



U.S. Citizenship
and Immigration
Services

B-6



FILE: WAC-02-053-59742 Office: CALIFORNIA SERVICE CENTER Date: JUL 13 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

U.S. DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
PROTECTED BY LAW

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, who subsequently rejected the appeal as improperly filed. Upon review, the director effectively withdrew the rejection and forwarded the matter to the Administrative Appeals Office (AAO), where it is now on appeal. The appeal will be dismissed.

The record of proceeding is replete with procedural irregularities due in part to substitution of counsel during the appellate filing period. The director rejected the appeal as untimely based upon an improperly filed Form I-290B (Form I-290), Notice of Appeal to the Administrative Appeals [Office], filed by the petitioner's prior counsel. When the petitioner's counsel took corrective action, the form that he filed was received later than the due date and rejected.¹ The confusion arose due to an additional Form I-290B filed on the petitioner's behalf by current counsel, that caused two filing fees to be received, the one by current counsel was returned as unnecessary. Current counsel's Form I-290B was properly filed and received by CIS on time, as it was received on July 9, 2002, and the director's decision was issued on June 12, 2002. Thus, it was received within the thirty-three days allotted by regulation. Current counsel submits on appeal that the director was wrong in rejecting the petitioner's appeal, as the petitioner's filing fee and receipt notice indicate an appeal received on time. Counsel is correct, as his Form I-290B and Form G-28, Notice of Entry of Appearance as Attorney Representative, was filed prior to the petitioner's prior counsel, thereby properly effecting substitution of counsel.

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 at 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

¹ It is notable that the initial appellate filing submitted by prior counsel was too late as well. Prior counsel submitted his Form I-290B on July 19, 2002; however, the director's decision was dated June 12, 2002, so this was too late. That receipt date is crossed out, however, as an administrative notice was sent to the petitioner's prior counsel on July 23, 2002, that the Form I-290B omitted a signature and was thus rejected as improperly filed. A "properly" filed Form I-290B was re-submitted on August 5, 2002, which was untimely and rejected by the director.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 5, 1998. The proffered wage as stated on the Form ETA 750 is \$14.75 per hour, which equates to \$30,680 annually.

With the petition, the petitioner submitted its owner's Schedule C to Form 1040, U.S. Individual Income tax return, without the completed return for 2000, as well as unaudited profit and loss statements for the monthly periods January through August 2001, and the entire years of 2000 and 1999.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 6, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of complete federal tax returns, clarification concerning wage reporting on the Schedule C previously submitted, Form DE-6, Quarterly Wage Reports, with identification and descriptions of employees listed on the DE-6 forms, and payroll summaries.

In response, the petitioner submitted its owner's Forms 1040 Individual Income tax returns for 1998 through 2001 with accompanying Schedules C, Profit or Loss From Business Statements. The Schedules C show that the petitioner's owner also owns other businesses. The tax returns reflect the following information for the following years pertaining to the petitioner's restaurant with respect to the instant proceeding:

	<u>1998</u>	<u>1999</u>
Proprietor's adjusted gross income (Form 1040)	\$13,597	\$14,925
Petitioner's gross receipts or sales (Schedule C)	\$82,905	\$85,935
Petitioner's wages paid (Schedule C)	\$3,837	\$0
Petitioner's net profit from business (Schedule C)	\$11,915	\$16,832
	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$21,927	\$20,381
Petitioner's gross receipts or sales (Schedule C)	\$85,801	\$99,438
Petitioner's wages paid (Schedule C)	\$0	\$0

Petitioner's net profit from business (Schedule C)	\$17,699	\$22,690
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Additionally, prior counsel's accompanying letter to the petitioner's response to the director's request for evidence states the following:

Please note that our office made a mistake regarding the number of employees. There have been no employees for the last couple of years. The owner, along with her husband and children, have been working full time at the restaurants. Thus there are no current DE-6s.

Also enclosed is a customer receipt showing an account balance of \$20,500. This is the money the owners received from the sale of their second restaurant, USA Frosty. They sold this restaurant in order to concentrate their energy in the future development of [the petitioner], and plan to reinvest their capital in the improvement of and profitability of [the petitioner].

A copy of a Customer Receipt issued by Bank of America on April 29, 2002 reflects an available balance of \$20,500.00 for a savings account. The savings account is not connected to the petitioner or the petitioner's owner by any other evidence.

Additionally, in random and confusing order, miscellaneous documents pertaining to the petitioner with different addresses on different documents, and the petitioner's other businesses were submitted into the record of proceeding as follows: the petitioner's state income tax return for 2001; an annual reconciliation statement to the California Employment Development Department indicating wages paid by the petitioner of \$6,354.63 in 1999; the petitioner's Forms 941 and California state Quarterly wage and withholding reports for all quarters in 1998 and 1999; Form W-3, Transmittal of Wage and Tax Statements for 1998 evidencing wages paid by the petitioner of \$3,836.85 in that year; an annual reconciliation statement to the California Employment Development Department indicating wages paid by the petitioner of \$3,836.85 in 1998; and Forms W-2, Wage and Tax Statements for 1999 indicating payment of wages by the petitioner to two (2) employees in that year. Additionally, the following documents were submitted pertaining to "USA Frosty:" Forms W-2, Wage and Tax Statements for 1999 indicating payment of wages to four (4) employees in that year; Form 941, Quarterly Federal Tax Return for the quarters ended March 31, 1999, June 30, 1999, and December 31, 1999; Form W-3, Transmittal of Wage and Tax Statements for 1999 evidencing wages paid of \$6,354.63 in that year. Finally, a copy of a California state Quarterly wage and withholding reports for the quarters ending March 31, 1998 and September 30, 1998 were submitted for "Main Street Burger." None of these documents reflect employment of and wages paid to the beneficiary by the petitioner or its other businesses.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 12, 2002, denied the petition.

On appeal, substituted counsel asserts that the petitioner has the ability to pay the proffered wage based upon its owner's real estate ownership, profits realized by the sale of a different business owned by the petitioner's owner, and savings account funds.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, or 2001.

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, without consideration of depreciation or other expenses. 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). In *K.C.P. Food Co., Inc.*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. There is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The director, in his decision in this matter, erred by adding depreciation back to the sole proprietor's adjusted gross income.

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 *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a proprietor of 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 three. Since the director failed to obtain the sole proprietor's monthly expenses, the AAO's analysis will use the general guidance delineated in *Ubeda v. Palmer* to ascertain the realistic probability of the sole proprietor's ability to pay the proffered wage out of her adjusted gross income and to sustain herself and her dependents.

In 1998, the sole proprietorship's adjusted gross income was \$13,597. In 1999, the sole proprietorship's adjusted gross income was \$14,925. In 2000, the sole proprietorship's adjusted gross income was \$21,927. In 2001, the sole proprietorship's adjusted gross income was \$20,381. The proffered wage is \$30,680. The sole proprietorship's adjusted gross income is lower than the proffered wage for every relevant year. It would be impossible for the sole proprietor to pay the proffered wage from her adjusted gross income and sustain herself and her dependents. Thus, the director did not commit prejudicial error by failing to seek the sole proprietor's monthly expenses.

Since the petitioner is a sole proprietor, she may use her assets, such as savings accounts or cash in checking accounts, to bolster her ability to pay the proffered wage. Counsel states that the petitioner's owner owns two homes with combined equity totaling \$173,000 which "the petitioning employer can use ... as collateral to secure additional funds to insure that the restaurant will be capable of paying the proffered wage." Counsel submits a copy of a grant deed illustrating the purchase of properties by the petitioner's owner in 1991 and 2000. There is no additional evidence to corroborate counsel's claims concerning the current values of the properties or the owner's equity in either of them. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Even if the AAO were to consider counsel's proposition that the petitioner's owner could seek an additional mortgage on her property to pay the proffered wage, the realization of a cash allowance would be offset by the debt incurred to obtain it. Thus, such a proposition would fail to establish the petitioner's ability to pay the proffered wage.

Counsel also states:

The petitioning employer recently sold its other business, USA Frosty, a venture which caused the petitioning employer to realize substantial losses during the past 4 years. By eliminating this unprofitable venture, the petitioning employer will have more time and financial resources to focus upon the continuing growth of [the petitioning employer's restaurant].

No evidence was submitted to evidence the sale of USA Frosty or proceeds realized from such a sale to the petitioner. As stated above, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Thus, there is insufficient evidence to establish this claim and it will not be considered any further in this instant proceeding.

Finally, counsel states that the petitioner maintains a balance of \$25,713.03 in a Bank of America account. Thus, counsel states the petitioner could use these funds to pay the proffered wage. Exhibit H to counsel's appellate exhibits contains a copy of a Customer Receipt issued by Bank of America reflecting a savings account balance of \$25,713.03 in July 2002. An additional copy of an account balance statement dated June 2002 follows indicating the same balance and reflecting the petitioner's owner as holding title to the account. The amount of \$25,713.03 is lower than the proffered wage and fails to establish the petitioner's ability to pay the proffered wage. Even if that amount were to be added to one of the year's adjusted gross incomes reported by the sole proprietor, the petition would fail since a continuing ability to pay the proffered wage must be illustrated. The amount in the savings account is not substantial enough to cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage.

Additionally, counsel concedes that the petitioner's business has suffered over the past four years. Indeed, the petitioner's net profits from business as reflected on Schedule C to the sole proprietor's individual income tax return show very modest results -- results that are too low to cover the proffered wage and fail to inspire confidence concerning the petitioner's ongoing financial viability.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998 through 2001. Therefore, the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date.

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. The petition is denied.