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U.S. Citizenship and Immigration Services

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[redacted]

APR 13 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

WAC-03-056-54332

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 Director of the California Service Center denied the preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an adult recreational care facility. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is February 7, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & 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 jeweler. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	4
	College	0
	College Degree Required	n/a
	Major Field of Study	n/a

The applicant must also have two years of experience in the job offered in order to perform the job duties listed in Item 13, which states:

> Prepares and cooks family-style meals for residents of the facility. Cooks foodstuffs in quantities according to menu and number of residents to be served. Washes dishes. Bakes breads and pastries. Cuts meat. Plans menu and taking [sic] advantage of foods in season and local availability. Orders food supplies and keeps records and accounts. Directs activities of one or more workers who assist in preparing and serving meals.

Item 15 indicates that applicants must also meet the special requirements of being able to provide references and verification of work experience.

The beneficiary set forth his 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 listed only the following:

a. United Philippine Lines in the Philippines, as an assistant cook from February 1998 through May 1998, for which he did the following: "Prepared food. Cleaned and ensured kitchen cleanliness. Purchased food supplies. Made sure that food supplies were well refrigerated and always fresh. Did such other varied functions in the kitchen as may be assigned."

[redacted] Restaurant in [redacted] s an assistant cook from June 1998 to February 1998. The beneficiary stated his duties as "Prepared and cleaned food."

c. [redacted] Carson, California as a cook from March 1998 through the present (2003), for which he:

> Prepares and cooks foodstuffs in quantities according to menu and number of possible customers to be served. Washes dishes. Bakes breads and pastries. Plans menu and taking advantage of foods in season and local availability. Orders food supplies and keeps records accounts. Directs activities of one of [sic] more workers who assist in preparing and serving meals.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications to perform the duties of the proffered position.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on May 1, 2003. The director requested experience verification letters with details conforming to the regulatory requirements in accordance with at 8 C.F.R. § 204.5(l)(3).

In response to the director's request for evidence, the petitioner submitted a letter from [redacted] certifying the beneficiary's employment at their restaurant from March 1999 to July 1999. Additionally, the petitioner submitted a notarized and sworn statement from the beneficiary stating that he could not obtain evidence to verify his employment with United Philippine Lines because he "jumped ship and abandoned [his] job." The petitioner also submitted another notarized and sworn statement from the beneficiary stating that the ownership of Tito Oscar Restaurant changed and the new owner "would not be in a position to certify that [he] had worked there."

The director denied the petition on October 1, 2003 stating that the petitioner failed to provide verifiable experience that established that the beneficiary had the requisite two years of employment experience as a cook.

On appeal, counsel asserts that the beneficiary "had moved Heaven and Earth (literally and figuratively)" to obtain an additional experience letter from a former employer in the Philippines, which he did not list on the ETA 750B because "he said he had lost connections with the restaurant he had worked with." On appeal, the petitioner submits a letter from [redacted] owner and general manager of Lin-Mar Restaurant, certifying the beneficiary's employment as a cook at that restaurant from February 1992 to August 1993.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

> 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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(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.

The experience letter provided by [redacted] verifying the five months of experience the beneficiary gained as a cook there and the letter submitted on appeal from [redacted] conform to the regulatory requirements at 8 C.F.R. § 204.5(l)(3). However, the statements provided by the beneficiary fail to conform to 8 C.F.R. § 204.5(l)(3), and absent any additional independent and corroborative evidence of the

beneficiary's employment with United Philippine Lines and Tito Oscar Restaurant, the petitioner failed to establish the beneficiary's verifiable employment experience as a cook with those purported former employers.

Although the letters from [redacted] appear to conform to the regulatory requirements, the record of proceeding contains significant inconsistencies that cannot result in an approval of this petition. The beneficiary represented that he worked at [redacted] from March 1998 through the date he signed the ETA 750B, June 25, 2003, but the letter submitted to verify his employment experience there corroborates five months of employment in 1999 only. The beneficiary also claims he was a cook on the United Philippines Lines on his Form ETA 750B, but a Form I-409, Report of Deserting Crewman, contained in the record of proceeding indicates that he was employed in "utility" while on the vessel. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Additionally, the beneficiary failed to detail his employment experience concerning [redacted] on the Form ETA 750B until the director noted deficiencies in the evidence contained in the record of proceeding. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Only counsel attempted to explain the omission on appeal with an assertion that the beneficiary did not think he could procure evidence of that employment. The assertions of counsel 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). There has been no adequate explanation of the inconsistencies in representation and evidentiary submissions in this case to overcome an adverse determination.

Thus, the AAO concurs with the director's determination that the petitioner has failed to establish that the beneficiary is qualified for the proffered position as there is no verifiable evidence that the beneficiary has two years of employment experience as delineated as a requirement on the ETA 750A.

Beyond the decision of the director, the petitioner has failed to establish that it has the continuing ability to pay the proffered wage beginning on the priority date. 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 the Department of Labor. *See* 8 CFR § 204.5(d). Here, as noted above, the Form ETA 750 was accepted for processing on February 7, 2001. The proffered wage as stated on the Form ETA 750 is $15 per hour, which amounts to $31,200 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its Schedules C, Profit or Loss from Business statements, for 1998 through 2001[1].

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 1, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested complete tax returns from the sole proprietor, quarterly wage reports, and the sole proprietor's monthly expenses.

In response, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax returns, with accompanying Schedules C, Profit or Loss from Business statements, for 2001 and 2002. The tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	$113,534	$23,210
Petitioner's gross receipts or sales (Schedule C)	$579,563	$592,842
Petitioner's wages paid (Schedule C)	$127,132	$165,688
Petitioner's net profit from business (Schedule C)	$36,632	$6,200

The petitioner also submitted copies of its quarterly wage reports for the last three quarters in 2002 and first quarter in 2003, none of which show that the petitioner paid any wages to the beneficiary for those quarters. Copies of various bills were submitted into the record of proceeding.

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 has previously employed the beneficiary.

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[1] Evidence preceding the priority date in 2001 is not necessarily probative of the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2001.

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 a family of two. In 2001, the sole proprietor's adjusted gross income is much greater than the proffered wage and establishes the petitioner's ability to pay the proffered wage in that year. In 2002, however, the sole proprietorship's adjusted gross income of $23,210 is less than the proffered wage of $31,200, making it an impossibility that the sole proprietor could support herself and her family, without even considering expenses, and pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.