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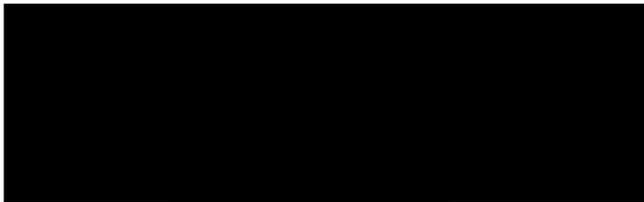
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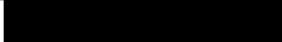
U.S. Citizenship
and Immigration
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FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 07 2007

EAC-04-056-50066

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center ("director"), denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a roofing business, and seeks to employ the beneficiary permanently in the United States as a roofing supervisor ("Working Foreman"). 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 June 7, 2005 decision, the petition 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 denied the petition as the petitioner was not able to adequately document that the beneficiary met the experience requirements as set forth in the certified ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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

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).

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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$21.00 per hour,² \$43,680 per year based on a 40 hour work week. The labor certification was approved on November 4, 2003. The petitioner filed an I-140 Petition for the beneficiary on December 18, 2003.³ The petitioner listed the following information on the I-140 Petition: date established: not listed; gross annual income: not listed; net annual income: not listed; and current number of employees: 3.

On August 11, 2004, the director issued a Request for Evidence ("RFE") for the petitioner to: provide evidence related to the individual owner, including birth certificate, passport biographic page, and a copy of any naturalization certificate if relevant; for the petitioner to explain why it listed an amount lower on Form I-140 for the wage to be paid, than the wage listed on the certified Form ETA 750; to submit evidence that the beneficiary met the requirements as listed on the certified Form ETA 750; to submit the petitioner's 2001 federal tax return; and if the petitioner employed the beneficiary to submit Form W-2. The petitioner responded. On June 7, 2005, the director denied the petition on the basis that the petitioner failed to establish its ability to pay, as well as that the beneficiary had the experience required as listed on the certified Form ETA 750. 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 on April 19 2001, the beneficiary listed that he has been employed with the petitioner since March 2000. The petitioner submitted the following evidence of prior wage payment:

<u>Year</u>	<u>W-2 Wages</u>
2004	\$28,066.00 ⁴
2003	not submitted
2002	not submitted
2001	\$6,965.00

² The petitioner initially listed a lower wage, but DOL required that the wage be increased prior to certification.

³ The petitioner previously filed an I-140 petition on behalf of the beneficiary on April 26, 2001. The petition was denied on December 21, 2001, as the petitioner failed to file the petition with a certified labor certification as required by 8 C.F.R. 204.5(l)(3).

⁴ We note that the W-2 Forms are handwritten, and that in any further proceedings the petitioner should provide further evidence to document these wages paid, either in the form of W-3 statements for the employer, Forms 941 listing quarterly wages paid, or the beneficiary's individual Form 1040 to further evidence that the petitioner paid the amounts listed to the beneficiary.

The wages paid to the beneficiary are less than the proffered wage. Therefore, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary alone. For the years 2002, and 2003, the petitioner would need to show that it could pay the full proffered wage. In the years 2001, and 2004, the petitioner would need to show that it can pay the difference between the proffered wage and the wages paid.

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, 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, his wife, and two children and resides in Brielle, New Jersey.⁵ The tax returns reflect the following information:

Tax Year	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2004 ⁶	Not provided			
2003	Not provided			

⁵ The tax return indicates that the sole proprietor's spouse filed a separate return, so that it is unclear how much, if any, additional income would be available to support the family from his wife's return.

⁶ The petitioner did not provide its 2002 or 2003 federal tax returns, which should have been at the time of response to the RFE. On appeal, the petitioner did not provide its 2002, 2003, or 2004 tax returns, which all should have been available at the time of appeal. A petitioner is required to show its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2).

2002	Not provided			
2001	\$35,130	\$225,851	\$11,110	\$44,466
2000 ⁷	\$25,729	\$172,058	\$856 (costs of labor \$5,500)	\$37,964

If we factored in the 2001 wages paid to the beneficiary, and reduced the sole proprietor's AGI by the proffered wage remaining that the petitioner must demonstrate that it can pay the beneficiary in 2001 (\$36,715), the owner would be left with an adjusted gross income of: 2001: -\$1,585.

The sole proprietor would not be able to pay the proffered wage and support his family on negative income. The sole proprietor did not submit any evidence of his spouse's earnings, any evidence of bank accounts, or other personal or business readily liquefiable assets that would be available to pay the proffered wage. Further, the sole proprietor did not provide a list of estimated monthly family expenses to demonstrate the amount required to support himself and his family, or of additional resources for support.

On appeal, the petitioner's owner provides that:

The first reason for denial was the 2001 year tax return and the inability to pay \$43,680 out of that \$. At that time the applicant was making \$10/hr. and was new with the company. We never received the updated requirements of these forms until [sic] approx. 11/2003, with the \$21 pay and required skill/experience. Which we then provided [sic]. Also, the applicants amount [sic] of hours worked at that pay scale are no salary but based on hours actually worked, which are affected by rain/snow, extreme heat and cold and economic conditions (the applicant will not get 40 hrs/week, 52 weeks all year).⁸ And the amount of hours the applicant works during the year have a direct relationship to the gross income of the company (if work is abundant and the employee cant [sic] work due to weather conditions, the gross will be down.

A petitioner is not required to employ the beneficiary at the proffered wage until the beneficiary attains permanent residence. However, based on 8 C.F.R. § 204.5(g)(2), a petitioner must show that it can pay the beneficiary the proffered wage from the time of the priority date onward. It appears from Form ETA 750 that the petitioner submitted the forms, but that based on the experience required DOL required the petitioner to raise the proffered wage to \$21 per hour prior to certification. The ETA 750 was certified at that wage. The petitioner must show that it could pay that wage from April 2001 onward.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. See 20 C.F.R. § 656.30(c)(2). 20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself."

The petitioner filed the petition with an offer that stated the petitioner would pay the beneficiary \$21 per hour, based on 40 hours of work. The petitioner cannot now change the terms of the labor certification, and assert

⁷ Based on the priority date of April 2001, the sole proprietor's 2000 tax return would not be required, however, the 2000 return was contained in the record with a prior filing, and the information will be considered generally.

⁸ The petitioner had also provided a letter in response to the RFE, which stated that, "this is not a salary job, but in good conditions the yearly pay could approach an end of year total of \$28,000 to \$38,000."

that the beneficiary can only work, or will only be paid in decent weather conditions. 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 petitioner submitted no other documentation to allow us to conclude that the petitioner is able to pay the beneficiary the proffered wage from 2001 to the present. Accordingly, the petitioner cannot overcome this basis for the petition's denial.

Additionally, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary had the work experience as required by 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 (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" description for a working foreman provides:

From beginning to end: remove old roofs, make repairs and/or new ply-wood [sic], install new roof and clean-up. Supervise helpers and other mechanics on job.

Further, the job offer listed that the position required:

Education:	none
Major Field Study:	none
Training:	2 years on the job
Experience:	4 years in the job offered, working foreman or of related experience in siding and sheet metal
Other special requirements:	None.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(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.

Form ETA 750B lists the beneficiary's prior experience as: (1) the petitioner, March 2000 to the present (date of signature, April 19, 2001), working foreman, 40 hours per week; and (2) C.R. Herder, West Orange, New Jersey, May 1997 to July 1998, mechanic of roofing, 40 hours per week; (3) Ultimate Construction, West Orange, New Jersey, January 1996 to December 1996, carpenter (hours not listed).

The petitioner provided the following letters to document the beneficiary's prior experience:

Letter (handwritten) from [REDACTED], Ultimate Construction, letter undated,
Title: not listed;
Dates of employment: "the period of 1999 to 2000;"
Job duties: "Roofing and carpentry."

[REDACTED] also provided a typed version of the letter, which listed that he was employed from 1999 to 2001, and his duties included Siding, Windows, Roofing and Carpentry.

The dates of employment listed in the letter conflict directly with the dates listed on Form ETA 750B. Additionally, the dates of the typed letter conflict with the dates of the handwritten letter. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Further, the letter does not identify the beneficiary's job title, exact dates of employment, and whether the beneficiary was employed on a full-time or part-time basis.

Letter from [REDACTED] Roofing, and Siding, letter undated,
Title: not listed;
Dates of employment: a period of time of approximately two years in 1996 and 1997;
Job duties: "assisting foreman and mechanic in removal and replacement of roofs and all related functions such as gutters, siding and wood replacement."

Similarly, the dates of employment listed in the letter conflict directly with the dates listed on Form ETA 750B. See *Matter of Ho*, 19 I&N Dec. at 591-592. Further, the letter does not identify the beneficiary's job title, exact dates of employment, month and year, and whether the beneficiary was employed on a full-time or part-time basis.

Letter from [REDACTED] (foreman), letter undated,
Title: not listed;
Dates of employment: "I trained [the beneficiary] for a one year period in 1995 while working for Scott's Roofing and Siding;"
Job duties: "Most of the work we did was roofing and siding; some carpentry, metal work and windows."

The beneficiary did not list this experience on Form ETA 750B. Further, the letter does not identify the beneficiary's job title, exact dates of employment, month and year, and whether the beneficiary was employed on a full-time or part-time basis. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

The petitioner additionally provided a letter, which stated that the beneficiary began employment with the petitioner on April 26, 2001 "on a trial basis on several jobs." These dates further conflict with the dates of experience that the beneficiary listed on Form ETA 750B. See *Matter of Ho*, 19 I&N Dec. at 591-592 (BIA 1988).

In viewing the letters together, all of the letters are deficient in not listing job titles, exact dates worked, or number of hours worked, and accordingly are insufficient to meet the regulatory requirements for documenting that the beneficiary has the required experience to meet the requirements of the certified Form ETA 750.

On appeal, the petitioner provides:

Reason #2 for denial; Which was a lack of experience and training. Keep in mind that this trade has no school or diploma. The applicant started in the trade in the early 1990's and worked for numerous companies starting as a clean-up helper and working up to mechanic and foreman. The companies that the applicant previously worked for are either no longer in existence or not helpfull [sic] in providing the letters and info. that you need. Also the applicant jumped back and forth to some of these companies on an as needed basis (if one Co. is out of work for 3-5 days then you go to who needs you, as a matter of financial survival). If it appears the applicants required training and experience is not documented properly it is because its hard to pin point [sic] the exact locations as at the exact times (due to the nature of the business) and I assure you as the author of the letter that the applicant is above and beyond the requirements.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3). The letters that the petitioner submitted on the beneficiary's behalf to document the beneficiary's prior experience are insufficient, as set forth above. The petitioner did not provide any further evidence related to the beneficiary's work experience on appeal. The petitioner's statement alone is insufficient to document that the beneficiary had the experience required as listed on the certified ETA 750. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of 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.