

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED]
EAC-05-021-50542

Office: VERMONT SERVICE CENTER

Date: APR 25 2007

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

The petitioner is a landscaping/construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's August 3, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 C.F.R. § 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 on June 23, 2003. The proffered wage as stated on the Form ETA 750 is \$21.53 per hour (\$44,782.40 per year)¹. The Form ETA 750 states that the position requires two years of

¹ The director erred in stating \$17.00 per hour, and further erred in calculating the annual salary as \$35,360.00 in his decision dated August 3, 2005.

experience in the job offered. On the petition, the petitioner claimed to have been established in 1993, to have gross annual income of \$27,744.00, to have net annual income of \$28,391.00, and to currently employ two workers. On the Form ETA 750B signed by the beneficiary on June 18, 2003, the beneficiary did not claim to have worked for the petitioner.

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 appeal². Relevant evidence in the record includes the [REDACTED] Form 1040 U.S. Individual Income Tax Return for 2003 and 2004, statements of [REDACTED] investment account from [REDACTED], statements of Ms. [REDACTED] retirement plan account from Scudder Investments, letters and statements from banks regarding Ms. [REDACTED] accounts, a statement of Ms. [REDACTED] household expenses, and invoices of vehicles purchased by the petitioner. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that with the balance in Ms. [REDACTED] savings account added to the adjusted gross income reported in the petitioner's income tax returns, the petitioner has established its ability to pay the proffered wage as of the priority date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not submit any evidence showing that it employed and paid the beneficiary from the priority date in 2003 onwards. Therefore, it failed to establish its ability to pay with wages already paid to 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, 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)

² 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).

(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 evidence indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. Counsel's argument that the depreciation should be added back to adjusted gross income is misplaced.³ 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 (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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33⁴, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. Since adjusted gross income has already excluded the business expenses including depreciation, the petitioner needs to demonstrate that the adjusted gross income reflected on the sole proprietor's tax return covers the proffered wage and the sole proprietor's household living expenses. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2003 and 2004. The tax returns for 2003 and 2004 demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$44,782.40:

In 2003, the Form 1040 stated adjusted gross income of \$27,744.

In 2004, the Form 1040 stated adjusted gross income of \$22,318.

In 2003 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage which is \$17,038.40 less than the proffered wage in that year without taking into account the sole proprietor's household living expenses; in 2004 the adjusted gross income was also insufficient to pay the beneficiary the proffered wage with a shortage of \$22,464.40 that year without taking into account the sole proprietor's household living expenses. Therefore, the petitioner did not have sufficient adjusted gross income to pay the proffered wage in 2003 and 2004. The petitioner failed to establish that the sole proprietor could cover the business expenses and the proffered wage for the beneficiary as well as his household living expenses for 2003 and 2004 with the sole proprietor's adjusted gross income. In response to the director's

³ Counsel refers to a decision issued by the AAO concerning the depreciation to be added back to the taxable income, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

⁴ The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 34 for 2003 and Line 36 for 2004.

request for evidence (RFE) counsel stated that the monthly expenses for the sole proprietor's household is \$1,810.00 (or \$21,720.00 per year), including \$1,000 of mortgage, \$300 of food, \$200 of utilities, \$10 of clothing and \$300 of transportation. Counsel did not submit any supporting documents to the statement of monthly expenses for the sole proprietor's household. However, the sole proprietor reported itemized deductions on Schedule A. The schedule A's show that the sole proprietor paid medical expenses of \$7,419 in 2003 and \$5,828 in 2004 (average \$6,623.50 per year), paid home mortgage interest of \$5,792 in 2003 and \$6,111 in 2004 (average \$5,951.50 per year), and contributed cash to charity of \$409 in 2003 and \$990 in 2004 (average \$699.50 per year). The petitioner claimed that the sole proprietor paid \$12,000 of mortgage per year and the tax returns indicate that about 50% of the total amount paid as mortgage was mortgage interest. The figures reflected on the tax return do not appear against the sole proprietor's statement about the amount of mortgage payment. However, it appears more likely that \$6,623.50 per year as medical expenses, and \$699.50 per year as charity contributions should be added to the sole proprietor's yearly expenses per the tax returns since the statement of expenses does not include health insurance expenses, medical expenses or charity contributions. Therefore, the AAO will consider \$29,043 as the sole proprietor's yearly living expenses in determining the petitioner's ability to pay. Thus, the petitioner is obligated to demonstrate that it had additional income or liquefiable assets of \$46,081.40 in 2003 and \$51,507.40 in 2004 to pay the proffered wage and to sustain the sole proprietor's family of five.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, counsel submitted evidence showing the sole proprietor has additional liquefiable assets to be considered in determining the petitioner's ability to pay, such as balances in checking account, savings account, retirement plan account and investment account, certificate of deposits, and invoices of vehicles the sole proprietor purchased. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. If the accounts represent what appears to be the sole proprietor's business checking accounts, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore, the balances in the sole proprietor's business checking accounts with Citizens Bank and Sharon Credit Union cannot be considered as additional liquefiable assets in determining the petitioner's ability to pay. The AAO does not generally accept a claim that the sole proprietor relies on the value of his or her business or equipment to show the ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. Therefore, counsel's reliance on the sole proprietor's vehicles purchased for the business to demonstrate her ability to pay is misplaced.

However, the record contains letters and statements from banks and investment companies regarding the sole proprietor's accounts as evidence of her additional liquefiable assets to pay the proffered wage and to cover living expenses. Statements from [REDACTED] for Ms. [REDACTED] investment account show that she had a balance of \$39,435.66 as of March 1, 2004, \$39,107.87 as of March 31, 2004, \$38,641.06 as of June 1, 2004 and \$39,706.64 as of June 30, 2004. Statements from Scudder Investments for Ms. [REDACTED] retirement plan account show that the sole proprietor had a balance of \$8,766.99 as of January 1, 2004, \$10,011.36 as of April 1, 2004 and \$10,935.75 as of June 30, 2004. The letter dated August 26, 2005 from The Sharon Co-operative Bank verifies that the sole proprietor has held the savings account [REDACTED] since August 28, 2002 with an average balance throughout the year 2003 of \$24,000 and \$53,000 for 2004. These documents demonstrate that the combined balances of savings account, retirement plan account and investment account were approximately \$70,000 in 2003 and \$100,000 in 2004. The sole proprietor's liquefiable assets were greater than the shortage amounts of \$46,081.40 in 2003 and \$51,507.40 in 2004 which the sole proprietor needed to be added to her adjusted gross income to pay the proffered wage and to sustain her family in each of these years. Thus, assessing these additional liquefiable assets of the sole

proprietor, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2003 and 2004. This portion of the director's decision is withdrawn.

However, beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience as a carpenter. 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*, 299 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 the instant case, the Application for Alien Employment Certification, Form ETA-750A, Item 14 requires two years of experience in the job offered⁵. The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represents that he have been working for City Hall of Santa Cruz das Flores as a carpenter since August 1995 to the present (he signed the Form ETA 750B on June 18, 2003). He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The instant I-140 petition was submitted with an experience letter from José Francisco Salvador Fernandes, President of the City Council of the City Hall of Santa Cruz das Flores pertinent to the beneficiary's qualification as required by the above regulations with an English translation. The translation of the experience letter did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [CIS] shall be

⁵ 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).

accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The translation contains inconsistencies with the original foreign language document. The translation states that the beneficiary "performed the service of Carpenter from August 15, 1995 until to date." However, the original letter does not mention any beginning date of employment. The translation indicates the letter was signed on May 23, 2003, however, the original letter shows that it was signed on December 23, 2002. The original letter verifies that the beneficiary worked as a carpenter for 9 years and as a gardener for 4 years. This is not stated in the translation. Per the original letter the beneficiary should have started his employment either 13 years ago or 9 years ago from 2002, that is 1989 or 1993. However, the beneficiary claims on the Form ETA 750B that he worked for this employer from August 1995 to June 18, 2003 when he signed the form. The concurrently filed Form I-485 indicates that the beneficiary entered the United States on April 11, 2003. The beneficiary did not explain how he could have worked for the City Hall of Santa Cruz das Flores from April 11, 2003 to June 18, 2003 while he was also in the United States.

The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 582.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue pertinent to the beneficiary's requisite experience as stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.