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U.S. Citizenship
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FILE: WAC 03 146 50695 Office: CALIFORNIA SERVICE CENTER Date: AUG 08 2005

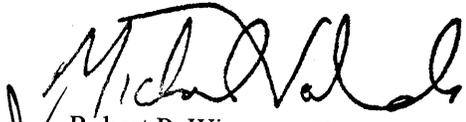
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed. The petition is denied.

The petitioner states that it is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty Korean 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, as a sole proprietor, 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 states that the petitioner has sufficient funds to pay the proffered wage and submits additional documentation.

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 May 3, 1999. The proffered wage as stated on the Form ETA 750 is \$2,405 a month, which amounts to \$28,860 annually.

The petitioner is structured as a sole proprietorship. The petitioner stated that it was established in 1982, and that it has three employees. With the petition, the petitioner submitted a letter verifying the beneficiary's previous work experience in Korea, and the petitioner's income tax return for 1999, 2000, and 2001.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 25, 2003, the director requested additional evidence pertinent to that ability. The director noted that the petitioner was a sole proprietor and specifically requested that the petitioner provide a statement of monthly expenses for the petitioner's family. The director also requested that the petitioner submit its IRS Form 1040 for 2002, as well as Forms DE-6 Quarterly Wage Report for all employees for the last eight quarters, with a brief description of the duties of each employee listed on the DE-6 forms.

In response, counsel submitted the petitioner's income tax return for 2002, and resubmitted the federal income tax returns for 1999, 2000, and 2001. The petitioner also submitted nine DE-6 Forms for quarters from June 2001 to June 2003. Finally the petitioner submitted a statement of monthly expenses for the petitioner and his dependents that indicated monthly expenses of \$2,260 or on an annual basis, \$27,120.

The director determined that the evidence submitted did not establish that, as a sole proprietor, the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and also to support himself and three dependents. The director stated that the petitioner's monthly expenses totaled \$27,120 on an annual basis, while the proffered wage was \$28,860. The director then stated that the petitioner must establish a yearly adjusted gross income of a minimum of \$55,980 to have the capability to pay the proffered wage. The director then examined the adjusted gross income of the petitioner for the year 1999 to 2002, and determined that a deficit in the petitioner's adjusted gross income existed in each year. On October 24, 2003, the director denied the petition.

On appeal, counsel states that the petitioner does have sufficient funds to pay the offered wage from the priority date onward and support himself and three dependents. Counsel asserts that the petitioner's monthly expense statement should not be the determinative factor in establishing the petitioner's ability to pay the proffered wage, and states that the petitioner's expenses are not constant and are easily subject to change based on the petitioner's financial situation. Counsel further notes that the petitioner has been in business for a long time and the petitioner's business and profits have increased every year. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), in looking at the totality of the petitioner's circumstances. Counsel also submits a letter from the petitioner that states the petitioner is willing to economize on his personal expenses in order to hire the beneficiary. The petitioner also describes his monthly expenses as non permanent and variable.

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. The petitioner has not established that it has previously employed the beneficiary.

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. CIS does not consider depreciation deductions to be available cash, but rather only examines net income figures in this analysis. 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 the instant petition, in the years 1999, 2000, 2001, and 2002, the petitioner's net income was as follows: in 1999, \$49,846; in 2000, \$51,147; in 2001, \$52,104; and in 2002, \$52,816. These net income sums are sufficient to pay the proffered wage of \$27,120 in every year from 1999 to 2002.

However, the petitioner is 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 supports himself and three dependents. In 1999, the sole proprietorship's adjusted gross income of \$49,846 minus the proffered wage of \$28,860 would leave \$20,986 to support a household of four. In 2000, the sole proprietorship's adjusted gross income of \$51,147 minus the proffered wage of \$28,860 would leave \$22,287 to cover the personal expenses of the sole proprietor and his three dependents. In 2001, the petitioner's adjusted gross income of \$52,104, minus the proffered wage of \$28,860 would leave \$23,244 to cover the personal expenses of the petitioner and his dependents. Finally, in 2002, the petitioner's adjusted gross income of \$52,816, minus the proffered wage of \$28,860, would leave \$23,956 to cover the household expenses of the petitioner and his dependents. None of these remaining funds is sufficient to cover the petitioner's annual expenses of \$27,120.

The director in his decision analyzed the petitioner's adjusted gross income versus the petitioner's monthly expenses extrapolated to an annual basis to determine that the petitioner could not support himself and his dependents and pay the proffered wage as of the 1999 priority date and to the present time. While counsel's and the petitioner's statements with regard to the monthly expenses being variable have some merit, the AAO must rely on the figures provided by the petitioner. Moreover, the request for further evidence provided the petitioner an opportunity to demonstrate that the wage could be paid with other liquid assets at the petitioner's disposal. The petitioner chose not to do so. In addition, it should be noted that the petitioner's expenses could have been higher during the period of time in question, as well as lower.

In examining the totality of the petitioner's circumstances, as described in *Sonegawa*, the AAO acknowledges that the petitioner has had positive adjusted gross incomes from the priority date to the present time, has increased its profits each year that has been examined, and had been in business for an extended period of time. However, given the petitioner's tax structure as a sole proprietor, it does not appear reasonable that the petitioner would have the capability to pay the proffered wage and cover the household expenses of himself and his dependents from the priority date and onward. As stated previously, the petitioner has not shown that it has any other financial assets with which to pay the proffered wage. Accordingly the petitioner has not established that it has the capability of paying the proffered wage as of the priority date and onward.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In the instant petition, the petitioner has not met that burden. The director's decision will be upheld. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.