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U.S. Citizenship
and Immigration
Services

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BE

FILE: [Redacted]
WAC 03 041 55221

Office: CALIFORNIA SERVICE CENTER

Date: 11/16/05

IN RE: Petitioner: [Redacted]
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:



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 case will be remanded for further investigation and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as branch manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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. The director also found that the petitioner had failed to establish that the beneficiary had the requisite two years experience required by the offered position.

On appeal, counsel submits additional evidence and contends that the petitioner has established its financial ability to pay the proffered wage and has demonstrated that the beneficiary qualifies for the certified position.

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 regulation at 8 C.F.R. § 204.5(l)(3) also 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 worker.* 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

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. The petitioner must also establish that alien beneficiary has the required education, training, and experience specified on the ETA 750 as of the priority date. See 8 CFR § 204.5(d); *Matter of*

Wing's Tea House, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on February 8, 2000. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 per year. Part B of the ETA 750, signed by the beneficiary, does not indicate that the petitioner has employed the beneficiary.

Part A, item 14 of the ETA-750, indicates that the beneficiary must have two years of experience in the job offered of branch manager or two years of experience in a related occupation as an assistant manager.¹

On Part 5 of the visa petition, filed November 15, 2002, the petitioner claims to have been established in 1978, have a gross annual income of \$750,000, a net annual income of \$250,000, and to currently employ thirty workers.

The petitioner is structured as a sole proprietorship. It failed to submit any evidence of its ability to pay the proposed wage with the petition. On January 24, 2003, consistent with 8 C.F.R. § 204.5(g)(2), the director requested the petitioner to submit evidence of its ability to pay the proffered salary in the form of annual reports, federal tax returns, or audited financial statements, which demonstrate its ability from 2000 until the present. The director also instructed the petitioner to provide copies of its state wage reports for the last four quarters filed.

In response, the petitioner provided copies of its state wage reports filed during 2002. They show that the petitioner employed an average of thirty-three, mostly part-time workers. The alien beneficiary's name was not included among those listed on the quarterly reports.

The sole proprietor's individual federal tax returns for 2000 and 2001 were also submitted, as well as a draft copy of the 2002 federal tax return, along with a copy of an Internal Revenue Service (IRS) form requesting an extension of time to file the 2002 tax return. These returns reveal that the sole proprietor files as a single individual. In 2000, she claimed her parent as a dependent. In 2001 and 2002, the tax returns show that no dependents were claimed. The tax returns also contain the following information:

| | 2000 | 2001 | 2002 |
|---|------------|-----------|-----------|
| Proprietor's adjusted gross income (Form 1040) | -\$ 2,014 | -\$ 4,904 | \$ 38,066 |
| Petitioner's gross receipts or sales (Schedule C) | \$375,643 | \$767,209 | \$676,883 |
| Petitioner's wages paid (Schedule C) | \$134,979 | \$282,712 | \$211,742 |
| Petitioner's net business income (Form 1040) | -\$ 13,721 | -\$ 5,656 | \$ 16,793 |

On May 7, 2003, the director requested the petitioner to provide additional evidence in support of the beneficiary's qualifying work experience. The director advised the petitioner to submit evidence of the beneficiary's prior experience on the pertinent employer's letterhead, showing the title and name of the author of the letter, as well as the beneficiary's title, duties, dates of employment and hours worked per week.

¹ The director interpreted the provisions in Item 14 to require two years of experience in the job offered, as well as two years in the related occupation of assistant manager. We find that the more reasonable interpretation of these provisions is either two years experience in the job offered or two years as an assistant manager.

In response to this request for evidence, the petitioner provided three letters from employers in Mexico. One is dated July 4, 2003, and is from [REDACTED] O of the "Los Candiles del Mexicano" in Napoles, Mexico. [REDACTED] identified as being connected to "public relations," states that the beneficiary worked at the restaurant from February 1991 until January 1992, forty hours per week. [REDACTED] does not identify what job or duties the beneficiary performed.

The second letter, dated July 3, 2003, is from Amadeo Lameiro A. of the "Bar El Sol" in Tlalnepantla, Mexico. [REDACTED] states that the beneficiary worked as a cook, specializing in Mexican Hors D'oeuvres, for approximately one year. [REDACTED] A claims that the beneficiary worked 46 hours per week but does not state when he worked for this establishment.

The third letter, dated July 16, 2003, is from the general manager of "La Jaliciencia Restaurant," Reynaldo Vega Mora. This restaurant is also located in Tlalnepantla, Mexico. [REDACTED] affirms that the beneficiary worked as an administrative assistant, 40 hours per week from February 1992 until December 1999. [REDACTED] claims that the beneficiary was "esponsible for the presentation and supervision of traditional Mexican dishes" and showed broad experience and responsibility.

On August 29, 2003, the director denied the petition, determining that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director also found that the letters submitted to demonstrate the beneficiary's qualifying employment experience had not established that the beneficiary obtained any managerial experience.

On appeal, counsel asserts that [REDACTED] letter, affirming the beneficiary's performance as an administrative assistant at Los Candilos del Mexicano, where the beneficiary was responsible for the presentation and supervision of traditional Mexican dishes, clearly supports the beneficiary's qualifying managerial experience, regardless of the title of the position.

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 this case, counsel's contention that [REDACTED] s letter adequately supports the beneficiary's qualifying experience is persuasive. The AAO finds that the beneficiary's duties as an administrative assistant at [REDACTED] restaurant were sufficiently supervisory in nature to count as qualifying experience in the related occupation as an assistant manager as set forth in Item 14 of the approved labor certification. As he accrued over seven years in this job, it can be concluded that the beneficiary is qualified for the certified position of branch manager.²

Relevant to counsel's claims that the director erred in reviewing the petitioner's ability to pay the proffered salary of \$24,960, counsel has submitted copies of the sole proprietor's amended individual tax returns to be

² *See also Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991) (*en banc*); [Previous position's duties, rather than job title is more determinative of qualifying experience.]

considered as additional evidence in support of the petitioner's ability to pay the proffered salary. It is noted that they reflect changes in the sole proprietor's filing status and claimed dependents and include substantially amended figures as shown by the following:

| | 2000 | 2001 | 2002 ³ |
|---|-----------|-----------|-------------------|
| Proprietor's adjusted gross income (Form 1040) | \$ 67,870 | \$ 72,659 | \$ 86,823 |
| Petitioner's gross receipts or sales (Schedule C) | \$404,969 | \$827,900 | \$716,883 |
| Petitioner's wages paid (Schedule C) | \$134,979 | \$282,712 | \$211,742 |
| Petitioner's net business income (Form 1040) | \$ 50,230 | \$ 55,035 | \$ 60,199 |

It is noted that 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 may have employed and paid the beneficiary during a given 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, neither the ETA 750B, nor the quarterly wage reports provided by the petitioner reflect that the petitioner has employed the beneficiary.

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).

In this case, the petitioner is operated as 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. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). This is the reason that a review of the ability to pay the proffered wage includes consideration of the sole proprietors' household expenses, as well as the adjusted gross income set forth on page one of the tax return.

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

³ The amended copy of the sole proprietor's 2002 tax return also reflects that the original draft 2002 offered to the director was not the original version filed with the Internal Revenue Service (IRS).

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 smaller family than that illustrated in *Ubeda*. The petitioner has also provided amended tax returns relevant to the period under consideration. A more accurate assessment of the petitioner's ability to pay the proffered wage should also include consideration of monthly household expenses pertinent to the period under review. As these were not provided or requested during the underlying proceedings, the director should request this documentation on remand so that after reducing the adjusted gross income by the amount required to pay household expenses, it can be determined whether the resulting total is sufficient to pay the proffered wage. As these amended tax returns submitted on appeal also reflect increases in the sole proprietor's taxes owed, it is further advised that verification that these tax returns were filed with the IRS be obtained.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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, if adverse to the petitioner, is to be certified to the AAO for review.