



U.S. Citizenship
and Immigration
Services



BG

FILE: [REDACTED]
WAC 03 030 53436

Office: CALIFORNIA SERVICE CENTER

Date: APR 28 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



PUBLIC COPY

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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be withdrawn and the petition will be approved.

The petitioner is an Indian 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, accompanies 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. The AAO concurred with the director's decision on appeal.

On motion, 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on August 1, 2001. The proffered salary as stated on the labor certification is \$13.87 per hour or \$28,849.60 per year.

On motion, counsel submits a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, copies of the prior petitioner's bank statements for the period December 7, 2000 through March 30, 2001 and September 28, 2001 through December 31, 2001, copies of unaudited balance sheets, and a copy of the prior petitioner's Form 1099, Miscellaneous Income. The petitioner's 2002 Form 1120S reflects an ordinary income of \$36,064 and net current assets of -\$1,914. The prior petitioner's bank statements reflect balances from a low of \$19,993.72 to a high of \$46,062.84. Counsel states:

The Petitioner submitted the 2001 Tax return for Parvinder Singh, as part of these proceedings. Statement 1, under footnotes refers to non-employee compensation in the amount of \$5,250.00 from Marina Pacifica LLC. This was reimbursement for tenant improvements and treated for tax and accounting purposes, as a reduction in the cost of improvements and not income. It nevertheless, represents additional liquid assets in the amount of \$5,250, which should have been considered in the year 2001. A copy of the form 1099 for this amount, which was not previously submitted, is enclosed with the motion.

* * *

Petitioner encloses with this motion the 2002 tax return for Tandoori Grill, Inc., the successor in interest to the original petitioner (see exhibit H). The certified return form 1120S, line 21 shows ordinary income of \$36,064 for the year 2002. This exceeds the amount required for the employer to pay the wage. As noted on page 9 of the decision, prior counsel did not provide the 2002 income tax return for Tandoori Grill. Petitioner requests reopening and reconsideration at this time, since the tax return was on extension and therefore was not previously available.

The evidence submitted shows clearly that there were more than sufficient liquid assets to pay the prevailing wage in 2001 and ordinary income as shown on the tax return, to pay the wage for the year 2002.

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 employed the beneficiary at a salary of \$9,414.76 and \$10,200.00, respectively, in 2001 and 2002. These wages were \$19,434.84 and \$18,649.60, respectively, less than the proffered wage of \$28,849.60.

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).

The prior petitioner was a sole proprietorship, 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 sole proprietor supported a family of four in 2001 and 2002. The beneficiary's 2001 and 2002 Forms W-2 reflect wages earned by the beneficiary of \$9,414.76 in 2001 and \$10,200.00 in 2002. When these amounts are subtracted from the beneficiary's proffered wage, the resulting figures are \$19,434.84 (\$1,619.57 per month) and \$18,649.60 (\$1,554.13 per month), respectively. In 2001, the sole proprietorship's adjusted gross income was \$26,129. The prior petitioner would have had to make up the difference between the wages paid to the beneficiary and the proffered wage. This would have resulted in an income of \$6,694.16 left to the prior petitioner to support a family of four (\$26,129 adjusted gross income - \$19,434.84 after wages paid = \$6,694.16). The prior petitioner's yearly expenses were \$25,870.80 or \$19,176.64 more than the income left to the petitioner. The prior petitioner submitted copies of the restaurant's bank statements. However, CIS will not consider those statements as evidence of the prior petitioner's ability to pay the proffered wage, as the petitioner's Schedule C should have included those amounts under gross receipts. CIS will consider the liquid assets of the sole proprietor; in this case, his personal and joint bank balances as evidence of the ability to pay the proffered wage. The AAO concludes that the amounts in the personal accounts are the sole proprietor's personal assets. The prior petitioner's personal bank account reflected balances ranging from a low of \$5,243.33 to a high of \$35,281.11 for the period July 31, 2001 through December 31, 2001, and the prior petitioner's joint savings account reflected balances of a low of \$3,664.91 to a high of \$54,929.66 for the period July 31, 2001 through December 31, 2001. All of the bank balances reflected amounts higher than that needed to pay the proffered wage and the yearly expenses of the petitioner. ($\$28,849.60 + \$25,870.80 = \$54,720.40$ - $\$26,129$ adjusted gross income = $\$28,591.40$ or $\$2,382.62$ per month)

In 2002, the prior petitioner ran the restaurant as a sole proprietorship until October, at which time, the restaurant was sold and the current petitioner ran the restaurant as an S corporation. In 2002, the beneficiary's wages were \$10,200.00 or \$18,649.60 less than the proffered wage. The prior petitioner's adjusted gross income was \$51,877, more than enough to pay the prior petitioner's yearly expenses and make up the difference between the beneficiary's wages and the proffered wage. ($\$51,877$ adjusted gross income - $\$25,870.80$ yearly expenses = $\$26,006.20$ - $\$18,649.60$ remaining part of the proffered wage = $\$7,356.60$) In addition, the current petitioner's 2002 Form 1120S reflected an ordinary income of

\$36,064 and net current assets of -\$1,914. The current petitioner could have paid the proffered wage from its ordinary income.

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 sustained that burden. Accordingly, the previous decision of the AAO will be withdrawn, and the petition will be approved.

ORDER: The AAO's decision of October 16, 2003 is withdrawn. The petition is approved.