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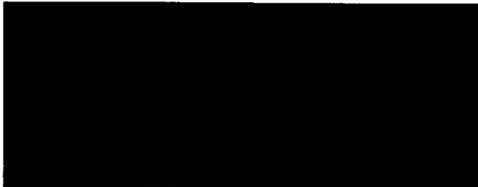
FILE: WAC 03 265 54266 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a 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 statement 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 granting 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$11.62 per hour, which equals \$24,169.60 per year.

On the petition, the petitioner stated that it was established during February 1992 and that it employs 6 workers. The petition states that the petitioner's gross annual income is \$163,703. The petitioner did not state its net annual income in the space provided on the Form I-140 petition for that purpose. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since February of 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

In support of the petition, counsel submitted the 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns of [REDACTED]. Those returns show that Ms. [REDACTED] has three dependents. Schedules C attached to those returns show that she owned the petitioner as a sole proprietorship. The lack of any other Schedules C shows that Ms. [REDACTED] owned no other sole proprietorships. Further, the fact that the amounts shown at Line 31, Net Profit or Loss, on both of those Schedules C is the same as the amount shown on the

corresponding Forms 1040 at Line 12, Business Income, confirms that the petitioner's owned no other sole proprietorships during that year.

The 2001 Schedule C shows that the petitioner returned a profit of \$25,704 during that year. The return shows that the petitioner's owner declared adjusted gross income of \$33,608 during that year, including the petitioner's entire profit.

The 2002 Schedule C shows that the petitioner returned a profit of \$52,311 during that year. The return shows that the petitioner's owner declared adjusted gross income of \$50,474 during that year, including the petitioner's entire profit offset by deductions.

Counsel also provided the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for the second and third quarters of 2002 and the first and second quarters of 2003. Those returns show that the petitioner employed six workers during each of those quarters but do not show that it employed the beneficiary. The petitioner paid total wages of \$14,580 during each of those quarters.

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 21, 2004, denied the petition.

On appeal, counsel states that the petitioner's owner and her husband, [REDACTED], own three El Atacor Restaurants. Counsel provides 2001 and 2002 Schedules C for El Atacor #8 and El Atacor #11, the two restaurants owned by the petitioner's husband.

The petitioner is a sole proprietorship. Unlike the owners of a corporation and some other entities, the owner of a sole proprietorship is obliged, if necessary, to pay the debts and obligations of the business out of his or her own income and assets. For that reason the income and assets of the petitioner's owner are reasonably and logically to be considered in determining the sole proprietor petitioner's ability to pay the proffered wage.

The petitioner's owner did not file a joint return with her husband, but filed separately as a head of household with three dependents. The record does not contain the petitioner's husband's personal tax return, other than the Schedules C, nor any other evidence of his adjusted gross income. Further, the record contains no evidence pertinent to the petitioner's husband's living expenses. Finally, the record contains no evidence to demonstrate that the income and assets of the petitioner's owner's husband are available to the petitioner's owner to pay wages at her own restaurant.

Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). For this reason and the other reasons listed the income and assets of the petitioner's owner's husband shall not be further considered.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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, although the beneficiary claims to have worked for the petitioner, the petitioner submitted no evidence to establish that it employed and paid 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 a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of her own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that she could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, she must show that she could still have sustained herself and her dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$24,169.60 per year. The priority date is April 24, 2001.

During 2001 the petitioner's owner had adjusted gross income of \$33,608. If the petitioner's owner were obliged to pay the proffered wage out of that amount she would have been left with \$9,439 with which to support herself and her dependents. To expect that the petitioner's owner could support a family of four for a year on that amount is unreasonable. The petitioner has submitted no reliable evidence of any other funds that were available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner had adjusted gross income of \$50,474. If the petitioner's owner were obliged to pay the proffered wage out of that amount she would have been left with \$26,304.40 with which to support herself and her dependents. No evidence pertinent to the petitioner's owner's budget or recurring monthly expenses was requested and none was provided. Under these circumstances this office declines to find that the petitioner's owner could not have supported her family of four on \$26,304.40 during 2002. The petitioner has sufficiently demonstrated its ability to pay the proffered wage during 2002.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that basis.

The record contains an additional issue, however, that was not raised in the decision of denial. The petitioner's owner's name is [REDACTED]. The beneficiary's name is [REDACTED]. That one of the family names given for the beneficiary is the same as that of the petitioner's owner creates the suspicion, at least, that the beneficiary and the petitioner's owner might be related, which would cast suspicion on the assertion that the petitioner is hiring the beneficiary because it was unable to locate suitable U.S. workers for the proffered position.

Pursuant to 20 C.F.R. §626.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." See *Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000). Because this issue was not raised by the Service Center, however, and the petitioner has not been accorded an opportunity to respond, this office does not base today's decision, in whole or in part, on that issue. Should the petitioner attempt to overcome today's decision in a motion, however, it should address the similarity in the petitioner's owner's name and the beneficiary's name. Further, in that event the petitioner should submit evidence pertinent to the petitioner's budget and recurring monthly expenses.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.