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U.S. Citizenship
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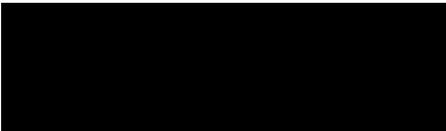
Office: CALIFORNIA SERVICE CENTER

Date: **MAR 25 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a statement.

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.

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.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750

Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$11.26 per hour, which equals \$23,420.80 per year. The Form ETA 750 states that the position requires two years of experience as a cook.

On the petition, the petitioner stated that it was established during 1990 and that it employs seven workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 1991. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Santa Clara, California.

With the petition counsel submitted the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return. A Schedule C Profit or Loss from Business attached to that return shows that the petitioner is operated as a sole proprietorship and that it returned a net profit of \$12,199 during that year. The tax return shows that during that year the petitioner's owner declared a loss of \$3,009, including the petitioner's entire profits offset by deductions.

In a letter dated January 12, 2003 counsel asserts that the petitioner's premises were damaged by fire. Counsel states that the business was closed from May 2000 to October 2001 and that, therefore, the 2001 return reflects earnings for only two months. Counsel also submitted the petitioner's unaudited financial statements for the first six months of 2002.

In the January 12, 2003 letter, dated counsel also cited *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) for the proposition that funds pledged by the petitioner's owner must be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel also asserted that the petitioner's owner owns a house worth approximately \$700,000 encumbered by a mortgage with a balance of approximately \$300,000. Counsel states that, therefore the petitioner's owner has equity of approximately \$400,000 in that house and that, if necessary, the petitioner's owner can borrow additional money secured by his equity in his residence in order to pay the proffered wage. In support of the assertion that the petitioner owns a house counsel provided a copy of a deed.

As to the beneficiary's employment experience, counsel submitted a letter, dated May 30, 2003, from the petitioner's manager, stating that Mr. Park worked as a full-time cook at that restaurant from October 1991 to April 1999.

On March 18, 2003 the California Service Center issued a Request for Evidence in this matter. The Service Center requested that the petitioner submit a statement of the monthly expenses of the petitioner's owner and his family. The Service Center also requested that the petitioner submit copies of its California Form DE-6 Quarterly Wage Reports for the previous four quarters and a list stating the job title and duties of each of the petitioner's employees. In addition, as evidence in support of both the petitioner's ability to pay the proffered wage and the beneficiary's claimed employment experience, the Service Center requested that the petitioner provide copies of Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during each year from 1991 through 1999.

In response, counsel submitted a letter, dated June 4, 2003. In that letter counsel stated that the beneficiary paid the beneficiary in cash from 1991 through 1999, and was therefore unable to provide W-2 forms for that period showing wages the petitioner paid to the beneficiary.

Counsel provided another employment verification letter from the petitioner. This letter, dated May 30, 2003, again stated that the petitioner employed the beneficiary as a cook from October 1991 to April 1999.

Counsel also provided the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return. A Schedule C Profit or Loss from Business attached to that return shows that the petitioner is operated as a sole proprietorship and that it returned a net profit of \$110,337 during that year. The tax return shows that during that year the petitioner's owner declared adjusted gross income of \$97,443, including the petitioner's entire profits offset by deductions.

Counsel provided a list of the petitioner's owner's personal living expenses. That list indicates that the petitioner requires \$5,284 per month, or \$63,408 annually, for his recurring expenses.

Finally, counsel submitted the petitioner's California Form DE-6 Quarterly Wage Reports for the last three quarters of 2002 and the first quarter of 2003. Those reports show that the petitioner employed between 10 and 13 workers during each of those quarters but did not employ the beneficiary.

The director denied the petition on July 13, 2003, finding 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel asserts that the evidence demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also asserted, "federal case law and federal regulations prohibit (requiring additional evidence of an employment claim) when a valid affidavit has been submitted."

In a brief filed to supplement the appeal counsel reiterates his assertion that *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) requires CIS to consider funds the petitioner's owner pledges to his company in determining the ability of the petitioner to pay the proffered wage.

Counsel also asserts, in that brief, that the petitioner had submitted employment documentation consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), and that CIS may not, consistent with the decision in *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7 (D.D.C. 1988) require contemporaneous evidence in support of the employment claim.

Both of those cases are decisions of a United States district court. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of

law. *Id* at 719. Further, the decision in *Full Gospel* states that CIS must consider funds pledged to a church. The relevance of that decision to the instant case, even if the reasoning were persuasive, is unclear.

The only evidence that the beneficiary is qualified for the proffered position is the affidavit of the petitioner. The Service Center correctly sought evidence to confirm the assertion that the beneficiary has the requisite employment experience. The petitioner is either unable or unwilling to provide the requested evidence. The petitioner has not demonstrated that the beneficiary is qualified for the proffered position and the petition may not be approved.

The remaining issue is the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Although *Full Gospel Portland Church v. Thornburgh* is neither binding nor relevant, that does not end the issue of whether the petitioner's owner's income and assets should be included in the determination of the petitioner's ability to pay the proffered wage.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. 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. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself on his remaining adjusted gross income and assets.

As evidence of the value of the petitioner's home counsel submitted a Uniform Residential Appraisal Report stating the appraiser's opinion that the value of the property, on August 3, 2002, was \$645,000. A recertification of value appended to that appraisal report, stated that, on November 8, 2002, the value of the property was still \$645,000.

Counsel provides a sample of property listings, stating that they demonstrate "the dramatic increase in home prices." Whether those properties are similar to the petitioner's owner's home in size, amenities, location, and other factors is unclear. That they demonstrate a dramatic increase in values is also unclear. That they have any relevance to the instant case is similarly unclear.

Counsel states that the property may now have a value of \$700,000. Despite this assertion, the appraisal and recertification were of value were issued by a professional appraiser and stated that the value of the property on August 3, 2002, and again on November 8, 2002 was \$645,000. Counsel has submitted insufficient evidence of any increase in value. That the property has appreciated at all is speculative. Additionally, equity in a petitioner's owner's residence is not normally considered the kind of liquid asset that the petitioner can easily convert to cash in order to pay wages.

Counsel provides a loan statement pertinent to the petitioner's owner's property. That statement shows that as of July 22, 2003 the petitioner owed \$360,695.67 on that particular mortgage on the property. Counsel states that, therefore, the value of the petitioner's equity in his home, "based on the conservative estimate (of fair market value) provided by the appraiser" is \$284,305.

No evidence in the record, however, suggests that the appraiser's estimate of value is conservative. Counsel is correct that, based on the difference between the property's appraised value and balance of the first mortgage the petitioner's owner might obtain a second mortgage. The record contains no evidence, in fact, that he has not already done so. The record does not demonstrate that the property has no encumbrances other than the first mortgage. The record does not, therefore, contain information sufficient to estimate the petitioner's owner's equity in his home.¹

In any event, this office is loath to find ability to pay a proffered wage based on ability to borrow. An indication of available credit is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not generally part of the calculation of the funds available to pay the proffered wage.

The petitioner's reliance on the unaudited financial statements submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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, the petitioner did not submit evidence sufficient to establish that it employed and paid the beneficiary at any time since the priority date.

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 year after the priority date, 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 wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v.*

¹ Counsel initially stated that the property was worth approximately \$700,000, that it was encumbered by a mortgage balance of approximately \$300,000, and that the owner's equity, therefore, was approximately \$400,000. Pressed for evidence, counsel submits an appraisal estimating the value at \$645,000 and a loan statement showing a mortgage balance of \$360,695.67. Assuming no other encumbrances those documents indicate an owner's equity of \$284,304.33.

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, as was noted above, the petitioner's owner's income and assets are properly included in the determination of the ability of a sole proprietorship to pay a proffered wage.

The proffered wage is \$23,420.80 per year. The priority date is March 14, 2001.

During 2001 the petitioner's owner's adjusted gross income, including the petitioner's entire profit offset by deductions, was a loss of \$3,009. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its profit and the petitioner's owner's adjusted gross income during that year. The petitioner submitted no evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner's adjusted gross income, including the petitioner's entire profit offset by deductions, was \$97,443. That amount, minus the \$63,408 that the petitioner's owner stated he needs for his annual personal expenses, equals \$34,035. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner's profit and its owner's adjusted gross income do not establish that the petitioner was able to pay the proffered wage during 2001. Counsel submits evidence to demonstrate, however, that the petitioner was forced to close from May 2000 to October 2001 because of a fire on its premises. Counsel asserts, and the evidence supports, therefore, that the small profit earned by the petitioner during 2001 was earned during only two months. Further, the petitioner's performance during 2002 indicates that it quickly recovered from the financial setback occasioned by the fire. That the petitioner is unable to demonstrate that it could have paid the proffered wage during 2001 out of its income is excused pursuant to the reasoning underlying the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

However, that the petitioner was closed from May 2000 to October 2001 raises another issue in this matter. The Form ETA 750 in this matter was filed March 14, 2001, alleging that the petitioner was unable to find a U.S. worker to fill the position of cook at its restaurant. At that time, the petitioner had been closed for almost a year and would remain closed for more than another six months.

Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden of showing that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Because the petitioner did not operate a restaurant on the priority date, it could not conceivably have then had an opening for a cook.² No bona fide job offer existed on the priority date. Furthermore, a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a later

² That the petitioner did not operate a restaurant when it submitted the Form ETA 750 application for labor certification also raises the question of whether the labor certification was obtained by fraud and should be invalidated pursuant to 20 CFR 656.30(d). The petitioner had no opening for a cook at the time it filed the labor certification. Further, the petitioner cannot have been seeking a U.S. worker to fill the proffered position, in view of the fact that no position then existed. However, this office will not base today's decision, even in part, on that issue in view of the other fertile grounds upon which the petition must be denied.

date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). As no *bona fide* job offer existed on the priority date, the petition may not be approved notwithstanding that the petitioner subsequently reopened its restaurant. The petition should have been denied for this additional reason.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The evidence demonstrates that no valid job offer existed on the priority date. For both of those reasons the petition may not be approved.

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.