



U.S. Citizenship
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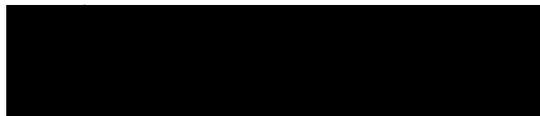
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BC

FILE: WAC 02 167 51966 Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2006

IN RE: Petitioner:
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:



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 Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen or reconsider. The motion will be granted and the previous decision of the AAO will be affirmed. The petition will be denied.

The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel does not assert that the director and the AAO made an erroneous decision through misapplication of law or policy. However, the motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner's counsel is providing new facts with supporting documentation not previously submitted.

The petitioner is a seafood restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the motion is timely. 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 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 19, 2001. On motion, counsel asserts that the amended letter of experience from El Oasis Restaurant submitted with the motion establishes that the beneficiary is qualified for the proffered position.

On motion, counsel submits a brief and a letter from the beneficiary's previous employer, El Oasis Restaurant, detailing his work experience. Other relevant evidence in the record includes an earlier letter from El Oasis Restaurant detailing the beneficiary's work experience. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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

14.	Education	
	Grade School	6
	High School	0
	College	0
	College Degree Required	none
	Major Field of Study	none

The applicant must have three years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A, and since this is a public record, the duties will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

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 represented that he worked as a cook at Mel O Burger from January 1995 to January 1998. He also represented that he worked as a foreign food cook (mexican seafood) at El Oasis Restaurant from January 1989 to January 1992. He does not provide any additional information concerning his employment background on that form.

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.

In the undated letter submitted on motion by counsel, the owner of El Oasis Restaurant in Mexico states that the beneficiary worked for his restaurant as a cook from 1984 to 1988. This contradicts his previous letter dated July 31, 1998 submitted in response to a request for evidence (RFE) issued by the director on July 31, 2002. That letter stated that the beneficiary worked at El Oasis Restaurant from 1986 to 1989, but as noted by the director in his decision, the letter is not written on a business letterhead, it does not specify the position held by the beneficiary, it does not describe the duties performed, it does not state the amount of hours worked per week and the person signing the letter does not state his title. Both letters submitted by the owner of El Oasis Restaurant contradict the Form ETA 750 on which the beneficiary represented that he worked as a foreign food cook (mexican seafood) at El Oasis Restaurant from January 1989 to January 1992. 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. 582, 591-592 (BIA 1988). The petitioner has not resolved the inconsistencies in the evidence submitted to establish the beneficiary's qualifications for the proffered job. The petitioner has failed to demonstrate that the beneficiary acquired the required three years of experience and therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the findings of the previous decisions, the petitioner has not shown its continuing ability to pay the proffered wage beginning on the priority date.¹ 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 DOL. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 6, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024.00 per year based on a 40 hour work week).

As previously stated, the director issued an RFE on July 31, 2002 requesting the petitioner to submit evidence to establish that the petitioner had the ability to pay the proffered wage as of January 6, 1998 and continuing until the date of the RFE. In response to the portion of the RFE relating to the petitioner's ability to pay the proffered wage, counsel submitted the petitioner's 1998, 1999, 2000 and 2001 IRS Forms 1040, U.S. Individual Tax Returns. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on July 31, 1998, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer

¹ 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*, 229 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 cases on a de novo basis).

remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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 employed and paid the beneficiary the full proffered wage from the priority date in 1998 onward.

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 himself and his spouse. The proprietor's IRS Forms 1040 reflect that his adjusted gross income was \$33,149 in 1998, \$25,645 in 1999, \$46,183 in 2000 and \$31,363 in 2001. After paying the proffered wage of \$24,024, the petitioner would have had \$9,125 to support himself and his spouse in 1998, \$1,621 in 1999, \$9,125 in 2000 and \$7,339 in 2001. The record does not contain a statement of the petitioner's monthly expenses for 1998, 1999, 2000 and 2001. Therefore, the AAO cannot determine if the petitioner was able to pay the proffered wage and his household expenses with the remaining income. Regardless, it is improbable that the sole proprietor could support himself and his spouse on the amount remaining after reducing the adjusted gross income by the amount required to pay the proffered wage. The petitioner has failed to establish by the preponderance of the evidence its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains permanent residence.

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 motion to reopen is granted and the decision of the AAO dated November 26, 2004 is affirmed. The petition is denied.