U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: WAC-03-253-54918 Office: CALIFORNIA SERVICE CENTER Date: DEC 15 2005

IN RE: Petitioner:
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:

[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 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 a dry cleaner and alterations. It seeks to employ the beneficiary permanently in the United States as a tailor. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a brief statement 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 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, the Form ETA 750 was accepted for processing on June 13, 2001. The proffered wage as stated on the Form ETA 750 is $12.50 per hour ($26,000 per year). The Form ETA 750 states that the position requires 4 years experience in the job offered. On the Form ETA 750B, signed by the beneficiary on March 1, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on September 15, 1997, to have gross annual income of $324,517, to have net annual income of $66,199, and to currently employ 6 workers. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. In support of the petition, the petitioner submitted Form 1040 U.S. Individual Income Tax Return for 2001.

On July 1, 2004, the director determined that the petitioner had not established that it has continuously had the ability to pay the beneficiary's wage since the priority date until the present and accordingly denied the petition.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not pay the beneficiary the proffered wage in any of the years at issue.

The evidence indicates that the petitioner is a sole proprietorship. 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).

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $26,000 per year from the priority date:

In 2001, the Form 1040 stated adjusted gross income[1] of $20,338.
In 2002, the Form 1040 stated adjusted gross income of $38,585.
In 2003, the Form 1040 stated adjusted gross income of $(30,195).

In the year 2001, the petitioner's adjusted gross income was $20,338, which was $5,662 less than the proffered wage. It is not likely that the petitioner could meet his and his three dependents' personal expenses with a negative amount. In the year 2002, the petitioner's adjusted gross income was $38,585, which was $12,585 greater than the proffered wage. However, without his and his three dependents' personal expenses[2] submitted, the petitioner has not established that they could sustain themselves with that amount. In the year 2003, the petitioner's adjusted gross income was $(30,195). It is not likely that the petitioner could meet his and his three dependents' personal expenses with that negative amount. The record of proceeding does not contain any other evidence of the sole proprietor's assets that could show the ability to pay for 2001, 2002 or 2003.

Therefore, for the years 2001 through 2003, the petitioner did not establish that he had sufficient income to pay both the proffered wage and petitioner's living expenses since the record does not contain any evidence of the petitioner's household expenses.

CIS will consider the sole proprietorship's income and his or her 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 petitioner's assets and other methods to establish the ability to pay. The petitioner should address this issue in any subsequent proceedings.

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[1] IRS Form 1040 for 2001, Line 33.

[2] Such expenses generally include mortgage, utilities, food, clothes, etc.

The adjusted gross income shown on Form 1040 in each year failed to establish that the petitioner would cover the living expenses of four people household in each of the years 2001 through 2003.

On appeal counsel submits the petitioner's audited financial statements as of July 31, 2004 and schedule of adjusted gross income of [redacted] cleaners for the years ended December 31, 2001, December 31, 2002 and December 31, 2003 from the petitioner's CPA. The petitioner's assets as of July 31, 2004 cannot determine the petitioner's ability to pay for 2001, 2002 and 2003. Beyond that, the sole proprietor relies on the value of his homes and business to show his ability to pay, the AAO does not generally accept such claim because it is not likely that the petitioner will liquidate such assets in order to pay a wage.

The CPA's schedule of adjusted gross income adds back depreciation and goodwill to the income from business reflected on Schedule C. Reliance on depreciation in determining the ability to pay is misplaced. The court in *Chi-Feng Chang* noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel asserts with the CPA's schedule of adjusted gross income that the petitioner may demonstrate its ability to pay the proffered wage by adding back amortization of "goodwill". The AAO does not agree. Goodwill is found on Schedule L under the Shareholder's Equity portion of the balance sheet. Goodwill is regarded as an intangible asset based on a business's reputation, customer based, and other such factors, and is not, by definition, an asset that will be converted to cash within one year. *See Barron's Dictionary of Finance and Investment Terms* 239, 243 (5th Ed.).

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 as of the priority date.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the director's decision, the AAO notes that the record of proceeding does not demonstrate that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The certified Form ETA 750 in the instant case states that the position of tailor requires four (4) years of experience in the job offered. 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record of proceeding contains two documents pertinent to the beneficiary's qualification submitted with the initial filing of I-140 petition: one is the beneficiary's Small Retailer & Craftsman Registration Certificate and the other is Member Registration from the Chamber of Women's & Men's General Tailors. The Small Retailer & Craftsman Registration Certificate issued by Istanbul Province Small Retailer & Craftsman Registration Office in 1995 indicates the beneficiary's name, place and date of birth, profession as Tailor and business address, however, it does not provide any verification on where, when and for whom the beneficiary worked as a tailor and what he did in the position. It appears to be a license or capacity of profession rather than verification of employment. The regulation at 8 C.F.R. § 204.5(g)(1) requires that the petitioner provide evidence of the beneficiary's working experience. Evidence of capacity as a profession cannot automatically prove pertinent working experience in that profession. The Member Registration from Istanbul Chamber of Women's & Men's General Tailors does not verify any working experience with any employer for any period prior to the priority date. It only proves that the beneficiary was a member of that chamber since July 27, 1995. Being a member of a professional association for tailors without any other supporting documents cannot be considered as primary evidence that the member had worked as a tailor for four years prior to the priority date. The petitioner must submit a letter from current or former employer or trainer with a specific description of the duties performed to establish the beneficiary's qualification in the instant case. The regulation allows other documentation relating to the alien's experience or training to be considered only if such evidence is unavailable. However, the petitioner did not submit any documents explain whether or not the evidence required under 8 C.F.R. § 204.5(g)(1) was unavailable and why. Furthermore, Form ETA-750B signed by the beneficiary on March 1, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury appears to be inconsistent with these two documents. The beneficiary did not indicate that he had any working experience on Part 15 when he set forth his credentials on Form ETA–750B.

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.
>
> 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.

Therefore, the petitioner did not establish that the beneficiary had working experience requested on Form ETA–750 prior to 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 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.