [REDACTED] which provided that "I have known [REDACTED] since 1992 and have been in contact with him till the present moment. To the best of my knowledge, during all this time he has been engaged in the painting and paper hanging business. We have in the past work together in few occasions [sic], therefore, I can testify that he is very capable in these trades. I can also say that he had worked several years for a company called [REDACTED] owned and operated by [REDACTED]

The petitioner did not provide any other documentation to demonstrate the beneficiary's prior experience. The letter submitted is deficient in that it does not provide specific details regarding the beneficiary's job duties, hours worked, or exact dates of employment. While we acknowledge that the beneficiary lists that he was self-employed, and, therefore, obtaining letters to document experience may prove more difficult, the letter's author did not specify the exact time periods on the "few occasions" that they worked together, and the beneficiary's exact work during those time periods. Further, given the nature of the beneficiary's self-employment, a second or third letter would have provided more compelling evidence to corroborate the first letter. Additionally, no letter was provided from his second listed employer, [REDACTED], where the beneficiary listed that he was employed for an approximate four to five year time period. The petitioner did not indicate that the beneficiary was unable to obtain a letter from his prior listed employer. The documentation provided to document the beneficiary's prior skills was insufficient to demonstrate that he met the requirements of the certified ETA 750 job offer.

Accordingly, the petition should have been denied for: (1) failure to demonstrate the petitioner's ability to pay the proffered wage; and (2) failure to document the beneficiary's qualifications for the job offered. The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the record.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.