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U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536

U.S. Citizenship  
and Immigration  
Services

FILE:

Office: TEXAS SERVICE CENTER

Date:

APR 26 2004

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, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean style food cook. 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 proffered wage as of the visa priority date.

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)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 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 continuing 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 March 23, 2001. The beneficiary's salary as stated on the labor certification \$18,000 per year based on a 40-hour week. The record indicates that the petitioner was established in 1993 and is organized as a sole proprietorship.

The petitioner, through counsel, initially submitted a partial copy of the sole proprietor's 2001 Form 1040, U.S. Individual Income Tax Return. On June 4, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the beneficiary's wage offer. The director instructed the petitioner to submit copies of its 2000 and 2001 federal tax return and copies of its federal quarterly tax return for the last four quarters of 2001.

In response, the petitioner submitted partial copies of the sole proprietor's 2001 quarterly tax returns and copies of the sole proprietor's 2000 and 2001 individual tax returns. The quarterly tax returns show that the petitioner paid an average of about \$7,300 in salaries and wages in each quarter of 2001. The sole proprietor's individual income tax returns reflect that he filed jointly with his spouse and claimed one dependent in each year. The 2001

tax return, covering the visa priority date of March 23, 2001, is the most relevant in determining the petitioner's ability to pay the proffered wage. This tax return indicates that the sole proprietor declared a business income of \$35,715 and an adjusted gross income of \$33,791.

The director denied the petition, concluding that the sole proprietor's income, remaining after paying the proposed salary to the beneficiary, was not sufficient to support himself, his spouse and one dependent.

On appeal, counsel asserts that the sole proprietor's adjusted gross income exceeded the proposed wage offer and therefore the petition merits approval. Counsel submits copies of various bank accounts maintained by the sole proprietor and claims that these cash assets should be taken into consideration.

At the outset, it is noted that in reviewing 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

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 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. 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.

In this case, the 2001 tax return shows an adjusted gross income of \$33,791. The bank statements, submitted on appeal, suggest that the sole proprietor had approximately \$17,500 in personal cash assets available to him at the end of 2001. The proffered wage, calculated on a prorated basis from the visa priority date, reflects that the petitioner would be obligated to pay about \$14,000 in salary to the beneficiary for the remaining portion of 2001. This represents about 41% of the petitioner's adjusted gross income. 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.

In the instant case, however, the sole proprietor's family consists of himself, his spouse and one dependent. It would be more reasonable to evaluate the petitioner's ability to pay the proffered wage if the director requests the petitioner to provide the sole proprietor's actual monthly household living expenses (food, clothing, rent or mortgage, etc.) from the visa priority date to the present, as a basis to evaluate an ability to pay a proposed salary. The petitioner should also be requested to provide any additional details relevant to other cash or cash

equivalent assets, not already included in the tax return income, consistently available to pay the proffered wage.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional updated evidence relevant to the petitioner's ability to pay the proffered wage. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director to request additional for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.