

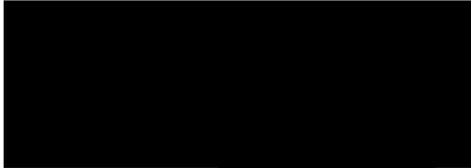
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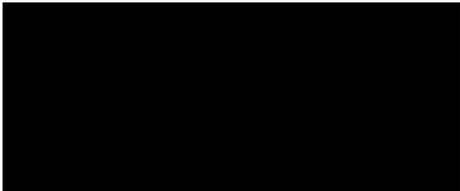
Office: VERMONT SERVICE CENTER

Date: **AUG 14 200**

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Brazilian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook ("Head Cook"). 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 January 14, 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. The case was additionally denied based on the petitioner's failure to document that the beneficiary had all of the required experience as set forth in 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 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 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).

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 12, 2001. The proffered wage as stated on the Form ETA 750 is \$9.71 per hour, 35 hours per week, which is equivalent to \$17,672.20 per year. The labor certification was approved on May 21, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on July 15, 2002. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: April 1998; gross annual income: left blank on the form; net annual income: left blank on the form; and current number of employees: left blank on the form; salary: \$339.85 per week.

On April 15, 2003, the Service Center issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional evidence that the employer had the ability to pay the proffered wage, including the petitioner's 2001 and 2002 U.S. Federal Income Tax Returns, or the owner's individual Form 1040, if the business was a sole proprietorship, as well as W-2 statements for the beneficiary; and to submit evidence that the beneficiary had the required experience as of the April 12, 2001 labor certification filing.

Based on the petitioner's failure to demonstrate its ability to pay the beneficiary the proffered wage, and to show that the beneficiary had the required experience, the director determined that the evidence submitted in response to the RFE was insufficient, and denied the case on January 14, 2005.

We will initially examine the petitioner's ability to pay, and then turn to the question of the beneficiary's documented experience. The evidence in the record of proceeding regarding the petitioner's ability to pay includes the petitioner's Forms 1040, and Forms 4562 U.S. Federal Tax Returns for the years 2000, 2001, and 2002, along with the beneficiary's W-2 statements for the years 2001, 2002, and 2003.

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. In the instant case, the petitioner has submitted W-2 statements for the years 2001, 2002, and 2003, which show that the beneficiary has been paid \$10,400 in each of the foregoing years. This amount is less than the proffered wage (\$17,672.20), but will be considered in addition to any funds available from net income.

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 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 three, including himself, his wife, and one dependent child in Framingham, Massachusetts. The tax returns reflect the following information for the following years:

	2000	2001	2002
Proprietor's adjusted gross income (Form 1040)	not available ²	\$25,680	\$30,041
Petitioner's gross receipts or sales (Schedule C)	\$128,047	\$150,157	\$172,029
Petitioner's wages paid (Schedule C)	\$8,600	\$10,400	\$10,400
net profit from business (Schedule C)	\$24,263	\$28,470	\$33,376

The proffered wage is \$17,672.20. If we subtract the amount already paid to the beneficiary (\$10,400), the amount remaining would be \$7,272, which the petitioner would need to be able to demonstrate that they could pay. If we reduced the owner's adjusted gross income (AGI) by \$7,272, the remaining amount of the proffered wage that the petitioner must demonstrate it can pay, the owner would be left with an adjusted gross income of \$18,408 in 2001, and \$22,769 in the year 2002. It would be difficult to conclude that a family of three could live on those amounts. Had the petitioner forwarded evidence of any personal assets, such as personal bank account statements, or evidence of other liquid assets, we might have been able to conclude otherwise. However, in the absence of such information, we cannot make that determination in the case at hand.³

On appeal, counsel contends that CIS failed to consider the partial wages paid to the beneficiary, exhibited by Forms W-2 (which we have considered above), and failed to consider the effects of depreciation and amortization on the petitioner's income. Counsel contends that the director in looking at AGI failed to consider that "deductions for depreciation and amortization are income tax deductions only – they do not represent actual out-of-pocket cash expenses during the year, which is why they are referred to as "non-cash deductions. These amounts do not represent actual money that was spent by the taxpayer in the given year; instead, they only reduce the taxpayer's taxable income." Further, counsel claims that if depreciation and amortization were added back into the petitioner's AGI, that the petitioner's AGI would be \$45,856 in 2002, and \$41,404 in 2001, leaving \$28,184, and \$23,732 respectively as funds for the owner's family to live on after subtracting out the beneficiary's proffered wage.

² The petitioner did not submit the 1040 form to report U.S. Individual Income, but rather only submitted Schedule C, Profit or Loss from Business, for the year 2000. We note, however, that based on the priority date of April 12, 2001, the 2000 tax returns would not be relevant to the petitioner's ability to pay.

³ Should the petitioner take any additional steps in these proceedings, the owner's personal expenses and assets should be documented.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, we do not find the depreciation argument compelling and cannot conclude that the petitioner has shown the ability to pay the beneficiary the proffered wage from the priority date to the time that the beneficiary obtains permanent residence.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

Additionally, a second point raised in the director's denial was the petitioner's failure to document that the beneficiary had all of the required education, training, and experience as required in the certified ETA 750. In evaluating the beneficiary's qualifications, 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. 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 priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(1)(3):

(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 beneficiary must demonstrate that she had the required skills by the priority date of April 12, 2001. On the Form ETA 750A, the "job offer" for head cook states that the position requires two years of experience in a related occupation with job duties including: "Supervises, coordinates, and participates in activities of cooks, and other kitchen personnel engaged in preparing and cooking foods in restaurant. Estimates food consumption, and requisitions or purchases foodstuff. Receives and examines foodstuff and supplies to ensure quality meet standards and specification. Supervises personnel engaged in preparing, cooking, and serving, and serving meats, sauces, vegetable, soups, and other foods. Cooks or otherwise prepares food according to recipe. May employ, train, and discharge workers. Specialty in Brazilian Cuisine." The petitioner listed other special requirements for the position as "Brazilian – specialty cook" in Section 15.

On the Form ETA 750B, the beneficiary listed prior experience as: (1) Chief cook, for the petitioner, El Shaday Restaurant, Malboro, MA, from June 1999 until present (the time of filing the petition); and (2) Cook, for Bar e Lanch, Guaranhuns Ltda., Vila Velha, ES-Brazil, from 1997 to 1999. The beneficiary did not list the exact day and month that she began and ended her employment.

As evidence to document the beneficiary's qualifications, the petitioner submitted a letter from [REDACTED] [REDACTED] which states that "I, [REDACTED] . . . Manager-partner of Bar e Lanchonete Guaranhuns Ltda – ME (Bar & Snack Ltd.) declare for all due purposes that makes it necessary that [REDACTED] . . . worked in my company during the period of 1997 until 1999.

The letter submitted is deficient in that it does not list the job title of the beneficiary, further it fails to list: whether the position was full-time or part-time, or the number of hours worked per week; the job duties; and the letter fails to list the exact month and day of her employment start date, as well as the end date of her employment. Based on the one letter provided, we cannot conclude that the beneficiary has met the experience requirements set forth on the labor certification of two years as a Brazilian or Head Cook. The petitioner failed to submit any additional evidence on appeal to clarify the beneficiary's experience, and further failed to even mention this issue in the letter brief on appeal. We note that even if the petitioner were able to demonstrate its ability to pay, that the petition would still have been denied as a result of this omission.

Additionally, we note that the beneficiary has listed on her form G-325A, filed with her I-485 adjustment of status application, that she was employed at the Escola [REDACTED] Figueiropolis, [REDACTED] Brazil, as a *teacher* from February "1998"⁵ to April 1999. This would be the same, or partially the same time period that she claimed to have worked at the [REDACTED]. She does not list on the Form G-325A that she worked for the Bar e Lanchonete Guaranhuns at any time period, or that she worked as a cook

⁴ We note that the beneficiary's full name is [REDACTED] and would likely be a relative of the author of the letter, although this is not stated in the letter.

⁵ Whether the beneficiary meant "1997" or "1998" is unclear.

previously in Brazil. The discrepancy between the completed Form ETA 750B and the Form G-325A is significant, since if Form G-325A is the correct version of the beneficiary's work history, then she would completely lack the two years of prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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." *Matter of Ho*, 19 I&N Dec. at 591-592.

Therefore, the petition was properly denied for: (1) failure to demonstrate that the petitioner could pay the beneficiary the proffered wage beginning on the priority date until the beneficiary obtains permanent residence; and for (2) failure to demonstrate that the beneficiary met all the requirements of the position offered.

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.