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U.S. Citizenship
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Services

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FILE: [REDACTED]
SRC-04-137-51936

Office: TEXAS SERVICE CENTER

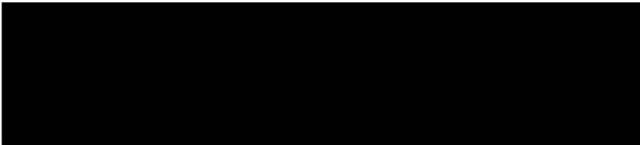
Date: **SEP 28 2006**

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

The petitioner is in the business of alteration and shoe repair. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 February 8, 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 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 January 16, 2003. The proffered wage as stated on the Form ETA 750 is \$19,864 per year,² 40 hours per week. The labor certification was approved on October 22, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on April 15, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: July 1, 2000; gross annual income: \$69,289.00; net annual income: \$55,113; and current number of employees: 2; salary: \$382.00 per week.

On November 4, 2004, 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, and that if the business were a sole proprietorship or partnership to submit documentary evidence of the owner's U.S. citizenship, or permanent residence. In response, the petitioner submitted bank statements, and cited to a case where bank statements were accepted to show the ability to pay the proffered wage. The petitioner also submitted unaudited balance sheets, profit and loss statements, and proof of the owner's U.S. citizenship.

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, and denied the case on February 8, 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 year 2003, business bank savings and checking account statements for the years 2003 and 2004, a "personal balance sheet," an affidavit from the owner, W-2 statements for his wife, whom he says will stop working when the beneficiary arrives in the U.S. and the beneficiary will replace her.

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 September 30, 2002, the beneficiary did not list that she was employed with the petitioner. Both the ETA 750 and the I-140 reflect that the beneficiary still is in her home country and will obtain her immigrant visa abroad, when available, if the case is approved.

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 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,

² The ETA 750 Form originally listed \$18,720, but was raised to \$19,864 prior to certification.

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 four, including himself, his wife, and two dependent children in Middleburg, Florida. 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	\$43,179	\$69,289	\$20,400	\$4,608

If we reduced the owner's adjusted gross income (AGI) by \$19,864, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of \$23,315 in 2003 to support a family of four. The owner submitted a "personal balance sheet," which outlined savings, assets, and liabilities. However, the "balance sheet" was unsupported by any further documentary evidence, such as actual bank statements, mortgage statements, or property assessments, which might provide independent verification of the assets, which they assert that they have. Without objective evidence, we cannot conclude that the petitioner can demonstrate that it can pay the beneficiary the proffered wage, and support a family of four with the income remaining.

The petitioner submitted additional evidence regarding its ability to pay the proffered wage. Counsel has submitted the petitioner's business bank statements for each month for the calendar years 2003, and 2004. Counsel contends that the statements demonstrate that the petitioner had enough money in the bank to pay the beneficiary's proffered wage on a monthly basis. Bank statements, however, are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. While this regulation allows for 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. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements reflect additional available funds to the amounts listed on the petitioner's tax return, such as the cash represented by the petitioner's gross income on Schedule C of its tax return.

Counsel cites to a prior AAU case, *In re X*, 13 Immig. Rptr. B2-259 (Oct. 7, 1994), for the proposition that bank statements may be accepted as proof of ability to pay the beneficiary's wage. The petitioner in *In re X* was able to demonstrate that it maintained a monthly bank balance of \$41,770 for the entire year of 1993. The beneficiary's priority date was January 19, 1993, and the proffered wage was \$34,500. The monthly bank balance therefore

consistently exceeded the annual proffered wage. The petitioner had paid the beneficiary \$24,960 in wages in 1993, only \$9,540 less than the proffered wage. The AAU concluded that the foregoing was sufficient to demonstrate the petitioner's ability to pay the proffered wage. In the case at hand, however, the petitioner has not demonstrated a monthly bank balance, which consistently exceeded the annual proffered wage. Additionally, we note that tax returns provide a more accurate picture of the petitioner's business, since tax returns reflect the petitioner's assets and liabilities, whereas bank statements similarly do not reflect liabilities.

The petitioner additionally submitted an unaudited "balance sheet" reflecting "total liabilities and net worth" in the amount of \$504,750. The balance sheet, according to the "tax preparer" who signed the sheet, was "compiled from information submitted by [REDACTED], and from income statements and tax records." We note that as a sole proprietorship, information regarding the owner's assets and liabilities would be accepted. However, the balance sheet was compiled based on the representations of the owners with no supporting documentation attached to independently corroborate the information. Therefore, the balance sheet is not compelling evidence to lead us to conclude that the petitioner has demonstrated its ability to pay the proffered wage. 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. Nothing indicates that the statement compiled was audited in conformance with 8 C.F.R. § 204.5(g)(2).

In addition to the owner's unaudited balance sheet, a tax practitioner had additionally prepared other unaudited profit and loss statements to reflect the business' revenues. We note similar objections as above, that the statements were compiled based on the representations of the owners with no supporting documentation attached to independently corroborate the information, and, therefore, the statements are not compelling evidence to lead us to conclude that the petitioner has demonstrated its ability to pay the proffered wage. 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.

The statements provided additionally conflict with other evidence regarding amounts paid to the owner's wife. A 2004 profit and loss statement provides that the owner's wife was paid wages in the amount of \$15,300. Elsewhere, the owner asserts that his wife was paid \$20,000 for the year 2004. A 2003 profit and loss statement reflects that the owner paid his wife \$16,000. The owner signed an affidavit, which provides that he paid his wife \$20,400, and submitted a hand written W-2 form as evidence in support. The Service Center decision further notes another close to \$9,000 discrepancy in alleged net profits between the tax returns and the statements prepared. Based on a number of inconsistencies in the evidence, and the unaudited nature of the statements, we cannot conclude that the statements provided accurately verify the petitioner's ability to pay. *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.

Additionally, the owner asserts and has provided an affidavit that states his wife is presently working for him, and that his wife will stop working upon the beneficiary's arrival, as his wife "does not wish to be employed as an alteration tailor. In support, the petitioner forwarded a copy of his wife's 2003 1099 showing earnings in the amount of \$20,400. We note that the 1099 Form is hand written. Further, the petitioner has submitted a tax return reflecting that it was "jointly filed." The 2003 tax return does not reflect the income stated on the hand written W-2. The 2003 tax return reflects only the owner husband's reported W-2 income.

In a case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the evidence in the record must name these workers, and contain competent evidence of the wages paid and of full-time employment, as well as verify that the duties are those of the proffered position as set forth on the ETA 750. Based on the conflict in the evidence regarding the amount paid to the owner's wife, and that the wife's position and title have not been identified, the petitioner has not established by competent evidence the amounts paid to the worker who the beneficiary will replace and that the position involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position title, and job duties that the owner's wife performs.

Further, the affidavit, which the owner provided states that he lacks help and is unable to take on more work. If the owner replaces his wife with the beneficiary, he will still have the same amount of workers and will not be able to take on more work. We might surmise that if the owner needed additional help, despite his statement that he would replace his wife, that the beneficiary might be an additional worker, rather than a replacement worker.

The documentation submitted raises numerous inconsistencies in the evidence. *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.

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 although not 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. 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 appeals on a *de novo* basis).

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 he had the required skills by the priority date of January 16, 2003. On the Form ETA 750A, the "job offer" for Alteration Tailor states that the position requires two years of experience in the job offered with job duties partially including: "Alters clothing to fit individual customers and repairs some defective garments, following alteration or repair marks on garment. Examines tags to ascertain necessary alteration." The petitioner listed that no 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: Chintana Dressmakers and Designers Academy. No Address was listed. The beneficiary listed that she was employed from 1999 to April 30, 2002. The beneficiary did not list the exact start day and month that she began her employment, and did not list any other employment.

As evidence to document the beneficiary's qualifications, the petitioner submitted a letter from Chintana Dressmakers & Designers Academy in Thailand, which states that [REDACTED] . . . has held the position of alterations tailor in my institution from the year of 1999 until April 30, 2002." The letter additionally provided the beneficiary's job duties for her employment at that time.

The letter submitted is deficient in that it does not list whether the position was full-time or part-time, or the number of hours worked per week, as well as the exact start date, month, day, year format 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 Alteration Tailor. If the beneficiary began employment in December 1999 and ended employment on April 30, 2002, and any of the experience was part-time, the beneficiary would not have two years of experience. The letter as provided is not sufficient to confirm the beneficiary's prior experience for the position.

Therefore, 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. In addition, the petitioner has not demonstrated that the beneficiary met all the requirements of the position offered.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.