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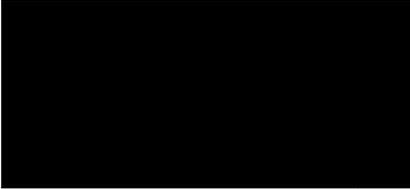
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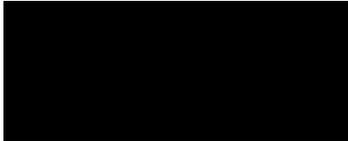
B6



APR 07 2004

FILE: WAC 02 033 52398 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the
Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(iii), which provides visas to qualified immigrants performing unskilled labor for which qualified workers are not available in the United States. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the director misinterpreted the petitioner's financial information and that the petitioner's evidence established its ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests, in part, upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is November 24, 1997. The beneficiary's salary as stated on the labor certification is \$16.82 per hour or \$34,985.60 per year based on a 40-hour week. The visa petition indicates that the petitioner was established in 1995 and is organized as a sole proprietorship

The petitioner, through counsel, initially submitted evidence of its ability to pay the proffered wage in the form of a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for the year 2000. It reflects that he filed jointly with his spouse and claimed two dependents in that year. This tax return indicates that the sole proprietor declared an adjusted gross income of \$50,814 including a business income of \$42,163.

On February 20, 2002, the director requested additional evidence from the petitioner to support its continuing financial ability to pay the beneficiary's wage offer of \$34,985.60. In response, counsel submitted copies of the

petitioning owner's individual federal tax returns for 1997, 1998, and 1999. These tax returns contain the following information:

Year	Business Income (Schedule C)	Adjusted Gross Income
1997	\$17,761	\$16,559
1998	12,255	17,008
1999	43,182	43,334

The director noted that the sole proprietor's adjusted gross income, less reasonable monthly living expenses, could not meet the beneficiary's proffered salary, and denied the petition accordingly. The AAO concurs. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses in 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. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents.

On appeal, counsel submits a copy of the sole proprietor's individual tax return for 2001, a bank statement, dated November 28, 1997, a statement from a tax consultant, and a statement from the petitioning owner. The 2001 tax return indicates that the sole proprietor declared an adjusted gross income of \$66,625 including a business income of \$68,685. Counsel asserts on appeal that the acting director should have limited her review to the petitioner's gross income and not taxable income, and should have also included non-cash deductions such as depreciation and amortization as set forth on the accountant's statement. This argument is not persuasive as it represents only a portion of the petitioner's financial picture. It is not reasonable to consider gross income without also examining the expenses incurred in order to generate that income. It is further noted that in looking at a petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Depreciation as the decreased value of the assets of a business is not considered to be a relevant factor in determining the financial viability of the business for ability to pay purposes and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

Although the director should have requested the petitioning owner to provide a summary of his living expenses, it is noted that even without considering any annual living expenses, the beneficiary's wage offer of \$34,985.60 is approximately 21% of the sole proprietor's adjusted gross income in 1997 if calculated on a prorated basis; more than twice the sole proprietor's adjusted gross income in 1998; 81% of the sole proprietor's adjusted gross income in 1999; 69% in 2000; and 53% in 2001. It is unlikely that the sole proprietor could continuously support himself, his spouse and two dependents plus cover the beneficiary's proffered wage during these years. In *Ubeda v. Palmer*, *supra*, the court concluded that it was highly unlikely that a

petitioner 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 about 30% of the petitioner's gross income.

It is noted that although other cash or cash equivalent assets can be considered in examining a sole proprietor's ability to pay a beneficiary's proposed salary, the record in the instant case contains insufficient documentation to convincingly demonstrate the petitioner's continued ability to pay the beneficiary's proffered wage. Although the bank statement indicates that the petitioning owner had \$19,000 on deposit as of November 28, 1997, it represents only a snapshot of the petitioning owner's cash assets at a particular point in time and does not reflect any encumbrances on those assets or a sustainable resource out of which the beneficiary's salary may be drawn. Similarly, the petitioning owner's statement, May 1, 2002, which indicates that he owns two businesses and has "liquid assets after liabilities" of "over \$500,000 is not supported by the evidence provided. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In the context of the financial records contained in the record, counsel asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner had been in business for over 11 years and was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual or unique business hardships have been shown to exist in this case, which parallel those in *Sonogawa*.

In view of the foregoing, and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

Beyond the decision of the director, it is noted that item 14 of the approved labor certification requires that the beneficiary have one year of work experience in the job offered as a food service manager or in the related occupation of driver. The record contains no evidence that the beneficiary has accrued the relevant experience. Pursuant to 8 C.F.R. § 204.5(g)(1), such evidence must be submitted by an employer or trainer specifically identifying the beneficiary's prior employment experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.