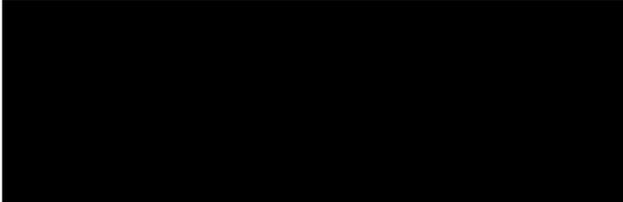


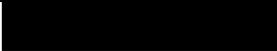
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invasion of personal privacy



U.S. Citizenship
and Immigration
Services

BL



FILE: 
EAC-04-198-53573

Office: VERMONT SERVICE CENTER

Date: DEC 31 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 appeal will be dismissed with a separate finding of fraud.

The petitioner operates a convenience store, and seeks to employ the beneficiary permanently in the United States as a manager, retail store. 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 January 11, 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 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).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

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).

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 system on April 30, 2001.² The proffered wage as stated on the Form ETA 750 is \$20.00 per hour, 40 hours per week, which is equivalent to \$41,600 per year. The labor certification was approved on November 30, 2001. The petitioner filed an I-140 Petition for the beneficiary on June 12, 2004. The petitioner listed the following information on the I-140 Petition related the petitioning entity: established: 1991; gross annual income: \$55,612.00; net annual income: \$11,996.00; and current number of employees: 3.

The director denied the petition on January 11, 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.

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 the Form ETA 750B, signed by the beneficiary on April 25, 2004, the beneficiary did not list that he was employed with the petitioner. The petitioner did not claim that it employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the beneficiary the proffered wage based on prior wage payment.

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

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

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 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, three children, and one parent in Pittsburgh, Pennsylvania. The tax returns reflect the following information for the following years:³

Tax Year	Sole Proprietor's AGI (1040)	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2003	\$14,145	\$268,843	\$0	\$15,167
2002	\$14,861	\$267,492	\$0	\$15,089
2001	\$32,426	\$246,791	\$0	\$34,612

If we reduced the owner's adjusted gross income (AGI) by \$41,600, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of -\$27,455 in 2003, -\$26,739 in 2002, and -\$9,174 in 2001. The petitioner would be left with negative income for each year. Based on the above analysis, the petitioner cannot demonstrate that he can pay the beneficiary the proffered wage in any year and support himself and his family. 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, counsel⁴ provides that "the alien is currently employed by [REDACTED] He is being paid equivalent of his salary mentioned in the ETA 750A." The petitioner has provided no documentation in the

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.

⁴ We note that a different attorney initially filed the labor certification and I-140 Petition. A second attorney then filed the appeal of the I-140 Petition, and present counsel has recently entered their appearance on behalf of the petitioner.

form of paystubs, W-2 statements, or otherwise to verify that the petitioner is currently employing and paying the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel additionally resubmitted the petitioner's 2001, 2002, and 2003 tax returns, which we have addressed above, and which fail to document the petitioner's ability to pay the proffered wage.

The petitioner also submitted copies of several months of bank statements for the petitioner's business for the months ending January 2001, March 2001, April 2001, and May 2001. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." Additionally, in the case of a sole proprietor, cash assets may be reflected on the petitioner's Form 1040 Schedule C, and accordingly already considered above. As a sole proprietorship, the owner's personal assets, or personal bank statements would be taken into consideration as additional funds to pay the proffered wage. However, the petitioner only submitted bank statements related to the petitioning company, and there is no evidence that these funds have not already been accounted for on the Form 1040 Schedule C.

Further, even if we were to examine the bank statements submitted, nothing contained therein leads us to conclude that the petitioner can demonstrate its ability to pay the proffered wage in the year 2001, or thereafter. The bank account balances reflect a high balance of \$1,027.29 at the end of April 2001, and a low balance of \$157.38 at the end of January 2001, which would be insufficient to pay the proffered wage on a monthly or an annual basis. The bank statements would not allow us to conclude that the petitioner had sufficient assets to pay the proffered wage.

Additionally, although not raised in the director's decision, the petitioner failed to adequately demonstrate that the beneficiary met the experience requirements of the certified labor certification. 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). 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 appeal⁵.

In examining the petition on appeal, we find that there is an issue related to the beneficiary's prior experience, and whether he qualifies for the certified Form ETA 750 position.

On the Form ETA 750A, the "job offer" description for a manager, retail store:

May plan and prepare work schedule and assign employees to specific duties; coordinate sales promotion activities and prepare merchandise displays and advertising copy;

⁵ 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

supervise employees; keep operating records; order merchandise. May answer customer complaints or inquiries; locks and secure store.

Further, the job offered listed that the position required:

Education: none
Major Field Study: none

Experience: 2 years in the job offered, Manager, Retail Store

Other special requirements: willing to work on weekends.

On the Form ETA 750B, the beneficiary listed his relevant experience as: [REDACTED], Multan, Pakistan, from April 1996 to April 2002; Store Manager. Further, the beneficiary listed that he was previously employed with PIA Airport, Multan, Pakistan, March 1969 to March 2003, Assistant Manager.

A beneficiary is required to document prior experience 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 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 the following letters:

Letter from Director [name and signature unclear], [REDACTED], Multan, Pakistan, dated July 25, 2002;

Position title: Retail Manager;

Dates of employment: February 1, 1996 to July 15, 2002;

Description of duties: manage, supervise employees, keep operating records, plan and prepare work schedule, assign duties to employees, coordinate sales promotion activities and advertisements.

Letter from [REDACTED], Station Manager, PIA – Multan Airport, Pakistan, dated December 21, 2003;

Position title: Customer Service Department;

Dates of employment: 1969 for "more than 3 decades with us;"

Description of duties: "has been working in a managerial capacity, commanding a squad of more than 25 workers, dealing with customers in various areas of service."

An investigation was initiated into the beneficiary's claimed prior experience. The U.S. Consulate in Islamabad, Pakistan contacted the beneficiary's prior employers to confirm the claimed experience.

In response to the Consulate investigation, Range Family Services responded with the following:

With reference to the letter that we received on 7th June 2007, about the confirmation of experience certificate, we shall confirm you that there was no such person named as [REDACTED] worked/working with our organization for that much period of time. We did not issue any certificate to him.

Accordingly, it appears that the beneficiary misrepresented his prior work experience in order to meet the requirements of the certified Form ETA 750, and submitted a fraudulent document to CIS.⁶ Both the petitioner and counsel were advised of the foregoing by a Notice of Derogatory Information, which the AAO director issued on September 21, 2007. The petitioner failed to respond. Therefore, the petitioner has provided no evidence to overcome the findings of the U.S. Consulate investigation.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* INA Section 212(a)(6)(c), [8 U.S.C. 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position through meeting the experience requirements of the position offered. The job offered requires two years of prior experience as a manager of a retail store. The beneficiary listed on Form ETA 750B that he gained this experience with Range Family Services, and signed the form under penalty of perjury, which constitutes an act of willful misrepresentation if the beneficiary was not employed in that position. The listing of such experience misrepresented the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the listing of false experience is a willful misrepresentation of the beneficiary's qualifications that adversely impacted DOL's adjudication of the Form ETA 750 and CIS's immigrant petition analysis.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be

⁶ Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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).

invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By filing the instant petition and listing information on the Form ETA 750 that would lead to a positive determination that the beneficiary had the required experience, the beneficiary has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the beneficiary misrepresented his prior experience, we affirm our finding of fraud and invalidate the labor certification. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

Based on the foregoing, the petitioner has failed to demonstrate both its ability to pay the proffered wage. Further, the petitioner has failed to demonstrate that the beneficiary meets the qualifications of the certified labor certification. Accordingly, 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 with a finding of fraud against the beneficiary and the Form ETA 750 is invalidated.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented his experience in an effort to mislead Citizenship and Immigration Services on elements material to his eligibility for a benefit sought under the immigration laws of the United States. Further, based on 20 C.F.R. § 656.31(d), the labor certification will be invalidated.