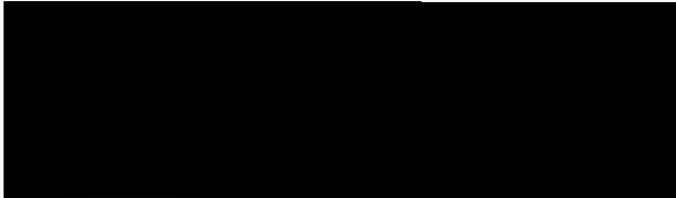




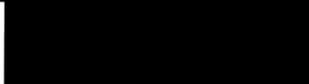
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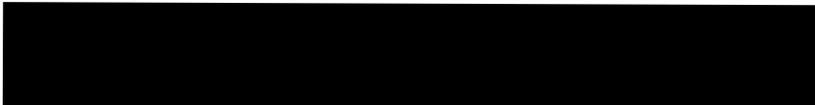
Date: **MAY 24 2007**

EAC-05-136-51214

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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. Wisnann, Chief
Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker, however, the labor certification presented was not certified to require two years specialized training or experience, and no ETA 750 or ETA 9089 labor certification was submitted with the petition to support the classification sought. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 16, 2005 denial, the single issue in this case is whether or not the petition is accompanied with a DOL certified labor certification to support the classification the petitioner sought for the beneficiary.

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. However, counsel does not submit additional evidence on appeal. Relevant evidence in the record includes DOL certified Form ETA 750 for a position of carpenter, a letter from the petitioner requesting considering in the third preference category as a skilled worker, an experience letter from [REDACTED] of [REDACTED] and [REDACTED]'s Form 1040 U.S. Individual Income Tax Return for 2001, 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Section 203(b)(3)(A)(i) of the Act 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 Act 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.

The record shows that the petitioner filed the instant petition to classify the beneficiary as a skilled worker under Section 203(b)(3)(A)(i) of the Act by checking the Box e, A professional or a skilled worker, in Part 2 of the Form I-140. Section 203(b)(3)(A)(i) defines the skilled worker as requiring at least two years training or experience.

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).

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 carpenter. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|----------|
| 14. | Experience | |
| | Job Offered | 3 months |
| | Related Occupation | Blank |

The duties 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.

On July 14, 2005, the director issued a request for evidence (RFE) indicating the petition is not approvable to classify the beneficiary as a third preference skilled worker and asking whether or not the petitioner wished to change the requested preference classification from skilled worker to unskilled worker. In response to the director's RFE, the petitioner requested that the "petition be adjudicated as a 3rd preference petition under section 203(b)(3)" on the RFE notice and counsel also submitted a letter from the petitioner dated July 22, 2005. The petitioner stated in pertinent part that:

I have completed the section in your letter requesting that the position be classified as a skilled worker. I request this classification understanding that the approved alien labor certification will not be affected, but rather that the beneficiary of this petition will have to establish that he had the requisite 2 years experience as a carpenter prior to filing the application for alien labor certification. Under these circumstances, please re-classify this petition as that of a Skilled worker under Section 203(b)(3) of the INA.

On appeal counsel asserts that if the petition did not warrant classification under a skilled category, it was up to the director to merely approve it as an other worker rather than indicating to the petitioner that there was a possibility for reclassification of the petition. Counsel contends that the director's RFE trapped the petitioner into taking a position that a new classification would be permissible, by having the petitioner indicate the classification it was seeking, and having him sign off on the request.

The AAO notes that counsel also represented the petitioner in the labor certification application processing. The petitioner with counsel's professional services knew that the Form ETA 750 requires three months of experience which cannot be categorized as a skilled worker. However, the petitioner with the same counsel's representation expressly requested CIS classify the beneficiary as a skilled worker by checking the box e in Part 2 of the Form I-140. The box e includes a professional category and a skilled worker category under the section 203(b)(3). While CIS must determine which category between professional and skilled worker the petition needs to be processed when the box e is checked by the petitioner, the director cannot decide to change the requested classification from the box e for a professional or a skilled worker to the box g. other

workers despite the petitioner expressly requested for classification as a skilled worker. 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). In her RFE, the director expressly indicated that the petition was not approvable under a skilled worker category and gave the petitioner a chance to correct its mistake in choosing to classify the beneficiary as a skilled worker and to change to classification as an unskilled worker. However, the petitioner through counsel insisted on requesting the director to classify the beneficiary as a skilled worker. The petitioner failed to establish eligibility for the benefit sought, i.e. the third preference as a skilled worker, with a valid labor certification for that category. The AAO concurs with the director's decision that with the instant labor certification the petition is not approvable, and accordingly the director's November 16, 2005 decision is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and finds that the petition would be denied even if the petition were adjudicated under the third preference as an unskilled worker. The AAO will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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).

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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$28.20 per hour (\$58,656 per year). On the Form ETA 750B signed by the beneficiary on April 14, 2001, the beneficiary did not claim to have worked for the petitioner. The petitioner claimed to have been established in 1998, to have a gross annual income of \$990,078 in 2004, to have a net annual income of \$76,557 in 2004, and to currently employ 5-7 subcontractors.

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 beneficiary did not claim to have worked for the petitioner on the Form ETA 750B. However, on the Form G-325A Biographic Information signed by the beneficiary on March 8, 2005, he

claimed working for the petitioner as a carpenter to the present time, but did not indicate his starting date. In response to the director's July 14, 2005 RFE, the petitioner stated that the beneficiary was employed by the petitioner in the year 2001 but was not issued form W-2. The record of proceeding does not contain any W-2 forms, 1099 forms or any other documents showing the beneficiary's compensation from the petitioner during the years 2001 through the present. **Therefore, the petitioner did not demonstrate that it paid any compensation to the beneficiary during the years in question.** The petitioner is still obligated to demonstrate it had ability to pay the beneficiary the full proffered wage for 2001 through the present.

The record shows that the petitioner was established as a domestic limited liability company (LLC) in Westchester County, the State of New York on October 30, 2002 and is currently active.² However, the LLC reports its income to the only member's individual income tax return as a sole proprietorship. **The record also shows that the petitioner was in business as a sole proprietorship under the name of [REDACTED] and reported the income and expenses on the schedule C of the form 1040 for the sole proprietor.** Therefore, the AAO will treat the petitioner as a sole proprietorship in determining its ability to pay the proffered wage in the instant case. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33³, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of **Form 1040 U.S. Individual Income Tax Return filed by [REDACTED] (the sole proprietor) and his wife, [REDACTED] for 2001, 2003 and 2004.** The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$58,656 from the priority date:

- In 2001, the Form 1040 stated adjusted gross income of \$58,186.
- In 2003, the Form 1040 stated adjusted gross income of \$43,228.
- In 2004, the Form 1040 stated adjusted gross income of \$59,448.

The record does not contain a statement of monthly expenses for the sole proprietor's household. However, the above information shows that in 2001 and 2003 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage in that year without taking into account the living expenses for the sole proprietor's household of 4 members in 2001 and 6 members in 2003; and in 2004 the adjusted gross income was sufficient to pay the beneficiary the proffered wage of \$58,656, however, it is most

² See http://appsext8.dos.state.ny.us/corp_public/corptest/entity_search_entry. (Accessed on May 2, 2007).

³ The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 34 for 2003 and Line 36 for 2004.

unlikely that the balance of \$792 after paying the proffered wage from the adjusted gross income could sustain the sole proprietor's 6 member household for that year. Therefore, the petitioner failed to establish its ability to pay the proffered wage as well as its household living expenses for years 2001, 2003 and 2004.

The record before the director closed on August 18, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the sole proprietor's federal tax return for 2002 should have been available. However, the petitioner did not submit the sole proprietor's 2002 tax return. 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). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. In the RFE dated July 14, 2005, the director requested the petitioner to submit the 2003 and 2004 tax returns in addition to requesting to "submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$58,656.00 as of April 20, 2001, the date of filing and *continuing to the present*." (Emphasis added). However, the petitioner declined to provide copies of its tax return for 2002. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Without the petitioner's tax return or other regulatory-prescribed evidence, the AAO cannot determine whether the petitioner had the ability to pay the proffered wage as well as to sustain the sole proprietor's household in 2002. The petitioner failed to establish its ability to pay the proffered wage because it failed to submit these documents.

CIS will consider the sole proprietorship's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the shortage between the proffered wage plus the sole proprietor's living expenses and the adjusted gross income at the end of each year 2001 through 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2001 through 2004.

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.