

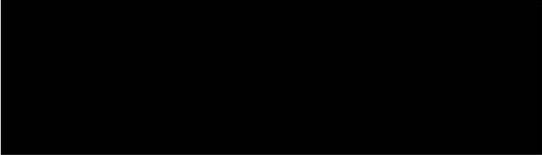
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 05 026 52395

Office: CALIFORNIA SERVICE CENTER

Date: FEB 20 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 on appeal. The matter will be remanded to the director.

The petitioner is a painting business. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition, and, that the petitioner had not established it was a viable business with the continuing ability to pay the beneficiary the proffered wage. Specifically, the director found that the business addresses stated on the labor certification, and that address on the petitioner's income tax returns are not the same, and, that therefore the existence of the business at the location stated in the labor certification and the legitimacy of the job offer has not been shown. 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.

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 regulation at 8.CFR § 204.5(1)(3)(ii) states, in pertinent part:

(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.

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, the Form ETA 750 was accepted on February 13, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$17.20 per hour (\$35,776.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: a copy of the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, counsel's letter dated November 1, 2004 listing the contents of his submittal; a letter from the petitioner dated October 12, 2004; the petitioner's business license from the City of Oxnard, California, dated September 14, 2004; the petitioner's contractor's license from the State of California; and, U.S. federal income tax returns, IRS Form 1040, filed by the petitioner for years 2001, 2002 and 2003.

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. 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 1987 and, at the time of preparation of the petition, to currently employ 25 workers.

The Beneficiary's Qualifications, Work Experience

The beneficiary must have two years of experience in the job offered, painter, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements. 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*,

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

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).

699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Relative to evidence of the qualifications of the beneficiary, counsel submitted the following documents: translated documents evidencing that the beneficiary attended the University of Guadalajara, Preparatory School No. 7 from 1980 to 1983; a statement of "Employee Status Change" from a prior employer of the beneficiary dated January 15, 1999; letters of appreciation dated March 4 and 28, 1997 from the beneficiary's prior employer, Double Tree Hotel, Ventura, California; and the birth certificate and marriage certificates of the beneficiary.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the beneficiary's qualifications Form ETA 750 Application for Alien Employment Certification beginning on the priority date, consistent with the regulations at 8 C.F.R. § 204.5(g) and 8 CFR § 204.5(1)(3)(ii), the director requested on December 7, 2004, the original labor certification as well as a current employer letter from the beneficiary's prior employer, [REDACTED]. The director requested a job verification from the prior employer on its letterhead with the beneficiary's job title, duties, dates of employment and number of hours worked.

In response counsel submitted a cover letter dated December 15, 2004, with the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, a current employer letter from the beneficiary's prior employer, [REDACTED] dated December 14, 2004.

The director denied the petition on May 25, 2005, finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, counsel asserts the beneficiary has the requisite two years experience as a painter prior to the "filing of his labor certification."

As additional evidence submitted upon appeal counsel submits copies of the following documents: the labor certification; a statement of "Employee Status Change" from a prior employer ([REDACTED] [REDACTED] of the beneficiary dated January 15, 1999; a current employer letter from the beneficiary's prior employer, [REDACTED] dated December 14, 2004; an undated statement from the petitioner stating that the beneficiary worked for the petitioner from 1998 to 2001; a letter of appreciation dated March 4, 1997 from the beneficiary's prior employer, Double Tree Hotel, Ventura, California; and, a statement of the petitioner dated June 15, 2005.

According to the labor certification, information provided by the beneficiary stated that he worked for the petitioner as a painter from January 1, 1999 to the "present" (the ETA 750, Part B form is undated). The two other employment positions the beneficiary provided was "General Maintenance" for the Double Tree Hotel, in Ventura, California, and "Maintenance" for a cat food factory, [REDACTED], of Oxnard, California from 1986 to 1990. The descriptions of both positions indicate that painting duties were accomplished along with general maintenance projects.

As is noted above, there is no job verification from either of these prior employers on their letterhead with the beneficiary's job title, duties, dates of employment and number of hours worked.

The petitioner has provided two additional supporting statements in this matter. The first is a statement of "Employee Status Change" from a prior employer, [REDACTED] stating that the then present

position of the beneficiary, "Painter" was changed to "Painter Supervisor" on January 15, 1999. The second statement from this prior employer is more specific. [REDACTED], statement dated December 14, 2004, declared that the beneficiary worked for the company from 1998 to 2001, first as a journeyman painter then as supervisor on November 1999.

The priority date is February 13, 2002. Based upon the evidence submitted concerning the beneficiary's work experience, it is credible to believe that the beneficiary had at least two years job experience prior to the priority date.

The Existence of the Petitioner's Business

The director determined that the petitioner that the petitioner had not established it was a viable business with the continuing ability to pay the beneficiary the proffered wage. Specifically, the director found that the business addresses stated on the labor certification, and that on the petitioner's income tax returns, are not the same, and, that therefore the existence of the business at the location stated in the labor certification and the legitimacy of the job offer has not been shown.

The business address as noted on the labor certification is [REDACTED] Oxnard California 93030. The business address on Schedule C of the Form 1040 is [REDACTED] Oxnard California 93030. Counsel states that [REDACTED] is the residence of the petitioner. The petitioner has submitted tax returns with Schedule C statements for the business, and copies of State of California as well as city business and contractor licenses referencing the city of Oxnard, California.

We find that both addresses given above, as already stated by the director, are within the same Metropolitan Statistical Area for computation of the proffered wage, and, by the evidence above mentioned the business does exist. The legitimacy of the job offer has been shown for the independent and objective evidence submitted.

In summary, the evidence submitted does demonstrate credibly that the beneficiary had the requisite two years of experience. The existence of the business at the location stated in the labor certification, and, the legitimacy of the job offer has been shown by the independent and objective evidence submitted. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

Ability to Pay the Proffered Wage

Beyond the decision of the director, the petitioner must demonstrate that it has the ability to pay the proffered wage from the priority date. The AAO reviews appeals on a de novo basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Director 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).

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 at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must 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 Sonégawa*, 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.

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).

Beyond the decision of the director, 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 supports a family of five in the years for which tax returns were submitted. The proffered wage as stated on the Form ETA 750 is \$17.20 per hour (\$35,776.00 per year). The tax returns³ reflect the following information for the following years:

- In 2002, the Form 1040 stated adjusted gross income⁴ of <\$4,465.00>⁵.
- In 2003, the Form 1040 stated adjusted gross income of \$60,092.00.

In 2002 and 2003, the sole proprietorship's adjusted gross incomes of <\$4,465.00>, \$60,092.00 respectively fail to cover the proffered wage of \$58,364.80 per year, and his family's reasonable living expenses. Schedule A⁶ as submitted with the petitioner's Form 1040 tax return each year listed personal deductible expenses such as medical and dental services, home mortgage interest, charitable contributions as follows: 2002, \$21,543.00; 2003, \$22,618.00.⁷ It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage and personal living expenses.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Since this was not part of the director's decision, and the grounds of ineligibility identified by the director were overcome, the case will be remanded to the director to give notice to the petitioner of this additional deficiency.

The AAO will remand the case to the director and the director can undertake any procedural mechanisms or request any additional information or evidence necessary to make an additional determination.

³ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. In 2001, the Form 1040 stated adjusted gross income of \$58,546.00.

⁴ IRS Form 1040, Line 33, 34 or 35 depending upon the year of the tax return.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁶ See generally <http://www.irs.gov/irs-pdf/i1040sa-2003.pdf>. - Schedule A instructions.

⁷ As already stated, the I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, all of the family's household living expenses should be considered. Besides the items found on the petitioner's Schedule A of his returns, such items generally includes the following: food, car payments (whether leased or owned), installment loans, insurance (auto, household, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. It is reasonable to expect that the petitioner's personal expenses for each of the years examined would be greater than that stated on the schedule a statements to the returns.

ORDER: The petition is remanded to the director for entry of a new decision.