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U.S. Citizenship and Immigration Services

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[redacted]

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MAR 15 2007

FILE: WAC-05-045-50879 Office: CALIFORNIA SERVICE CENTER Date:

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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner operates an auto mechanic service, and seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's August 23, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence. Further, the director questioned that the letters submitted to document the beneficiary's experience showed that the beneficiary met the requirements of the certified ETA 750.

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 appeal.[1]

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.

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 petitioner must demonstrate its 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).

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[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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $13.29 per hour, 40 hours per week, which is equivalent to $27,643.20 per year. The labor certification was approved on October 13, 2004. The petitioner filed an I-140 Petition for the beneficiary on December 3, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: date established: 1995; gross annual income: "see taxes attached"; net annual income: "see taxes attached"; and current number of employees: 2.

The director issued a Request for Evidence ("RFE") on May 18, 2005 requesting that the petitioner provide evidence that the beneficiary met the experience requirements of the certified ETA 750, and to provide evidence of the petitioner's ability to pay: the petitioner's federal tax returns, annual report, or audited financial statement for 2004, along with Form DE-6 Quarterly Wage Reports for the last three quarters submitted to the state of California, a list of the petitioner's monthly expenses, including information related to any personal assets that the petitioner would use to pay the proffered wage. Further, the RFE sought clarification regarding the petitioner's address. The petitioner submitted a response, however, following review, the director determined that the petitioner failed to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence. Further, the director found that the letters submitted to document the beneficiary's work experience were vague. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary listed that he was employed with the petitioner since January 1999 on a part time basis of 20 hours or more per week. The petitioner did not submit any W-2 Forms for the beneficiary. Therefore, the petitioner is unable to establish its ability to pay the beneficiary based on prior wage payment.[2]

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. 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 proprietor, 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,

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[2] We note that in response to the RFE, the petitioner provided "at this point of time [sic] I do not have quarterly wage report for employee [sic]. I am currently a sole proprietor who is working alone. I currently submitted my request to sponsor [the beneficiary] to work for my company for my future growth." Further, we note that this statement conflicts with the information provided on the ETA 750B that the beneficiary works for the petitioner.

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, his wife, and two children and resides in Agana, Guam. The tax returns reflect the following information for the following years:

Ely's Auto Shop	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net profit from business (Schedule C)
2004	$26,767	$74,998	$0	$26,767
2003	$11,884	$38,342	$0	$11,884
2002	$11,993	$49,054	$0	$11,993
2001	-$3,028	$49,850	$0	-$3,028
2000	-$3,229[3]	$73,790	$0	-$3,229

In response to the RFE, the petitioner submitted a list of estimated expenses. The owner's estimated list of expenses included estimates for rent, gas, telephone, water, electric, clothing, food, auto insurance, and life insurance. The petitioner's total monthly estimate was $3,302.75 per month, equivalent to $39,633 annually. In reviewing the petitioner's AGI above, based on the petitioner's estimated expenses, the AGI reflects that the owner would not be able to support himself in any year. Further, if we subtracted the petitioner's estimated expenses, and the proffered wage in each year, the petitioner would be deficient the following amounts to support his family and pay the proffered wage: 2004: -$40,509; 2003: -$55,392; 2002: -$55,283; 2001: -$70,304. Based on the foregoing, the petitioner's owner is unable to demonstrate his ability to support his family, and pay the proffered wage in any year.

On appeal, the petitioner has provided information related to the petitioning company's assets, the petitioner's owner's individual assets; and funds that the petitioning company has in the bank. The petitioner's estimate was that the company had $32,848 in assets, including machinery, tools, and several vehicles.[4] The petitioner

[3] The priority date is April 30, 2001, so that consideration of the petitioner's tax return for this year is not required. However, we have listed the 2000 tax return information for general consideration.

[4] We note that this is the owner's estimate, and no supporting documentation, such as vehicle appraisals, purchase orders, or photos were provided in support. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)), going on record

estimated that his individual personal assets, which included television sets, a computer, other appliances, and $10,000 in jewelry, totaled $20,895.[5] The petitioner additionally provided a letter from the [redacted] Bank, which confirmed that the petitioning entity had an account with First Hawaiian since September 2000, and the petitioner's bank balance as of September 21, 2005 was $5,366.83. The total estimate of the petitioner's personal and company assets is $59,109.93. However, we note that in the case of a sole proprietor, cash assets of the business would be reflected on the petitioner's Form 1040 Schedule C, and accordingly already considered above, so that funds from the business account would have already been considered. As a sole proprietorship, the owner's personal assets, or personal bank statements would be taken into consideration as additional funds to pay the proffered wage. Accordingly, the funds listed in the [redacted] account would have already been considered.

Based on the list of personal assets and company assets provided, even if we were to accept the petitioner's estimates for every item, which again we note are unsupported by documentation, the petitioner would not be able to pay the beneficiary's wage in 2001, and support himself and his family. The total amount of assets would be utilized in one year, and still leave a deficit in the estimated expenses.

The petitioner additionally provides that, should the beneficiary's I-140 be approved, and the beneficiary can begin working for the petitioner, then the petitioner can expand his business. The owner further provides that he has been reluctant to take on additional work without the availability of additional shop help to serve customers in a timely fashion. It would be speculative to suggest that an additional worker would generate greater revenue, and thus show the petitioner's ability to pay the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing, the petitioner has failed to demonstrate that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

The director's decision additionally raised the issue that the documentation provided to demonstrate that the beneficiary met the qualifications of the certified ETA 750 was vague, and, therefore, the petitioner did not demonstrate that the beneficiary met the requirement of four prior years of experience as an auto mechanic. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). 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.

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without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

[5] We note similarly that this is the owner's estimate. He did not provide any supporting documentation, photos, jewelry appraisals, or itemization for the $10,000 in listed jewelry. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)), going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

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).

On the Form ETA 750A, the "job offer" states that the position requires four years of experience in the job offered, as an automobile mechanic, with duties partially including:

> Repairs & overhauls automobiles, buses, trucks & other automotive vehicles. Examines vehicles & discusses with customer or estimator nature & extent of damage or malfunction. Plans work procedure. Raises vehicle using hydraulic jack or hoist to gain access to mechanical units bolted to underside of vehicle . . . removes . . . disassembles . . . repairs or replaces . . . rebuilds . . . realigns & adjusts.

The petitioner listed no educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed on April 27, 2001, the beneficiary listed his prior work experience as: (1) [redacted] January 1999 to present (April 27, 2001), auto mechanic, 20 hours per week; (2) Unemployed, Guam, from January 1998 to January 1999; (3) [redacted] May 1988 to June 1990, diesel, heavy equipment and auto mechanic; and (3) [redacted] Philippines, February 1986 to March 1989, auto mechanic.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate that the beneficiary's prior experience qualifies the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which 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.

To document the beneficiary's experience, the petitioner initially submitted one letter:

1. Letter from [redacted], San Fernando, Pampanga, Philippines, which provided that "this is to certify that [the beneficiary] has been working in our motor shop as an Auto Mechanic for the period of February 1986 to March 1989."

The RFE requested further documentation to show that the beneficiary met the four years of required experience. The petitioner submitted the following letters in response to the RFE:

1. Letter from R[redacted] Manager, [redacted], Angeles, Pampanga, Philippines, which provided: "this is to certify that [the beneficiary] has been employee with our company since May 1989 – June 1990 as auto mechanic worker [sic]." The letter additionally provided his hours of work and salary and that "he was a good example to his co-employee by working independently without supervision."
2. A second letter from [redacted], Pampanga, Philippines, which again provided the beneficiary's title, Auto Mechanic, and dates of employment, February 1986 to March 1989. The second letter additionally provided his hours of work and salary, and that "he has set an exemplary attitude toward his work and to his co-worker. He completed his work with minimal supervision. He will be a good asset to any future employer."

In the decision, the director provided that the letters were vague and failed to describe the beneficiary's job duties in order to determine whether the beneficiary qualified for the ETA 750 job offer.

On appeal, the petitioner provided an expanded letter of experience from [redacted] of [redacted] Body. The expanded letter provided the beneficiary's job duties, and listed his duties to include the repair and overhaul of automobiles, buses, trucks, and other vehicles; that he examined vehicles and discussed problems with customers; that he completed repairs using the hydraulic lift, that he is capable of relining brakes, aligning vehicles, and adjusting headlights.

We are willing to accept that the revised letter accurately documents the beneficiary's work experience to show one year of experience, and that the beneficiary's prior job duties are sufficient similar to the position offered to serve as qualifying experience. However, the petitioner did not provide an expanded letter with the beneficiary's job duties from the second employer to confirm the beneficiary's prior three years of experience, and accordingly, the petitioner has failed to document that the beneficiary has the required prior four years of experience to meet the experience listed on the certified ETA 750. Further, as set forth above, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage.

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.