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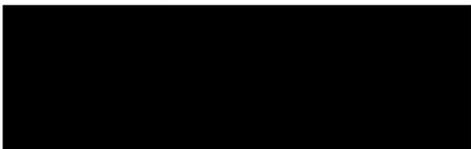
U.S. Department of Homeland Security
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U.S. Citizenship
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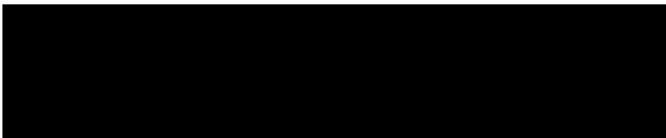
Office: CALIFORNIA SERVICE CENTER

Date: FEB 05 2007

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 "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile gasoline and service station. It seeks to employ the beneficiary permanently in the United States as a gas station manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position as stipulated on the Form ETA 750, or that the position qualified as either a professional or skilled worker as the position requires only a minimum of two months of work experience in management and training in computer equipment. Based on the petitioner's stated work experience requirements as stipulated on the original ETA 750, the director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

As set forth in the director's May 20, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director in his decision noted that in order for the petition to be considered a skilled worker, the Form ETA 750 had to indicate that the position required at least two years of training or experience. Although in his request for further evidence, the director asked whether the petitioner wished to change the visa petition classification from under section 203(b)(3)(i), skilled worker, to section 203(b)(3)(iii), unskilled worker, the petitioner made no response to this enquiry. The director then denied the petition because the position did not qualify as a skilled worker position and because the beneficiary was not qualified to perform the duties of a skilled worker position.

The regulation at 8 C.F.R. § 204.5(l)(3) also 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 worker. If the petitioner 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 The minimum requirements for this classification are at least the two years of training or experience.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides

(ii) Other documentation--

- (D) *Other Worker*. If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner must 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. 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 29, 1988.

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 appeal¹. On appeal, counsel submits a statement and a new I-140 petition. Other relevant evidence in the record includes letters of work experience from the petitioner as well as the beneficiary's former employer in Argentina. The record also contains the results of a fraud investigation conducted in Argentina with regard to a previous I-140 petition submitted with the original Form ETA 750 that was approved and then subsequently revoked based on the beneficiary's lack of management experience. In addition, the record contains the beneficiary's W-2 forms for tax years 1985, 1986, 1987, 1989, 1990, 1991, 1999, 2000, 2001, 2002, and 2004, as well as the petitioner's Forms 1040, U.S. Individual Income Tax Return, for tax years 2000 to 2004. The record also contains the beneficiary's incomplete Forms 1040, U.S. Individual Income Tax Return, for the years 1988, and 2003, as well as copies of the petitioner's DE-6 Forms ranging from the third quarter of 2002 to the first quarter of 2005. Finally the record contains a statement from the petitioner dated February 22, 1988 that the beneficiary had been given a basic six month training program in the use of computerized machines as well as in the management tasks for all aspects of the computerized automobile service station. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that former counsel prepared the petitioner's ETA Form 750, Parts A and B, and that the beneficiary had been denied benefits based on errors in the subsequent applications. Counsel states that the beneficiary has the required period of work experience as stipulated on the ETA 750, and that the matter should be reviewed and treated as an unskilled position. In a letter, counsel then states that the original

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).

ETA Form 750 was for an unskilled worker and that the beneficiary, in updating the information, incorrectly stated that the position was for a skilled worker.

Counsel submits two letters previously submitted to the record. One letter, is written by [REDACTED] Director, [REDACTED] dated August 31, 1989, [REDACTED] and a subsequent untranslated Spanish language letter written in March 30, 1993, by [REDACTED], Executive Director, [REDACTED]. In both letters, the letter writers stated that the beneficiary worked for a company named F [REDACTED] Publicidad from 1981 to 1984. Counsel also submits an untranslated² civil document from Mr. [REDACTED] written in March 1993. This document appears to be a refutation of a telephone interview conducted by the U.S. Embassy with Mr. [REDACTED] in 1993 with regard to the beneficiary's work experience at Fredy Publicidad.³

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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).

In the instant case, 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 manager, computerized automobile service station. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	4
	College	None
	College Degree Required	None Required
	Major Field of Study	(Blank)

With regard to the training and experience required, the Form ETA 750 stated originally three months of training in "[REDACTED]" as well as one year of experience in the job offered, and two months in the related occupation of management. The one year of job experience in the job and the two years of experience in a related occupation of management were crossed out, and the experience block was changed to indicate two months of

² It is noted that 8 C.F.R. § 103.2(b)(3) states the following "Translations. Any document containing foreign language submitted to [CIS] shall be 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."

³ As noted previously, the document should be accompanied by a full English language translation that the translator has certified as complete and accurate, in pertinent part. Thus, the AAO can only assume the contents of this document.

work experience in the job offered.⁴ This is the only work experience requirement listed in Part 14. Thus, the applicant must also have two months of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. The position title contained on the Form ETA 750 is "Manager, Computerized Automobile Service Station." Since this is a public record, the duties will not be recited in this decision. Item 15 of Form ETA 750A originally reflected other special requirements; however, these were crossed out and annotated with a date of May 9, 1989. Thus, there are not other special requirements for the proffered position.

The beneficiary set forth no 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 represented that he has worked from March 1985 to the date that he signed the Form ETA 750, namely February 22, 1988 for the petitioner. The beneficiary indicated that he worked as manager of a computerized automobile service station, and that his job duties were the following:

Plans, develops, & implements policies for operating station, such as hours of operation, workers required & duties, scope of operations, & prices for products & services. Hires & trains workers, prepares work schedules, & assigns workers to specific duties, such as customer service, automobile maintenance, or repair work. Reconciles cash with gasoline pump or other automotive accessories & parts. Etc.

The beneficiary also stated that he worked for Fredy Publicidad, Maipu 140, San Miguel de Tucuman, Argentina, as a manager, from 1981 to 1984, and was in charge of the management and supervision of all the processing and duties in the department of public relations and sales for the company.⁵

The regulation at 8 C.F.R. § 204.5(1)(3) 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.

⁴ These changes, in contrast to the changes in Item 15, have no annotation and date. Thus, the record is not clear as to who changed this part of the Form ETA 750, and whether or not the change was made prior to DOL's certification. For purpose of these proceedings, the AAO will consider that the Department of Labor made the changes.

⁵ Based on the actual experience stipulated on the corrected Form ETA 750, the beneficiary's work experience or lack of work experience as a manager of a public relations firm in Argentina prior to the 1988 priority date is irrelevant to the instant petition.

On appeal, counsel states that the matter should be treated as an unskilled worker based on errors in the applications.⁶ Counsel asserts that the original ETA Form 750 was for an unskilled worker and that the beneficiary, in updating the information, incorrectly stated that the position was for a skilled worker. However, the I-797 receipt notice submitted to counsel dated June 2004 establishes that the petition was filed as a skilled worker or professional, Section 203(B)(3)(A)(i) or (ii).⁷ If counsel had wished to change the classification of the petition, the director provided him with that opportunity to do so in the director's request for further evidence. Since counsel chose not to change the classification, the AAO will not accept an amended I-140 petition on appeal.

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). In the instant petition, the director was not requesting evidence as to the actual classification, but rather simply provided the petitioner with an opportunity to revise the visa petition classification.⁸ 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). If the petitioner had wanted to clarify the classification of the visa petition, it could have indicated as much prior to the director's decision. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the counsel's assertions as to whether the original ETA 750 indicates the proffered position was for an unskilled worker, or that the beneficiary incorrectly updated an application. Furthermore, the assertions of counsel on appeal do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Thus, the instant petition as submitted, is for a professional or a skilled worker. Citizenship and Immigration Services (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). The ETA 750 submitted to the record, which indicates that only two months of work experience in the job is necessary to

⁶ On appeal, counsel appears to infer that former counsel erroneously prepared the original Form ETA 750. 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).

⁷ This document is found in the record.

⁸ It is noted that the director made such a request as a matter of discretion. The regulations for employment-based visa petitions do not mandate or support such a request.

perform the duties of the position. Thus the position cannot be qualified as a skilled worker, which requires two years of work experience in the proffered position.

It is noted that the record does contain evidence that the petitioner employed the beneficiary prior to the 1988 priority date. In response to the director's request for further evidence, the petitioner submitted the beneficiary's W-2 forms for tax years 1985, 1986, and 1987. The record reflects that the petitioner paid the beneficiary \$2,100 in 1985, \$6,020 in 1986, and \$7,000 in 1987. Beyond the payment of wages being documented, the petitioner has not established the duties of the beneficiary during this period of time, and whether the requisite two months of training were accomplished during this period of time. Therefore although the petitioner can establish that it employed the beneficiary prior to the 1988 priority date, it did not establish that this employment could be accepted to fulfill the requisite training period stipulated on the Form ETA 750. Thus, the petitioner did not establish that the beneficiary had the stipulated two months of training prior to the 1988 priority date, and did not establish that the beneficiary was qualified to perform the duties of the proffered position. Consequently, the appeal will be dismissed. The director's decision will be affirmed.

Beyond the decision of the director, there is another reason to deny the present petition. 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 petition, the petitioner has not established that it had the ability to pay the proffered wage as of the 1988 priority date to the present.

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, contrary to counsel's assertion, the Form ETA 750 was accepted on February 29, 1988. The proffered wage as stated on the Form ETA 750 is \$11.25 an hour (\$23,400).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in January 1984, to have a gross annual income of

¹⁰ Based on the W-2 Forms, the beneficiary received the following wages for the respective years between 1989 and 2004: \$9,180 in 1989, (Illegible) in 1990, \$9,360 in 1991, \$13,500 in 1999, \$15,900 in 2000, \$15,600 in 2001, \$15,900 in 2002, and \$15,900 in 2004.

\$2,701,835, a net annual income of \$106,947, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on February 22, 1988, the beneficiary claimed to work for the petitioner since March 1985.

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 has established that it employed and paid the beneficiary prior to the 1988 priority date. However, these wages are not dispositive of whether the petitioner paid the beneficiary as of the 1988 priority date and to the present. With regard to the beneficiary's W-2 forms for the years 1989, 1990, 1991, 1999, 2000, 2001, 2002, 2003, and 2004.¹⁰ During these years, the petitioner paid the beneficiary less than the proffered wage of \$23,400. Therefore the petitioner has not established that as of the 1988 priority date and to the present, it has paid the beneficiary the entire proffered wage. Thus, the petitioner would have to establish that it had the ability to either pay the entire proffered wage in the years in which the beneficiary received no wages, or the difference between the actual wages and the proffered wage in the years in which the beneficiary received wages.

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) (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 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 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 did not provide its federal tax returns as of the 1988 priority date as requested by the director, but rather provided its Forms 1040 for tax years 2000 to 2004. The petitioner's tax

returns indicate he supports a family of four. The petitioner's total adjusted gross income¹¹ for these four years is as follows: \$66,650 in 2000; \$108,792 in 2001, \$70,534 in 2002, \$116,909 in 2003, and \$105,654 in 2004.

Although the director did not request a list of monthly household expenses for the petitioner and dependents, and the record contains no further evidence as to any such household expenses, based on the sole proprietor's adjusted gross income, it appears reasonable that the sole proprietor has the ability to pay his own household expenses and also to pay the proffered wage of \$23,400 during the years 2000 to 2004. However, the priority date identified on the Form ETA 750 is February 29, 1988. The petitioner has not established its ability to pay the proffered wage as of the priority date and up to tax year 2000.

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.

¹¹ Based on the combined profits of two gasoline stations identified in two Schedules C, Form 1040.