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U.S. Citizenship
and Immigration
Services

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FILE: WAC-05-030-53675 Office: CALIFORNIA SERVICE CENTER Date: MAR 29 2007

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a construction-demolition business, and seeks to employ the beneficiary permanently in the United States as a construction worker ("Construction-Demolition Worker"). 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 August 23, 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. Further, the director questioned the declarations submitted on behalf of the beneficiary, and, since the declarations were in question, found that the petitioner failed to establish that the beneficiary met the requirements of the certified Form 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

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).

of Labor 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 for processing by the relevant office within the DOL employment system on December 22, 1997. The proffered wage as stated on the Form ETA 750 is \$17.83 per hour,² 40 hours per week, which is equivalent to \$37,086.40 per year. The labor certification was approved on November 30, 2000. The petitioner filed an I-140 Petition for the beneficiary on November 15, 2004.³ Counsel failed to list the following information on the I-140 Petition related the petitioning entity: date established; gross annual income; net annual income; and current number of employees.

The director issued a Request for Evidence ("RFE") on May 10, 2005 requesting that the petitioner provide evidence of the petitioner's ability to pay: the petitioner's federal tax returns, along with Form DE-6 Quarterly Wage Reports listing all employees and wages paid. The RFE also requested that the petitioner submit evidence of the beneficiary's qualifications. The petitioner submitted a response, however, following review, the director determined that the petitioner failed to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence. Further, the director found that the petitioner failed to demonstrate that the beneficiary met the requirements of the labor certification, and denied the petition. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. 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 in 1997, the beneficiary listed that he was employed with the petitioner since 1992. The petitioner did not submit any W-2 Forms for the beneficiary.

The petitioner did provide quarterly wage statements for the quarters ending: September 30, 2004; December 31, 2004; and March 31, 2005, which provide that the petitioner paid the beneficiary the following amounts respectively for the quarters: \$9,790; \$9,080; and \$7,110. As the petitioner must demonstrate that it can pay the beneficiary \$37,086.40 per year from 1997 to the present, the payroll records are insufficient to establish the petitioner's ability to pay the beneficiary based on prior wage payment.

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).

² The petitioner initially listed a rate of pay of \$7.30 per hour, but the DOL required that the petitioner increase the wage to \$17.83 prior to certification.

³ We note that the petitioner filed a prior I-140 petition on behalf of the beneficiary in August 2001, which was denied, and that the original Form ETA 750 is likely with the prior petition filed.

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 himself, and his wife and resides in Fullerton, California. Additionally, for the years 1997 and 1998, the petitioner supported two dependent children. For the tax years 1999 to 2002, the petitioner supported one dependent child, and after the year 2003, the petitioner's tax returns reflect that he supported only himself and his wife. The tax returns reflect the following information for the following years:⁴

Kevin Ray Demolition	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Cost of Labor (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2004	\$238,235 ⁵	\$2,146,174	\$0	\$835,901	\$234,762
2003	\$742,721	\$2,146,682	\$0	\$748,041	\$733,204
2002	\$367,334 ⁶				
2001	\$322,469	\$1,609,499	\$0	\$581,440	\$337,202
2000	\$397,131	\$1,658,298	\$0	\$583,800	\$412,242
1999	\$184,438	\$1,315,018	\$0	\$498,902	\$194,607
1998	\$158,158	\$987,669	\$0	\$350,682	\$166,765
1997	\$145,917	\$556,128	\$0	\$162,986	\$152,008

If we reduced the owner's adjusted gross income (AGI) by \$37,086.40, the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, the owner would be left with an adjusted gross income of:

⁴ No tax return was submitted for the year 2005, which may not have been available at the time that the petitioner responded to the RFE, but would have been available at the time of appeal.

⁵ We note that all of the tax returns submitted have the petitioner's original signature and are dated July 6, 2005. It is unclear whether the sole proprietor signed the copies provided on that date, or why the petitioner was unable to provide a copy of a tax return that he would have initially signed at the time of filing.

⁶ The record before us contains only the first page of the petitioner's 2002 Form 1040. The filing does not contain Schedule C for 2002, and accordingly we do not have the petitioner's gross receipts, wages paid, and net profit for 2002.

2004: \$220,019⁷; 2003: \$705,635; 2002: \$330,248; 2001: \$285,383; 2000: \$360,045; 1999: \$147,352; 1998: \$121,072; and 1997: \$108,831.

While the sole proprietor could likely support himself and his family on the salary above, CIS records reflect that the petitioner has sponsored four employees, including the beneficiary. It is unlikely that the petitioner could pay the proffered wage for all four beneficiaries, and support himself and his family in some of the foregoing years, particularly in 1997, 1998, or 1999. The director noted in his decision that the petitioner should submit an estimate of household expenses, including costs of housing, utilities, food, car payments, and other household expenses such as schooling, daycare, housekeeping, clothing, credit cards, and/or other monthly recurring expenses so that CIS could determine the sole proprietor's income in comparison to his stated expenses. The petitioner did not submit any list on appeal, which would have allowed us to conclude whether the petitioner could support the salary of multiple beneficiaries, as well as his ability to meet his required household expenses.

On appeal, counsel cites to 8 C.F.R. § 204.5(g)(2) and contends that the petitioner has supplied its federal income taxes in compliance with the regulation, as well as the petitioner's quarterly wage reports, which should be sufficient to determine the petitioner's ability to pay. Counsel cites to *Matter of Quintero-Martinez*, No. A29-928-323 (AAU Aug. 4, 1992) and *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989) in support of reliance on quarterly wage reports, and the petitioner's tax returns. Further, counsel contends that CIS abused its discretion by then denying the petition for the petitioner failing to provide a statement of personal expenses.

We note that 8 C.F.R. § 204.5(g)(2) also provides that CIS may request, in appropriate cases, additional evidence, "such as profit/loss statements, bank account records, or personnel records." In the case of a sole proprietor, the petitioner must demonstrate that he can pay both the proffered wage, and support himself and his dependents based on the income listed on the tax return. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Accordingly, CIS has deemed it appropriate based on 8 C.F.R. § 204.5(g)(2) to request further documentation regarding the sole proprietor's expenses in order to determine whether the petitioner can support himself as well as pay the wage of any sponsored beneficiaries. As a sole proprietorship does not exist as an entity apart from the individual owner, the request related to personal expenses would be appropriate. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984).

While the petitioner's tax returns exhibit a fairly high Adjusted Gross Income, the petitioner has sponsored multiple beneficiaries. Therefore, without information related to the sole proprietor's personal expenses, it is not possible to determine if the petitioner can support himself and his family, as well as pay the proffered wage based on the information contained in the record in accordance with the *Ubeda* standard. The sole proprietor would need to provide evidence of personal unencumbered and liquefiable assets in order to determine if the sole proprietor could support himself and his family.

The director also denied the petition based on the petitioner's failure to document that the beneficiary met the requirements of the certified ETA 750. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("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

⁷ We have factored in the petitioner's 2004 payment to the beneficiary of \$18,870 based on the quarterly wage documentation provided for that year.

(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).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a construction worker - demolition, with duties including:

Performs any combination of following tasks, such as erecting, repairing, and wrecking buildings and bridges; installing waterworks and locks. Grading and maintaining. Digs, spreads, and levers [sic] dirt and gravel, using pick and shovel. Lifts, carries, and holds building materials, tools, and supplies. Cleans tools, equipment, materials, and work areas. Mixes, pours, and spreads concrete, asphalt, gravel, and other materials, using hand tools. Performs variety of routine, non-machine tasks, such as removing forms from set concrete, plaster removal, drywall removal, and construction clean-up.

The petitioner listed that only high school education was required in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed in November 1997, the beneficiary listed his prior work experience as: (1) C.C.H. Demolicion y Construction S.A. de C.V., Veracruz, Mexico, construction - demolition, from March 1987 to August 1991; and (2) Kevin Ray Demolition, 1992 to present, assistant/demolition worker.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which 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.

To document the beneficiary's experience, the petitioner submitted the following statements:

1. Statement from [REDACTED] originally from Veracruz, Mexico, which provided: "I know that [the beneficiary] worked for C.C.H. Demolicion & Construction S.A. de C.V. in the capacity of Construction-Demolition from March 1987 to August 1991. I have acquired this knowledge because he is the godfather of my two children. We always visited each other, and discussed his employment among other things. He did not own a car, and on occasions I gave him a ride to work at the company mentioned above."
2. Statement from [REDACTED], originally from Veracruz, Mexico, which provided: "I know that [the beneficiary] worked for C.C.H. Demolicion & Construction S.A. de C.V. in the capacity of Construction-Demolition worker from March 1987 to August 1991. I have this knowledge because he is my son's godfather, and we always spent a great deal of time together, and during such visits, we discussed employment."
3. Statement from [REDACTED], which provided: "I know that [the beneficiary] worked for C.C.H. Demolicion & Construction S.A. de C.V. in the capacity of Construction-Demolition worker from March 1987 to August 1991. [The beneficiary] is my brother-in-law, he is married to my sister, and I and other members acquired this knowledge of his employment through our familial relationship."

The petitioner initially did not submit any documentation with the initial filing to document the beneficiary's two years of required experience. In response to the RFE, the petitioner provided the three statements above. The petitioner did not provide any statements from the beneficiary's trainers or employers as required by statute. The director questioned the declarations as they were not in the regulatory prescribed format, and further, were from the beneficiary's acquaintances and brother-in-law. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), "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."

On appeal, counsel contends that CIS "requires only "evidence" of experience, and does not specify the form in which such evidence should be submitted." Further, counsel cites to *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7 (D.D.C. 1998), and contends that based on *Lu-Ann* only affidavits are required to show that the alien meets the requirements.

We dispute that CIS does not specify the form in which evidence should be submitted. The regulation at 8 C.F.R. § 204.5(l)(3) clearly provides that to document the beneficiary's qualifications, the evidence "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."

Further, only on appeal and after the denial of the petition, counsel provides that the declarations should be accepted as the beneficiary's prior employer is no longer in business. The beneficiary did not provide an affidavit that he tried to obtain a letter, but the company went out of business. Counsel provided no indication that the former owner of said company was contacted, or that the beneficiary tried to contact the prior owner, or anyone in Mexico to obtain a letter that the company was no longer in business. Counsel merely states that the beneficiary's prior employer is no longer in business. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the petitioner did not provide secondary evidence that the beneficiary worked for the company in question, such as pay statements, or other work records, which in connection with the declarations, may have bolstered the credibility of the documentation provided.

Further, the declarations are deficient. Each of the declarants lists a U.S. address, however, the declarants do not provide during what time period they resided in Mexico, and when they came to the U.S. to confirm the accuracy of their statements that they were in Mexico at the same time as the beneficiary.⁸ Additionally, the declarations provided have not been notarized, and are not affidavits. An affiant would swear or affirm the statement before an officer authorized to administer oaths or affirmations after the officer confirms the declarant's identity, and administers the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Further, in lieu of notarization, the declarations do not contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746.

Counsel has provided no other evidence or documentation on appeal, which would allow us to conclude that the beneficiary has the required two years of experience.

Based on the foregoing, the petitioner has failed to demonstrate that it can pay the proffered wage. Further, the unsworn declarations are deficient to show that the beneficiary meets the two years of experience listed on the certified ETA 750. 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.

⁸ The beneficiary's brother-in-law also appears to work for the petitioner as his name is listed on the quarterly wage statements provided.