



U.S. Citizenship
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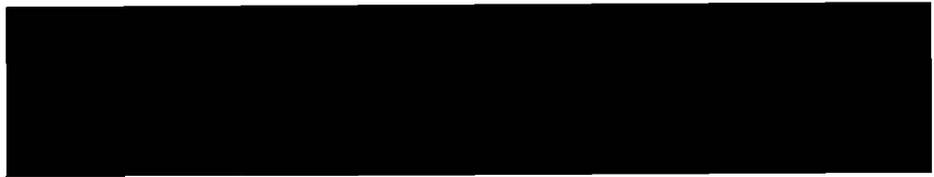
IN RE:

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, Director
Administrative Appeals Office

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

The petitioner is a concrete construction business. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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 that the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position, and denied the petition accordingly.

On appeal, counsel submits a brief and 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 first issue to be discussed in this case is whether or not the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$21.90 per hour, which amounts to \$45,552 annually. The beneficiary represented both on Form ETA 750B and Form G-325, Biographic Information sheet submitted in connection with an application to adjust status to lawful permanent resident, that he worked for the petitioner from July 2000 through December 2000.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns with accompanying Schedules C, Profit or Loss from Business statements, for 2003 and 2004. The petitioner also submitted a 1986 recommendation letter for its business and an article in an artisan newsmagazine from July 2000 that referenced the sole proprietor's business.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 9, 2005, the director requested additional evidence pertinent to that ability. The director specifically requested the sole proprietor's income tax returns, monthly recurring household expenses, and checking and savings account statements from 2001 onwards.

In response, the petitioner submitted its sole proprietor's individual income tax returns for 2001 through 2004; a list of the sole proprietor's monthly liabilities totaling \$1120.13; the petitioner's business checking account statements; and the sole proprietor's checking account statements reflecting ending balances of a high of \$2,523.63 to a low of \$73.92 for all of 2001 and all of 2004.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$14,213	\$16,340
Petitioner's gross receipts or sales (Schedule C)	\$538,539	\$219,676
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$44,308	\$29,154
Petitioner's net profit from business (Schedule C)	\$18,188	\$22,690
	<u>2003</u>	<u>2004</u>
Proprietor's adjusted gross income (Form 1040)	\$14,998	\$58,998
Petitioner's gross receipts or sales (Schedule C)	\$155,883	\$268,348
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$10,904	\$43,754
Petitioner's net profit from business (Schedule C)	\$19,601	\$48,630

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 18, 2005, denied the petition, noting that the sole proprietor's adjusted gross income was less than the proffered wage and four other immigrant petitions were pending as well further obligating the petitioner's resources.

On appeal, counsel asserts that DOL incorrectly determined the prevailing wage rate for the proffered position, and that the director erred by failing to consider the petitioner's gross receipts and depreciation. Additionally, counsel states that one of the petitioner's other pending immigrant petitions has been withdrawn. Finally, counsel states that the petitioner's gross receipts have fallen because it cannot find experienced and qualified labor so it cannot obtain the building contracts it would like and hiring the beneficiary would enable it to do so.

On appeal, the petitioner submits its sole proprietor's 2000 individual income tax return¹; a 2004 excerpt from the Park County Tourism & Community Development Office showing the development of construction projects in Park County, Colorado; a listing of building permits in Park County from 2002 through 2004; and a print-out from DOL's Online Wage Library (OWL) listing the prevailing wage rate in 2004 for cement masons as \$11.69 per hour.

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

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 the beneficiary from the priority date onwards, the relevant timeframe for analyzing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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, contrary to counsel's appellate assertions. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further 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.

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.

Counsel's appellate argument that DOL mistakenly inflated wages for cement masons and changed the prevailing wage rates retroactively is compelling. The AAO confirms on the OWL that the prevailing wage rate for cement masons in 2001 is \$17.79 per hour. The problem with counsel's argument is the failure to adduce evidence in support of his argument that the petitioner corresponded with DOL concerning this error. Additionally, 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). Finally, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities, which includes the rate of pay. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The Form ETA 750A Item 12 does not reflect any amendment process with DOL and the record of proceeding does not reflect that DOL has retroactively permitted the amendment of this item of the Form ETA 750 or that the petitioner relied upon faulty information from DOL prior to submitting its labor certification application to DOL. CIS lacks jurisdiction to alter that term of the proffered position on appeal and after DOL's certification. Thus, despite evidence that the prevailing wage rate is lower, CIS must analyze the petitioner's continuing ability to pay the proffered wage based on the proffered wage rate on the certified Form ETA 750A, which, as noted above, is \$21.90 per hour, which amounts to \$45,552 annually.

In the instant case, the sole proprietor supports a family of two. In 2001, the sole proprietorship's adjusted gross income of \$18,188 is less than the proffered wage². It is impossible that the sole proprietor could support himself and his family on a deficit for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the additional proffered wage it had not paid prior to deducting payroll expenses from its gross income.

In 2002, the sole proprietorship's adjusted gross income of \$22,690 is less than the proffered wage³. It is impossible that the sole proprietor could support himself and his family on a deficit for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the additional proffered wage it had not paid prior to deducting payroll expenses from its gross income.

In 2003, the sole proprietorship's adjusted gross income of \$19,601 is less than the proffered wage⁴. It is impossible that the sole proprietor could support himself and his family on a deficit for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the additional proffered wage it had not paid prior to deducting payroll expenses from its gross income.

² The AAO notes that \$18,188 is also less than the annualized prevailing wage rate according to OWL of \$37,003.20.

³ The AAO notes that \$22,690 is also less than the annualized prevailing wage rate according to OWL of \$37,003.20.

⁴ The AAO notes that \$19,601 is also less than the annualized prevailing wage rate according to OWL of \$37,003.20.

In 2004, the sole proprietorship's adjusted gross income of \$48,630 is greater than the proffered wage. However, it is impossible that the sole proprietor could support himself and his family on a deficit for an entire year, which is what remains after reducing the adjusted gross income by his annualized household expenses of \$13,441.56 for that year.

The petitioner has not demonstrated that it could pay the proffered wage out of its net income in 2001 through 2004. CIS also notes that the petitioner has filed other immigration petitions (on Form I-140) for four other workers at the same wage, using the same priority date, reflected on a Form ETA 750. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. Regardless of the withdrawal of one pending petition⁵, the petitioner remains obligated to demonstrate that it could pay the wages of all intended sponsored aliens from the beginning of the financial commitment to the termination of its sponsorship. The petitioner cannot demonstrate that it could pay one proffered wage; however, so its additional obligations further weighs against a finding in the petitioner's favor.

The sole proprietor maintains a checking account, which are additional funds available towards paying the proffered wage since any unencumbered and liquefiable personal assets of the sole proprietor may be intermingled with the petitioner's resources⁶. The record contains bank statements covering the period January through December in 2001 and 2004, with ending balances of a high of \$2,523.63 to a low of \$73.92. The average balances are not substantial enough to cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage. It is noted that the record of proceeding does not contain any bank statements for 2002 or 2003.

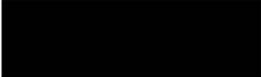
Finally, counsel asserts that the beneficiary and the other sponsored aliens would generate additional income for the sole proprietorship since it could apply for, obtain permission, and contract additional work in the future. Counsel relied upon reports in 2004 for this appellate argument. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if qualifications are not established at the priority date, with the expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The AAO further notes that the petitioner's reported total wages paid in each relevant year is either the same as or less than the proffered wage. Additionally, the materials initially submitted with the petition, a reference letter and news article, presumably submitted to evidence the reputation of the sole proprietor's business, pre-date the relevant timeframe of this petition since they date back to 1986 and 2000. These facts are either irrelevant or further weigh against a finding in the petitioner's favor considering the totality of circumstances. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

⁵ It is noted that only counsel asserted that a petition was withdrawn. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁶ The petitioner's cash assets in its business checking accounts would be reflected on Schedule C and part of its net profit. Thus, it will not be considered an additional source of liquefiable assets available to pay the proffered wage.



The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001, 2002, 2003, or 2004.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 through 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the appeal will be dismissed and the petition denied for that reason.

The second issue in this case is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which, as noted above, is April 30, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

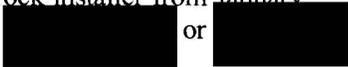
To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. As noted above, 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. at 406. See also, *Mandany v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d at 1.

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 cement mason. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	0
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of experience in the related occupation of "stucco masonry, concrete finishers, construction" in order to perform the job duties listed in Item 13 of the Form ETA 750 A, which will not be restated in this decision since it is incorporated into the public record of proceeding.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form were true and correct under the penalty of perjury on April 27, 2001. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner from July 2000 er 2000 as a form setter, concrete tender and laborer. Prior to that, he worked for [redacted] an excavation contractor as a pipe layer from July 1999 to June 2001 placing piping and filters or septic systems and fo a drywall contractor, as a sheet rock installer from January 1999 to April 1999 installing [redacted] ess information was provided for [redacted] or [redacted]



With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications for the proffered position.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on June 9, 2005. The director requested additional evidence to demonstrate the beneficiary's qualifying prior employment experience that would conform in content to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

In response to the director's request for evidence, the petitioner submitted a recommendation letter in Spanish, with certified English translation, from [REDACTED] (Mr. [REDACTED] who was writing in his capacity as union representative for the "Masonry, Brick and Tile Union" and teacher of construction trades. Mr. [REDACTED] stated that the beneficiary had been an active member of the union from 1987 through 1991 and had four years of experience "in the preparation of pre-stressed concrete for concrete roofs, floors and walls."

In the director's August 18, 2005 decision, she determined that Mr. [REDACTED] letter was insufficient evidence that the beneficiary was qualified to perform the duties of the proffered position because the beneficiary did not claim employment with Mr. [REDACTED] union on the Form ETA 750B and because the recommendation letter did not identify Mr. [REDACTED] specific position with the union.

On appeal, counsel states that it relies upon Mr. [REDACTED] letter as sufficient evidence of the beneficiary's qualifications since union representatives in Mexico, like the United States, routinely find employment for workers. Counsel also states that the beneficiary reported his progressive employment on the Form ETA 750B and Mr. [REDACTED] letter was submitted to DOL, which counsel asserts was "obviously sufficient to warrant certification."

At the outset, DOL's certification of the Form ETA 750 does not supercede CIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of the whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3).

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.

The AAO concurs with the director on the issue of the beneficiary's qualifications. No representation was made concerning the location of the beneficiary's employment prior to working for the petitioner in 2000 on the Form

ETA 750B. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) does not state that in lieu of submitting a letter from a prior employer or trainer, a union representative may attest to the beneficiary's employment experiences. Additionally, the beneficiary represented on the Form ETA 750B that he placed piping and filters for septic systems for two years and installed drywall for four months. Mr. [REDACTED] states that the beneficiary had four years of employment experience preparing pre-stressed concrete for concrete roofs, floors and walls, which presumably means installing drywall. This is a factual inconsistency.

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." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "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."

Finally, Mr. [REDACTED] letter is not on letterhead and does not provide contact information. It does not substitute for a letter conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) from a prior employer who can attest to the beneficiary's specific employment experience from "trainers or employers giving the name, address, and title of the trainer or employer."

Thus, the petitioner has also failed to demonstrate with regulatory-prescribed evidence that the beneficiary is qualified with two years of qualifying employment experience to perform the duties of the proffered position as delineated on the Form ETA 750A and is another reason for dismissal of this appeal and denial of the petition.

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.