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U.S. Citizenship
and Immigration
Services

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FILE:



EAC 05 015 50198

Office: VERMONT SERVICE CENTER

Date: **NOV 18 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foreign food specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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 additional evidence and contends that the director erred in concluding that the petitioner has not had the financial ability to pay the proffered wage.

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

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 April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour, which amounts to \$27,040 annually. On Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary claims to have worked for the petitioner since December 2000.

On Part 5 of the visa petition, the petitioner states that it was established in December 2000 and currently employs five workers.

Because the petitioner failed to submit any evidence supporting its continuing ability to pay the proffered wage, on November 21, 2002, the director requested additional documentation pertinent to that ability. The director instructed the petitioner to submit copies of its 2000 and 2001 federal income tax returns. The director also advised the petitioner to submit a copy of the beneficiary's 2001 Wage and Tax Statement (W-2) showing how much it paid the beneficiary, copies of its federal employer's quarterly tax return (Form 941) for the last six quarters.

In response, the petitioner submitted a copy of its business license issued for the period between December 26, 2000 and December 25, 2002, and a copy of the owner's Form 1040, U.S. Individual Income Tax Return for 2001. It indicates that the petitioner was operated as a sole proprietorship. The 2001 tax return reflects that the sole proprietor filed jointly with his spouse and declared two dependents. He reported an adjusted gross income of \$43,581, including the petitioning business' net income of \$36,670, as reported on Schedule C. Schedule C also reflects that the petitioning business reported \$309,400 in gross receipts or sales and paid \$7,020 in wages. Counsel's transmittal letter, dated January 16, 2003, accompanied this submission and further stated that the petitioner did not file a tax return for 2000 as it began operations in December 2000. She also stated that the petitioner paid the beneficiary in cash because she didn't have a social security number.

On May 2, 2003, the director denied the petition. 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 of April 4, 2001. The director noted that after deducting the proffered wage from the petitioner's adjusted gross income, the remaining amount would not be sufficient to support the sole proprietor, his spouse and two dependents.

On appeal, counsel submits copies of the beneficiary's income tax returns for 2001 and 2002, as well as a copy of a letter, dated January 24, 2003, from the sole proprietor, in support of his contention that the beneficiary has been employed at the proffered wage. The sole proprietor's letter states that he has employed the alien beneficiary as a cook since December 2000. The beneficiary's individual tax return for 2001 reflects that she reported an adjusted gross income of \$22,249 including a business income of \$23,940, as reported on Schedule C, where she reported her gross receipts or sales as a cook at \$27,040. Her 2002 individual tax return reflected \$21,821 in adjusted gross income including a business income of \$23,480, and gross receipts or sales as a cook at \$27,040. A copy of a cancelled check to the Internal Revenue Service (IRS) accompanies these submissions.

Counsel also submits partial copies of the sole proprietor's 2002 individual tax return, consisting only of Schedule Cs' for two businesses. The address given for each business indicate that they are located in close proximity to each other. One bears the same employer identification number as the petitioner, but a slightly different street address. It claims \$323,856 in gross sales or receipts, \$15,600 paid as wages, and a net income of \$33,197. The other business bears a different employer identification number than that of the petitioner's, but the same address. This Schedule C shows \$340,000 in gross sales or receipts, \$60,000 paid as wages, and \$35,345 reported as net business income.

Counsel argues that the petitioner's ability to pay the proposed wage is established by the beneficiary's payment of taxes to the IRS, her individual tax returns for 2001 and 2002, which show the equivalent of the proffered wage received as "gross receipts or sales," and the sole proprietor's letter claiming that he employed her at the proffered wage. Although it is clear that the beneficiary has paid taxes to the IRS, there

is no credible corroboration that the source of her income was from the petitioner. It is noted that the sole proprietor's 2001 individual income tax return shows only \$7,020 paid as wages on Schedule C, while the beneficiary declared approximately triple that amount on her tax return from working as a cook. Such evidence does not credibly establish that the petitioner employed the beneficiary at any given wage. No clarification of this discrepancy has been offered. It is incumbent upon 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. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 credible 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 during a given period. To the extent that a petitioner may be paying a beneficiary less than the proffered wage, consideration will be given to those wages. If the shortfall can be paid out of either a petitioner's net income or net current assets, a petitioner will be deemed to have established its ability to pay the proffered wage during a given period. As noted above, the evidence does not persuasively demonstrate that the petitioner employed the beneficiary at any given wage.

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). Showing that the petitioner's gross receipts or gross profits exceeded the proffered wage or reached a particular level is insufficient because such a review must necessarily include consideration of the expenses incurred in order to generate such revenue. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner has submitted copies of the sole proprietor's individual tax returns for 2001. A sole proprietorship is 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 director failed to request that the petitioner provide a summary of the sole proprietor's living expenses during the relevant period, so that a more accurate assessment of the petitioner's ability to pay the proffered wage could be made. It is noted, however, that the alien's proposed wage offer of \$27,040 represented approximately 62% of the sole proprietor's adjusted gross income in 2001. Although the sole proprietor's household was comprised of fewer dependents than in *Ubeda*, the comparison of the beneficiary's proposed wage measured against the sole proprietor's adjusted gross income of \$43,581 suggests that it was highly improbable that reasonable living expenses, as well as the proffered wage, could be met out of the sole proprietor's adjusted gross income during 2001. After paying the proffered wage, the sole proprietor, spouse and two dependents would only be left with \$16,541 for living expenses.

Counsel argues on appeal that although the petitioner has not yet filed his 2002 taxes, the incomplete Schedule C documents submitted on appeal accurately represent the income of the sole proprietor's businesses. The AAO will not consider such documents as credible evidence of a petitioner's continuing ability to pay a proffered wage when they represent incomplete draft copies of tax returns not yet filed. Counsel's contention that these documents support the petitioner's ability to pay the proffered salary does not constitute evidence and is not persuasive. See *Matter of Obaiqbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Similarly, counsel's assertions that the petitioner's standing as a new commercial endeavor does not preclude its ability to pay a proffered wage is not particularly convincing in this case. Whether a business is new or well-established, if it petitions for alien workers, it must show that it qualifies as a prospective U.S. employer making a realistic job offer pursuant to section 203(b)(3) of the Act. Part of this demonstration includes the requirement to demonstrate that it has a continuing ability to pay the certified wage, beginning on the priority date, as set forth in 8 C.F.R. § 204.5(g)(2). Although it may be a growing concern, as contended by counsel, the petitioner is still mandated to demonstrate a *continuing* financial ability to pay the proffered wage. Based on the evidence contained in the record, it cannot be concluded that the petitioner's ability to pay the proffered wage has been established. A visa petition may not be approved based on speculation of future eligibility or after the petition becomes approvable under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Beyond the decision of the director, it is noted that the certified ETA 750A contained in the record requires that the alien beneficiary must possess two years of experience in the job offered of a foreign food specialty cook. This experience must have accrued as of the priority date of April 4, 2001. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that such work experience be documented by the relevant employer(s) or trainer(s) specifically describing the experience acquired. There is no documentation of such experience contained in the record in this case.


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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.