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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER Date:

**JUL 01 2008**

EAC 05 012 53904

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director approved the employment-based petition. However when the record was reviewed for the issuance of a visa by the National Visa Center, it was noted that the original Form ETA 750 contained in the record was for another individual. The Director issued a Notice of Intent to Revoke (NOIR) and subsequently revoked the petition's approval pursuant to a Notice of Revocation (NOR) on June 9, 2006. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), in the name of another worker, [REDACTED],<sup>1</sup> accompanied the petition.

The regulations at 8 C.F.R. §§ 204.5(a)(2), and (l)(3)(i) require submission of a labor certification. 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, *must be submitted in the original* unless previously filed with the Service.

(Emphasis added.) 8 C.F.R. § 204.5(g) provides:

In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval.

(Emphasis added.)

Further, Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Regarding the revocation on notice of an immigrant petition's approval under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any

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<sup>1</sup> [REDACTED]'s first name is spelled Apninder on the G-28 filed by counsel with the original I-140 petition, while the original Form ETA 750 indicates a spelling of [REDACTED].

evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The instant petition was approved on November 16, 2004. In a NOIR dated March 17, 2006, the director noted that the approved petition was forwarded to the National Visa Center at Portsmouth, New Hampshire and that while there, it was noted that the I-140 petition contained an original Form ETA 750 issued to a beneficiary other than the beneficiary in the instant petition. The director noted that the record contained no formal request for substitution of the I-140 beneficiary and that the record did not contain a valid Form ETA 750 for the instant beneficiary, [REDACTED]. The director stated it was the intent of Citizenship and Immigration Services (CIS) to revoke the instant petition's approval.

In response, on April 28, 2006, counsel stated that his file copy of the instant petition has an approved labor certification on behalf of [REDACTED]. Counsel submitted a copy of the labor certification approved for the instant beneficiary, as well as copies of counsel's cover letter dated October 12, 2004, the petitioner's IRS Forms for tax years 2002 and 2003, and a letter of work verification for the instant beneficiary. Counsel also requested that the I-140 petition be affirmed, or that he be provided with a copy of the labor certification that the director indicated accompanied the instant petition. Counsel stated that he did not understand what had happened and that perhaps a mistake had been made by the Visa Center or by CIS.

On June 9, 2006, the director revoked the petition's approval. The director stated that even after the petitioner's notification of the lack of the original Form ETA 750 for the instant beneficiary, the record contained neither the original labor certification issued for the beneficiary or a valid request for substitution of a beneficiary in accordance with the regulations. Commenting on the copy of the labor certification submitted by counsel in response to the director's NOIR, the director noted that the original labor certification submitted with the petition<sup>2</sup> was for the same position of manager of a convenience store and that both certifications had been submitted to DOL and certified by DOL on the same day.<sup>3</sup>

On the I-290B form submitted on appeal, counsel states that as far as the petitioner knows, the correct approved Form ETA 750 was filed with the instant I-140 petition. Counsel states that the petitioner does not have any evidence or record of another labor certification being filed with the instant petition and CIS had not provided a copy of what had been filed with the instant petition. In his brief, counsel reiterates that his file for [REDACTED] contains a copy of the Form ETA 750 filed on his behalf with the Department of Labor.

Counsel also asserts that the director's comments with regard to the two labor certifications being applied for and approved on the same day were inappropriate. Counsel states if the director's reference was meant to

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<sup>2</sup> The original Form ETA 750 submitted for [REDACTED]

<sup>3</sup> Both the original Form ETA 750 issued for [REDACTED] submitted to the record with the initial I-140 petition, and the copy of the Form ETA 750 issued for [REDACTED] were accepted for processing on July 31, 2002 and then subsequently certified on December 23, 2003.

suggest something wrong with the two labor certifications, that there is nothing wrong with a given business sponsoring more than one person for positions involving the same duties if they have more than one position. Counsel adds that the petitioner has three shifts and a manager for all shifts, so that no negative inference should be taken based on the two labor certifications.

Counsel then states that the Form ETA 750 for the instant petition has obviously been lost, and that he does not know where it was lost between his office and the Service Center. Counsel states that there has been for many years a process for CIS to ask the Department of Labor for the issuance of a duplicate labor certification. Counsel states that since the director already has a copy of the approved labor certification for the instant beneficiary, CIS should follow the procedures for requesting a duplicate of the labor certification rather than denying the instant petition.

Upon review of the record, as stated previously, the original Form ETA 750 submitted to the record issued for [REDACTED] and the copy of the Form ETA 750 for [REDACTED] do contain evidence of having been submitted to the Philadelphia Job Bank and accepted for processing on the same date (July 31, 2002), and of having been reviewed by DOL on the same date (December 23, 2003). The record also reflects that the original Form G-28, dated August 18, 2004, Notice of Entry of Appearance as Attorney or Representative, submitted to the record with the instant I-140 petition identifies the beneficiary as [REDACTED], rather than [REDACTED].

CIS records reflect that the petitioner filed the instant petition for [REDACTED], as well as a second I-140 petition for [REDACTED] with the Vermont Service Center. The records indicate that the two I-140 petitions were received by the Service Center on October 18, 2004 and October 19, 2004, respectively. Further, the second I-140 petition for [REDACTED] (EAC 0501151630) was approved on August 23, 2005. CIS records indicate that the Vermont Service Center is in possession of the I-140 petition for [REDACTED], and that counsel represents the petitioner in both petitions. Thus, the record establishes that the petitioner represented by counsel filed two I-140 petitions for the same position. The AAO notes that a review of the petitioner's second I-140 petition and record of proceeding may resolve the issue of the wrong Form ETA 750 being submitted with the instant petition.<sup>4</sup> The AAO will withdraw the director's revocation of the instant petition, and remand the petition to the director for further review of both records and possible resolution of the issue of incorrect Forms ETA 750 contained in the instant petition and in the second I-140 petition. The AAO also acknowledges that a procedure does exist for requesting a duplicate Form ETA-750 from the Department of Labor; however, it suggests a review of both petitions prior to initiating such a request.

Upon a review of the record, there is probative evidence in the record of proceeding and in CIS records to support a reasonable inference that the petitioner submitted two I-140 Petitions during the same period of time, and that the Forms ETA 750 may have been inadvertently misfiled in the I-140 petitions. Prior to the revocation of the instant petition based on the lack of an original Form ETA 750, the AAO advises the director to examine the record of proceedings of both I-140 petitions to determine whether such a misfiling occurred. If no such misfiling can be documented, the AAO would advise the director to ask the DOL for a duplicate labor certification for [REDACTED]. The AAO does not find the director's decision to revoke the instant petition persuasive prior to his examination of both records of proceedings.

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<sup>4</sup> A review of the record may also reflect that the second I-140 petition was erroneously approved if based on an improper Form ETA 750.

Although the director has referenced the issue of substituted beneficiaries both in his NOIR and NOR, counsel has provided no further clarification on this issue. The AAO views this issue as moot, based on the submission of two I-140 petitions for the two beneficiaries discussed in these proceedings.

Beyond the decision of the director, the petitioner's submission of the two I-140 petitions for the same position with the same priority date raises the question of whether the petitioner has the ability to pay both proffered wages to the two beneficiaries.

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).

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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 C.F.R. § 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, based on CIS records, and the record of proceedings, both of the petitioner's Forms ETA 750 for [REDACTED] and [REDACTED] were accepted on July 31, 2002. The proffered wage as stated on the Forms ETA 750 is \$10 an hour (\$20,800) per year. The Forms ETA 750 found in the record both indicate the position requires two years of work experience in the proffered position, or in the related occupation of business management.

With the initial petition, counsel submitted the petitioner's Forms 1040, with accompanying Schedules C for tax years 2002 and 2003. In response to the director's NOIR, counsel resubmits the petitioner's IRS Forms 1040 for tax years 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wages.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner does not indicate when it was established or its current number of workers. The petitioner does indicate net gross income of \$530,000 and net annual income of \$50,000. On the Forms ETA 750B, signed by the instant beneficiary on November 22, [illegible year] and by [redacted] on March 4, 2002, neither beneficiary claimed to have worked for the petitioner.

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, 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 Sonogawa*, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2002 onwards. Therefore it has to establish its ability to pay the proffered wage of \$20,800 as of the 2002 priority date until the beneficiary obtains lawful permanent residence.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition, which the petitioner did for the years 2002 and 2003. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). In the instant matter, as stated previously, the petitioner filed two I-140 petitions simultaneously with the Service Center. Both the original Form ETA 750 contained in the record, and the photocopied Form ETA 750 submitted by counsel indicate the same proffered wage of

\$20,800. Thus, at the time the initial petition was approved, the petitioner had to establish his ability to pay the proffered wage for both beneficiaries, namely \$41,600.

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 supports himself. The petitioner's tax returns reflect the following information for the following years:

	2002	2003
Proprietor's adjusted gross income (Form 1040)	\$ 44,848	\$ 46,518
Petitioner's gross receipts or sales (Schedule C)	\$ 1,018,202	\$ 520,132 <sup>5</sup>
Petitioner's wages paid (Schedule C)	\$ 0	\$ 0
Petitioner's net profit from business (Schedule C)	\$ 50,679	\$ 50,055

<sup>5</sup> The petitioner has two Schedules C for tax year 2003. The first Schedule C identifies the petitioner's profit or loss from 7-Eleven # 20243 for November through December 2003, while the second Schedule C reflects the petitioner's profit or loss from 7-Eleven # 20243 from January to April 2003. The AAO combined figures for the petitioner's gross receipts or sales, wages and net profit in its examination of the sole proprietor's ability to pay both proffered wages in tax year 2003.

In the priority year 2002, and during tax year 2003, the sole proprietor's adjusted gross income was sufficient to cover the combined proffered wages of both beneficiaries of \$41,600. However, the payment of such wages would only leave the sole proprietor with the following sums for his yearly household expenses: \$3,248 in 2002 and \$4,918 in 2003. As stated previously, the sole proprietor has to establish that he can both pay the proffered wages and pay his yearly household expenses.

The record contains no information as to the sole proprietor's monthly household expenses, or any additional financial resources available to pay the proffered wages. Based on the record as presently constituted, it is improbable that the sole proprietor could cover his yearly household expenses based on the sums remaining following the subtraction of the proffered wages from the sole proprietor's adjusted gross income for tax years 2002 and 2003, namely, \$3,248 and \$4,918. Therefore, from the date the Form ETA 750 was accepted by the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiaries of both I-140 petitions the proffered wages as of the priority date.

Thus, with no evidence or discussion of the sole proprietor's household expenses, the instant petition should have been denied based on the petitioner's inability to pay the proffered wages to two beneficiaries with pending I-140 petitions and identical priority dates.

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.

The matter is remanded to the director for further consideration of misfiled Forms ETA 750, or Forms ETA 750 mistakenly filed with the wrong I-140 petition, prior to the revocation of the instant petition's approval, and for further consideration of the petitioner's ability to pay the proffered wages to two beneficiaries.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which is to be certified to the AAO for review.