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U.S. Citizenship  
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 19 2007  
WAC 03 243 50616

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 employment based visa petition was denied by the Director (director), California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and review.

The petitioner is a liquor store and deli. It seeks to employ the beneficiary permanently in the United States as a liquor store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Following an interview at the district office, the Service Center director concluded that the petitioner had not established that either it or the beneficiary maintained the requisite intent that the beneficiary will be employed by the **petitioner in the certified position**.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the beneficiary's intention was to be employed by the petitioner who offers bona-fide employment.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing qualified (or equally qualified in the case of an alien described in clause (ii) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Section 203(b)(3)(A)(i) of 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(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The approved Application for Alien Employment Certification (Form ETA 750, A and B) was accepted for processing by the DOL on December 27, 1996, thus establishing the priority date by which the beneficiary's qualifications for the certified position must be obtained, as well as the employer's continuing financial ability to pay the proffered wage. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). As set forth on the ETA 750A, the beneficiary's address was given as Apple Valley, California. The petition indicates that the petitioner is located in Sun City, California. The proffered wage is stated as \$13.05 per hour which amounts to \$27,144 per year. The duties of the certified position as stated on the ETA 750A are fairly extensive and include planning and preparing work schedules for employees, assigning specific duties such as customer service, setting up merchandise, and stocking shelves. Supervising and training employees as well as coordinating sales promotion, verification of inventory and cash reconciliations are also included.

The beneficiary signed the ETA 750B on December 10, 1996. He listed four jobs:

8/90 to 1/93	cashier/manager
2/93 to 4/95	owner/manager
5/95 to 8/95	cashier
2/96 to present	liquor store manager

The petitioner, through current counsel's law firm, filed its first Immigrant Petition for Alien Worker (I-140) on August 20, 2001 supported by this labor certification. The petition was denied by the director on May 10, 2002, based upon the petitioner's failure to establish its continuing ability to pay the proposed wage offer. The AAO dismissed a subsequent appeal on April 9, 2003.

On August 26, 2003, the petitioner filed its second I-140 using the same labor certification with its corresponding priority date of December 27, 1996. On Part 5 of this petition, the petitioner claims that it was established in January 2000 (as a partnership), that it currently employs two workers, that its gross annual income is \$453,248 and that its net annual income is \$87,960.

On January 10, 2005, the director issued a notice of intent to deny the petition, advising the petitioner that pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), information which is adverse to the consideration of the instant petition was being furnished to the petitioner to allow it an opportunity for rebuttal before the decision is rendered. The director proceeded to advise the petitioner that public record revealed that although the beneficiary was still living in [redacted] California in August 2003 when the current I-140 was filed, he is shown to have moved to [redacted] California in November 2003, and that the beneficiary is shown to be residing at [redacted]

[REDACTED], Goleta, California, as of September 2004. The director states that this would represent a driving distance of 190.5 miles to Sun City, California where the certified position is located.

The director also requested a copy of a business organizational chart showing the staffing of the petitioner as of the date of filing the petition, August 26, 2003, including the identification of the beneficiary's position and all employees that are under his supervision. The director further requested copies of the state quarterly wage reports for all employees for the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2003 and all of 2004, as well an explanation why the beneficiary would seek employment as a liquor store manager in [REDACTED] when he is the co-owner of two separate companies, identified by the director as "[REDACTED]" in Simi Valley, California and [REDACTED] in Barstow, California. The director also requested an explanation why the petitioner would require the services of a liquor store manager when they have only two employees.

In response, the petitioner, through counsel, stated that the beneficiary lives in [REDACTED] and not [REDACTED] or [REDACTED] and intended to drive to the certified employment. The petitioner also states that the beneficiary co-owns a liquor store in Barstow but does not own the [REDACTED] and requires additional income from the certified position to maintain an acceptable quality of life.

The petitioner provided a description of the beneficiary's potential duties which would involve arriving at 11:30 a.m. and working until 8:30pm. A copy of an internet driving directions excerpt indicates that the distance between the beneficiary's home address in [REDACTED] California to the petitioner's business is 75 miles.

A copy of an organizational chart shows the owners to be [REDACTED], [REDACTED], and [REDACTED], the manager to be the beneficiary, the cashier to be [REDACTED] and the cashier/ stockman to be [REDACTED]. Copies of the 2004 state quarterly wage reports show [REDACTED] listed as the only employee and copies of the four 2003 state quarterly wage reports show [REDACTED] listed as the employees.

The case was forwarded to the district office for an interview with the beneficiary and with [REDACTED]. The record reflects that a referral from the district office dated March 17, 2005 was made to the director. This referral contains a summary of the interview with the beneficiary and Mr. [REDACTED] which was conducted with two CIS officers present. The summary indicates the following: 1) that the beneficiary and the petitioner's owner have been friends for fifteen years and that the beneficiary retains ownership in two liquor stores but removed himself from the operation of one after 1995 due to **personal** and safety reasons; 2) that the three tax returns (beneficiary's) reflect this ownership; 3) that the beneficiary was asked why he was interested in becoming a liquor store manager when he controls interests in two liquor stores already and that there was no answer other than only God knows where and what people may end up; 4) that the beneficiary gives advice on the day-to-day operation of his liquor stores but also claims to be working for VON grocery 5) that there is no evidence of this claim and that 6) the petitioner's owner and beneficiary contradicted each other in that the petitioner claimed that the beneficiary did not have any liquor store and that he does not know where the beneficiary lives or works at the present time.

The director denied the petition on April 14, 2005. The director reiterated the claim that the beneficiary's commute to the petitioner's business would be from [REDACTED] to Sun City, a distance of 190.5 miles and thus questioning the beneficiary's intent to be employed for the petitioner. The director also determined that

based on the interview at the district office that it was not reasonable to believe that the owner of two liquor stores would also want to manage a third store. The director also observed that the size of the petitioner's payroll that varies between one full-time employee for one quarter and either two part-time employees or one part-time employee for the rest of the time does not validate the need for a manager.

On appeal, counsel takes issue with some of the factual conclusions cited by the director as having been elicited from the beneficiary and Mr. [REDACTED] at the district office interview. Counsel submits an affidavit by the beneficiary in which he states that he has been living in [REDACTED], California since September 1999 and has never lived in [REDACTED], California. He states that the Goleta address belongs to his cousin due to a joint credit card account that they share. The beneficiary claims that this information was imparted at the interview and that he had brought written documentation to show but was told it was not necessary. On appeal, copies of various bank statements, utility bills, home and car loan statements are provided showing the beneficiary's name and address in [REDACTED] California. The beneficiary also asserts that CIS's claim that he testified that he owns two separate companies is inaccurate. He states that he testified that he owns one company, being the [REDACTED], in which he is a partner. The beneficiary further states that:

[t]he officer asked why I would be employed for a company when I own another and my response was I make more money from managing another company than the proceeds from my own company. My answer of 'only God knew where and what people may end up' was in response to the question which asked, 'how long do you plan on working for Petitioner once you get your green card.'

An affidavit from [REDACTED] is submitted on appeal. He also asserts that misrepresentations and inaccuracies were presented in the director's denial. Mr. [REDACTED] states that he has a position available for a liquor store manager. He states that his brother previously performed this function but that he has had surgeries that have caused reconsideration of his employment in this capacity. Mr. [REDACTED] claims that although he stated that he knew the beneficiary, he also stated that he did not know what he owned or where he lived. He states that he does not base a job offer on where the beneficiary lives but told the officers that he knows that once the beneficiary is employed for him, he will be trustworthy. Mr. [REDACTED] states that the offer is bona fide and the job opening exists.

It is noted that the phrase " 'for the purpose of performing,' " in section 212(a)(5)(A)(i) of the Act (formerly section 212(a)(14) of the Act), clearly indicates that an immigrant alien within the contemplation of section 212(a)(14) must establish a *bona fide* intent to engage in the certified position as set forth on the ETA 750 A. See *Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966).

Here, it is observed that the beneficiary has used home addresses in both Barstow and in [REDACTED] his individual tax returns for 2001 through 2003 are contained in the record. A home address of 1 [REDACTED] California is given for each year on the returns. Other public record documents (UCC filings) also mention an address at [REDACTED]. It is not clear if the beneficiary was questioned about this. However, it is also clear that he owns real estate at the [REDACTED] address where he has received utility bills, home loan documents and bank statements. In 2001, his tax return reflects that his gross income of \$83,384 was reported as coming from [REDACTED] as management fees. In 2002, his gross income of

\$54,716 was declared as management fees from Brownies Liquor. In 2003, the beneficiary claimed \$50,488 as business profit described only as "management" on Schedule C, Profit or Loss from Business. He also claimed \$5,432 as income from [REDACTED], Income or Loss From Partnerships and S Corporations. Other than his interest in [REDACTED] in 2003, we do not find corroboration of the district adjudications officer's observation that the tax returns indicate the beneficiary's ownership in two companies. Nor do we find that the beneficiary's income from his self-employment as a manager so lucrative that it would necessarily disqualify him from accepting the certified position. Because the determination of intent so often involves questions of credibility, it is difficult to make an objective review without the record providing an indication of specific questions and answers given at the interview. Without more, we do not find that the current record clearly supports a finding that the beneficiary has no intent to take the certified position of liquor store manager.

Nor do we find that a two employee (part-time/full-time) store would not necessarily require some form of supervision and management. It is noted that the director's reliance on 8 C.F.R. § 204.5(j)(4)(ii) instructing CIS to consider the reasonable needs of the petitioning entity, is based on considerations surrounding the issuance of first preference multinational executives and managers who are exempted from the labor certification process. In view of Mr. [REDACTED] statement submitted on appeal, we cannot conclude from the record as it stands that a bona fide job offer does not exist. In this case, the AAO must conclude that the certified position remains open to the beneficiary and that at the time of the interview, mutual intentions of the petitioner and the beneficiary were that the beneficiary would accept this position. *See Yui Sing Tse v. INS*, 596 F.2d 831 (9<sup>th</sup> Cir. 1979).

That said, it is noted that 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 (9<sup>th</sup> Cir. 2003); *see also Dor v. INS, supra*, (noting that the AAO reviews appeals on a *de novo* basis). It is additionally noted that the AAO dismissed the previous appeal based on the petitioner's failure to establish its continuing ability to pay the proffered wage. Counsel's current law firm also represented the petitioner in that proceeding.

In this case, the petitioner failed to demonstrate its continuing ability to pay the proffered wage of \$13.05 per hour or \$27,144 per year. As noted above, the priority date in this case is December 27, 1996.

In examining the petitioner's ability to pay the proffered salary, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. In this case, there is no indication that the petitioner had commenced to employ 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 or audited financial statements without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the

certified salary during the period covered by the tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage has been well established by judicial precedent. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner submitted a 1999 individual (Form 1040) tax return of Sami Alberre, including Schedule C, Profit or Loss from Business, indicating that in 1999, the petitioner was a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). The seven page return reflected that the sole proprietor filed jointly with his spouse and claimed two dependents. His adjusted gross income was reported as \$39,619.

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 (line 12). 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.

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 this case, even without considering household expenses, it is noted that the proffered salary of \$27,144 represents 68% of the sole proprietor's adjusted gross income. Thus, after paying the proffered wage, \$12,475 would be left to support the proprietor's family of four. No other evidence of cash or cash equivalent assets was provided relevant to this year that would yield a positive determination of the petitioner's ability to pay the proffered wage.

The petitioner also provided copies of the petitioner's Form 1065 partnership returns for 2000, 2001 and 2002. They all reflected that the petitioner's net income of \$96,596, \$153,804, and \$87,960 was sufficient to cover the proffered wage. However, it is noted that the second preference petition was filed in August 2003. Other than the quarterly wage statements, the record lacks any regulatory-prescribed financial documentation covering this period.

Further, as noted above, and as found in the AAO's previous decision, the petitioner failed to provide any documentation pertinent to the petitioner's ability to pay the proffered wage for 1996, 1997 or 1998. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). 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).

That said, the director failed to address the petitioner's continuing ability to pay the proffered wage as of the priority date in the request for evidence or in the final decision. In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner consistent with the foregoing. 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 consistent with the foregoing and entry of a new decision, which is to be certified to the AAO for review.