

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



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

B6

PUBLIC COPY



FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **SEP 22 2006**
EAC 03 109 51671

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
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 states that it is a tax accounting and business services company. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 requisite two years of relevant work experience in the job offered as of the April 23, 2001 priority date and denied the petition accordingly.

On appeal, newly hired counsel states that the petitioner can establish that the beneficiary has the two years of relevant work experience. Counsel submits additional documentation.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. In response to a request for evidence from the director, the petitioner indicated that it is seeking classification under the skilled worker category.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 23, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of bookkeeper. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	4
	College	--
	College Degree Required	--
	Major Field of Study	--

The petitioner also specified that any applicants have two years of experience in the job offered. Under Item 15, the petitioner set forth no additional special requirements.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended "Alzhar" University, Cairo, Egypt, studying language from October 1986 to June "9."¹ He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated the following in reverse chronology:

1. Unemployed from June 1998 to the time the beneficiary signed the Form ETA 750; and
2. [REDACTED] Cairo, Egypt, from April 1992 to May 1998. The beneficiary stated that he kept complete financial records of the hotel.

The petitioner provided no further documentation to further substantiate this employment.

Because the evidence submitted was deemed insufficient to demonstrate the beneficiary's qualifications for the proffered position, on October 28, 2003, the director requested additional evidence as to the beneficiary's qualifying work experience. The director requested that the petitioner submit a letter from current or former employers that included the name, address and title of the writer, and a specific description of the duties performed by beneficiary. If such evidence was unavailable, the director stated that other documentation relating to the beneficiary's work experience would be considered.

In response, former counsel submitted a letter dated January 20, 2004. In his letter counsel stated that the petitioner and beneficiary were still in the process of getting further documentation and that they required an additional 60 days to submit the requested information.

On June 22, 2004, the director denied the petition. In his decision the director stated that 8 C.F.R. § 103.2(b)(8) states that an applicant or petitioner shall be given 12 weeks to respond to a request for evidence and that additional time may not be granted. Since the record did not contain any further documentation with regard to the beneficiary's requisite work experience, the director denied the petition.

On appeal, newly hired counsel states that the petitioner was denied because the prior attorney failed to respond timely to the director's request for further evidence. Counsel submits two documents and states that

¹ On Part B, the beneficiary did not indicate the complete year in which he ended his university studies.

the documents establish that the beneficiary was eligible for the I-140 visa benefit as of the 2001 priority date. The first document is a certificate of experience from the [REDACTED], in Cairo, Egypt, dated July 28, 1998. The certificate is signed by Mr. [REDACTED] personnel manager, and states that the beneficiary worked at the Hotel from April 14, 1992 to May 5, 1998 as a bookkeeper in the accounting department. The second document is an English language extract from Al-Azhar University, General Office for Educational Affairs, dated August 19, 1998. The document states that the beneficiary graduated in 1993 from the German Department with a BA degree in Foreign Languages and literature.

Upon review of the record, it is noted that the petitioner on appeal submits two documents that based on their date of creation existed at the time the I-140 petition was filed and thus were available to be submitted to the record earlier in the proceedings. Counsel on appeal provides no further explanation for why these documents are provided only on appeal, only stating that prior counsel did not submit them. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Further a copy of the beneficiary's Egyptian passport contained in the record, identifies his profession as front desk manager (Hotel). This evidence would call into question the beneficiary's claimed years of employment as a bookkeeper. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Moreover, any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the proffered wage.

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, as previously stated, the Form ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$13.57 per hour, which amounts to \$28,225.60 annually.

The petitioner is structured as a sole proprietorship. On the I-140 petition, the petitioner did not indicate when it was established, the number of employees, or its gross or net annual income, although the petitioner did note that an attached document provided more information.² With the petition, the petitioner submitted its Form 1040, Individual U.S. Tax Return, with accompanying Schedule C for tax year 2000. This document established the sole proprietor had four dependents and an adjusted gross income of \$46,802.

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. The beneficiary did not indicate on the ETA Form 750 that he had ever worked for the petitioner. The petitioner also did not claim to have employed the beneficiary or provided any documentation of employment. Therefore the petitioner cannot establish that it paid the beneficiary a sum equal to or greater than the proffered wage of \$28,225.60 as of the April 2001 priority date and 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. CIS does not consider depreciation deductions to be available cash, but rather only examines net income figures in this analysis. 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).

However, 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). 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

² The record does not contain any additional cover letter or further information about the petitioner submitted with the initial petition.

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 petition, the petitioner submitted its tax return for 2000. Based on this document, the sole proprietor supports himself, his wife, a daughter, and a sister. However, since the priority date for the instant petition is April 23, 2001, the petitioner's tax return for 2000 is not dispositive in the present proceedings. The petitioner did not submit its 2001 income tax return or any returns for tax years following the priority date year, or other types of documentation stipulated in 8 C.F.R. § 204.5(g)(2).

It is noted that in his request for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's personal household expenses. Therefore there is no list of household expenses or discussion of the sole proprietor's household expenses to allow further examination of this issue. Thus, the AAO cannot determine whether the sole proprietor had the ability to pay both the proffered wage and his monthly household expenses. In addition, as stated previously, without more documentation, such as the petitioner's income tax return for the priority year date of 2001 and subsequent tax years, the petitioner cannot establish its ability to pay the proffered wage as of 2001 and to the present.

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 either its ability to pay the proffered wage or the beneficiary's qualifications to perform the duties of the position. The appeal is dismissed. The petition is denied.

ORDER: The appeal is dismissed. The petition is denied.