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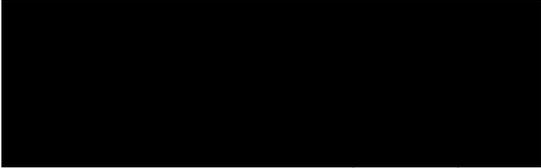
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



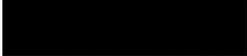
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

APR 13 2005

WAC 03 131 55230

IN RE:

Petitioner:

Beneficiary:



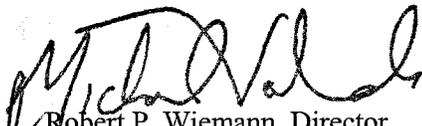
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 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 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 April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$1,745.50 per month, which amounts to \$20,946 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of \$252,000, and to employ six workers. In support of the petition, besides the labor certification, the petitioner provided a letter in support of the petition.

On April 28, 2003, the director sent a notice of his intent to deny (NOID) the petition based upon the director's preliminary determination that:

- The beneficiary lacked the minimum job qualification, as specified in the labor certification, of two years relevant work experience; and
- The petitioner had not established his ability to pay the proffered wage continuously from the priority date until the beneficiary can adjust status.

The NOID specified that in any response, the petitioner must establish his ability to pay with:

- Tax documents (2001,2002);
- Form W-2 (2001,2002); and
- Forms DE-6 [employer's quarterly wage reports]

The counsel previously of record responded by submitting the following:

- A May 27, 2003 enclosure letter reporting that the petitioner had transferred the business to Thai Cottage II, Inc. (Thai Cottage), of Houston, Texas, and that the beneficiary had not been issued any Form W-2's since she had not begun work at the restaurant;
- The petitioner's Form 1040's for 2001 and 2002;
- Form DE-6 reports for 2002's four quarters and the first quarter of 2003; and
- Thai Cottage's Form 1120 tax returns for 2001 and 2002, along with the corporation's state sales tax returns for those years.

The submitted tax returns reflect the following information:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	-\$27,810 <sup>1</sup>	-\$13,576
Petitioner's gross receipts or sales (Schedule C)	\$39,958	\$62,438
Petitioner's wages paid (Schedule C)	\$0	\$10,692
Petitioner's net profit from business (Schedule C)	-\$13,118	-\$13,576

On July 2, 2003, the director sent a request for evidence (RFE) asking counsel to submit an uncertified labor certification application, signed by the new restaurant owners, along with the sale documents showing the new owner would acquire the petitioner's rights and duties in the restaurant.

In response, counsel submitted the following:

- A September 17, 2003 letter;
- A copy of a May 1, 2003 sales contract requiring Thai Cottage to pay \$60,000 cash for the restaurant sale on the date of closing, set for May 15, 2003, in exchange for listed restaurant assets and the petitioner's rights in the leasehold property and in "any contracts, enterprises and deposits made by or granted to Seller in connection with its business, phone number or the trade name, 'Little Siam Restaurant';"<sup>2</sup> and
- An uncertified labor certification application signed on September 10, 2003, by Thai Cottage.

<sup>1</sup> The petitioner's adjusted gross income includes a \$14,692 net operating loss that is not from the restaurant.

<sup>2</sup> Contrary to counsel's assertions in the September 17, 2003 letter that the buyer "will assume all right, duties and obligations and assets of the original employer," the contract is silent on the buyer's obligations.

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 January 8, 2004, denied the petition.<sup>3</sup>

On appeal, counsel<sup>4</sup> asserts that the director erred by:

- Ignoring the petitioner's "other assets" in determining ability to pay; and
- Disregarding the successor-in-interest's takeover of the business.

Counsel submits no new evidence on appeal.

Counsel's first assertion assumes the record contains other evidence of the petitioner's "other assets" available to pay the proffered wage. This office notes that the only evidence in the record pertinent to the petitioner's ability to pay is his two submitted Form-1040 tax returns. The petitioner bears the burden of proof, which requires that he alone must produce credible evidence to establish his ability to pay. See section 291 of the Act, 8 U.S.C. § 1361. It is not up to the director or CIS to find the pertinent documents or other evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Nothing in the record reveals other assets available to the petitioner that would enable him to pay the proffered wage as of the priority date.

As to the second assertion of counsel, it is up to the successor-in-interest to submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *Matter of Dial auto Repair Shop, Inc.* 19 I&N Dec. 481, (Comm. 1986). This office not persuaded that the director erred by not weighing the financial strength of Thai Cottage as a successor in interest in deciding ability to pay.<sup>5</sup> The sale contract is silent on the buyer's assumption of the petitioner's obligations.

Moreover, even if counsel is correct and successor-in-interest rules apply after the May 1, 2003 sale, the petitioner must still establish its own pre-sale ability to pay the proffered wage. *Id.* The successor-at-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. In both 2001 and 2002, the petitioner reported negative earnings from its restaurant. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. Lacking proof of the petitioner's other assets, this office can only determine the petitioner's ability to pay from previously submitted Form 1040 tax returns.

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

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<sup>3</sup> The director sent the attorney's copy to prior counsel.

<sup>4</sup> New counsel was of record February 6, 2004.

<sup>5</sup> The petitioner's standing in these proceedings is in some doubt, given its claim to have sold its business.

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 2001 or 2002.

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); *Ubada 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 exceeded the proffered wage is insufficient. 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.

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. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubada*, 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 reports in his Form 1040 tax returns that he is single and has no dependents. In 2001, the sole proprietorship has reported a negative \$27,810 adjusted gross income. This amount is not sufficient to pay the proffered wage of \$20,946. It is thus not established that the sole proprietorship could pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently during 2002. Therefore, the petitioner has not established 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.