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U.S. Citizenship
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FILE:

WAC-04-013-50503

Office: CALIFORNIA SERVICE CENTER

Date: SEP 07 2006

IN RE:

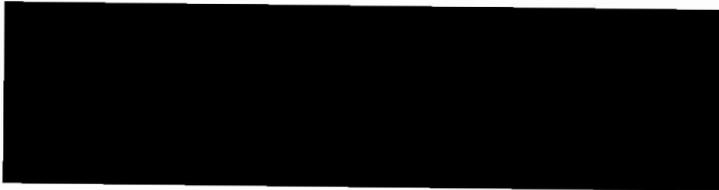
Petitioner:

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

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 is photo studio, mini lab, sales and repair store and seeks to employ the beneficiary permanently in the United States as a supervisor for film processing ("Lead Technician"). 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 13, 2005 denial, the case was denied for two reasons: 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; and for failure to document 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 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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$12.25 per hour, 40 hours per week, for an annual salary of \$25,480, with a designated over time rate of \$18.83 per hour. The labor certification was approved on August 7, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on October 17, 2003. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: November 2000; gross annual income: left blank; net annual income: left blank; current number of employees: 2;² salary: \$720.00 per week.³

On September 27, 2004, the Service Center issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional evidence related to: ability to pay; monthly expenses of the petitioner; quarterly wage payment filings; information related to the business, including licenses and utilities; clarification of the owner's business, listed on tax returns filed as a hair stylist; whether the petitioner currently employs the beneficiary; and employment clarification related to the beneficiary's prior work experience, including request to send documentation to verify the beneficiary's prior experience.

The director determined that the evidence submitted in response to the RFE was insufficient to demonstrate that the petitioner's ability to pay the beneficiary the proffered wage, as well as to demonstrate the beneficiary's qualifications and denied the case on January 13, 2005. The petitioner appealed and the matter is now before the AAO.

We will first examine the petitioner's ability to pay, and then consider the petitioner's additional arguments on appeal. The evidence in the record of proceeding regarding the petitioner's ability to pay includes the petitioner's Form 1040 for the years 2003, 2002, and 2001; business profit and loss statements, quarterly wage payments, and a record of the owner's personal expenses.

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 18, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner submitted quarterly wage payments that reflect the beneficiary was paid \$29,200 in 2004. Records do not reflect his employment with the petitioner in any prior years.

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.*

² We note that a letter submitted in response to a Request for Evidence lists that the petitioner employed eight individuals at the time of response in December 2004.

³ The weekly wage listed would equate to \$37,440 annually. The proffered wage based on the certified labor certification would be \$25,480. The \$37,440 listed would appear to be in error as the petitioner's motion to reconsider or alternative, appeal references an annual wage of \$25,480.

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, 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 Henderson, Nevada. The tax returns reflect the following information for the following years:

	Petitioner's AGI (1040)	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2003	\$63,271	\$137,972	\$44,091	\$21,110
2002	\$49,131	\$124,377	\$36,665	\$14,664
2001	\$28,990	\$80,666	\$24,020	\$(2,728)

The owner and his wife additionally own a hair salon. The owner also derives some income from real estate:

Hair Salon owned

	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2003	\$83,061	\$0	\$29,085
2002	\$87,759	\$0	\$30,285
2001	\$84,539	\$2,719	\$23,015

Real Estate Sales

	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2003	\$4,890	\$0	\$1,282
2002	\$2,895	\$0	-\$311

2001	\$0	\$0	-\$1,299
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The profits or losses from all businesses are reflected in the petitioner's tax return under business income or loss and thus already reflected in the petitioner's adjusted gross income (AGI).

If we reduced the owner's AGI by \$25,480, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of the following amounts:

<u>Year</u>	<u>Income remaining</u>
2003	\$37,791
2002	\$23,651
2001	\$3,510

The petitioner's income is sufficient in 2003 to support a family of three, but the income remaining in the years 2002 and 2001 is insufficient for the owner to support himself and his family after payment of the proffered wage.

The owner submitted a list of household expenses, dated November 8, 2004, which shows expenses of \$3,827 per month, \$45,924 annually. The owner claims that some of those expenses are defrayed by income of \$1,200 per month from a second house,⁴ which is rented out, which would provide additional income, and reduce annual expenses to \$31,524. Based on the statement submitted, if accurate, the owner would be able to support himself and show the ability to pay the proffered wage in 2003, and would operate at a deficit of -\$8,000 in 2002, and -\$21,970 for 2001, if the owner's estimate of expenses, and rental income generated are accurate.

The petitioner also submitted several balance sheets for the months ending December 31, 2002, November 30, 2002, September 30, 2002, March 31, 2002, February 28, 2002, and January 31, 2002. Along with the balance sheets, the petitioner provided the checking ledger, showing income, and checks written, and totals for wages paid.⁵ The balance sheets generally show total assets, which equal the total liabilities listed. A

⁴ The owner's 2002 tax return reflects rental income of \$1,125 for the year. The owner's 2003 tax return reflects rental income of \$12,000 for the year. The owner's 2004 tax return was not submitted so that we cannot confirm whether the owner's claimed estimate of rental income is accurate.

⁵ The payroll records exhibit payments to [REDACTED] which the "family register," official documentation for Korea, shows is the brother of the beneficiary and brother of the owner's wife. The register also shows that the beneficiary is the brother of the owner's wife. Payroll records additionally reflect the employment of a [REDACTED], which may be the father of the beneficiary, and of the owner's wife based on information from the Form G-325A submitted with the I-485 application. We cannot conclude from the documentation whether this is definitively the parent, or someone with the same name. We note that under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). See also *Paris Bakery Corporation*, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in [REDACTED] that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not *bona fide* or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor

profit and loss comparison sheet also submitted shows the difference in totals ending January 2001 and January 2002, which demonstrates an increased gross profit of \$5,479. We note, however, that the statements submitted are unaudited. 8 C.F.R. § 204.5(g)(2) provides that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited, otherwise the statements generally constitute compilations based on the representations of the owners, and therefore are not compelling evidence. Nothing indicates that the statement compiled was audited in conformance with 8 C.F.R. § 204.5(g)(2). Further, 8 C.F.R. § 204.5(g)(2) allows for the consideration of additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise does not provide an accurate financial picture of the petitioner.⁶

On appeal, the petitioner contends that there are a number of errors in the Service Center decision. Specifically, that the Service Center listed the beneficiary’s wage at \$38,230.40 per year based on the overtime rate of \$18.83 per hour. We have considered the petitioner’s ability to pay at the rate listed on the ETA 750, of \$12.25 per hour, and find that the petitioner cannot demonstrate its ability to pay at the certified labor certification wage rate. The amount listed in error by the Service Center does not alter the decision.

Further, the petitioner claims that the owner’s Schedule C income for 2002 is \$44,949, and therefore, the petitioner could pay the proffered wage of \$25,480. While this figure is accurate, as demonstrated above, after the owner pays the proffered wage, the owner would not have sufficient funds remaining to support his family based on the estimate of personal expenses prepared by the owner. We have considered income generated by the petitioning business, as well as the additional businesses owned and operated by the petitioning company’s owners.

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

to be considered. Assuming that there is still a genuine need for the employee with the alien’s qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification.”

⁶ The petitioner also submitted documentation related to the formation of the company, including articles of incorporation, utility bills, a business checking statement for one month, as well as quarterly wage reports. The quarterly wage reports are addressed above, and do show payments to the beneficiary in the year 2004, but not prior to that, and the remainder of the documents generally demonstrate only that the company is in existence and doing business, but not the petitioner’s ability to pay.

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 he had the required skills by the priority date of April 23, 2001. On the Form ETA 750A, the "job offer" for Lead Technician/Manager states that the position requires two years of experience in the job offered with job duties partially including: "Supervises and coordinates activities of workers engaged in developing photographic prints from negatives, copying, and enlarging prints, production of lantern slides, and airbrushing and retouching prints. Inspects finished film and sets up field laboratory equipment. Requisitions and distributes materials and supplies. Assists workers in performance of tasks such as airbrushing and retouching photographic prints. Set up and adjust laboratory equipment. Perform maintenance on photo lab equipment. Repair photo and lab equipment for customers." The petitioner listed that high school education was required in 14, and did not list any other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed prior experience as: [REDACTED], Seoul, Korea, as a Manager/Lead Technician from January 1988 to March 1998. The beneficiary did not list any other positions.

As evidence to document the beneficiary's qualifications, the petitioner submitted a letter to confirm the beneficiary's experience from [REDACTED] which provided that the beneficiary worked as a Technician in the [REDACTED] from January 28, 1988 to March 31, 1998, and that he worked 44 hours per week. The letter did not provide specific job details. The petitioner also initially submitted several training certificates, dated September 19, 1992, September 7, 1991, and a Certificate of National Technical Qualification, dated November 15, 1982. The petitioner also submitted a "history of employment" certificate confirming the beneficiary's dates of employment with the company, but which did not include any job details.⁷

⁷ We note that the documentation for the beneficiary was translated and certified by the owner's wife, and sister of the beneficiary.

On appeal, the petitioner also submitted a more detailed letter from the beneficiary's prior employer, which provided more extensive details:

- The letter provided that he was employed from January 28, 1988 to March 31, 1998 as a Technician; and
- From January 28, 1988 to August 1989, he worked in sales and repairs on Noritsu models;
- From September 1989 to October 1990, he worked in [REDACTED] and [REDACTED];
- In October 1990, he was promoted to the position of repair and installation technician for mini lab equipment;
- From November 1995 to March 1998, he served as the lead technician for the [REDACTED] where he supervised three other technicians and was responsible for repairs of photo equipment.

The letter additionally provided for four training courses taken between 1990 and 1992 all related to photo equipment. The Service Center had requested additional evidence to independently verify the beneficiary's employment, such as pay stubs or records from abroad. Petitioner's counsel asserts that there was no way to obtain these records, and that a large company should not be required to translate "reams of employment payroll records." We note that the payroll records if supplied, could have been translated by someone competent in both Korean and English languages outside of the company. While additional independent verification would be beneficial, we are willing to accept the extended letter detailing job duties as proof of the beneficiary's qualifications.

However, we find that the petition was properly denied for 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 despite demonstrating that the beneficiary meets the qualifications, the petition will remain denied. Further, we express concerns that based on the familial relationship, the position needs to be a bona fide job opportunity open to U.S. residents, and cannot discern from the record whether this aspect was disclosed and addressed at the DOL level.

Accordingly, the petition will be denied for the above stated reasons. 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.