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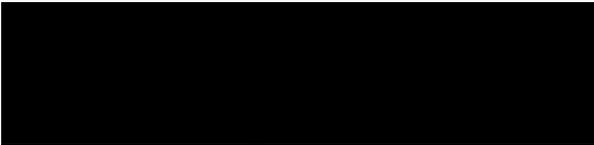
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAY 23 2005**  
EAC-03-188-51042

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:

SELF-REPRESENTED

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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, the petitioner submits a brief.

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 July 6, 2001. The proffered wage as stated on the Form ETA 750 is \$8.34 per hour, which amounts to \$17,347.20 annually.

The petitioner is structured as a sole proprietorship. With the petition, the sole proprietor submitted a letter explaining that he filed two other immigrant petitions in addition to the instant one because he opened a Thai restaurant relying upon their cooking skills but not realizing that they did not have permission to work in the United States. He submitted his Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss statement, for 2002.

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 July 9, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested additional evidence pertaining to 2001 and 2002.

In response, the sole proprietor submitted a letter stating that he transferred \$50,000 from his personal account into his business account. The petitioner submitted a copy of its bank account at [REDACTED] showing an

account balance of \$50,999.19 on July 24, 2003; the sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss statement, for 2001; and an itemized list of the sole proprietor's personal monthly expenses totaling \$1,535 for an annual expense of \$18,420.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$14,889	\$26,460
Petitioner's gross receipts or sales (Schedule C)	\$44,009	\$112,499
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$0	\$0
Petitioner's net profit from business (Schedule C)	-\$7,302	\$223

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 October 31, 2003, denied the petition. The director cited the federal poverty guidelines for determining that the sole proprietor's adjusted gross income was insufficient to evidence the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner states that the federal poverty guidelines are only to be used in family-based visa petitions, that the \$50,000 in his bank account show sufficient funds to pay the proffered wage, and that the director failed to consider that it would be eligible for a loan or a line of credit from a bank.

At the outset, the director erred by utilizing the federal poverty guidelines in these proceedings as they are not geographically specific enough for employment-based immigrant visa petition purposes.

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 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. 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 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 (7<sup>th</sup> 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 a family of three in 2002 but one in 2001. In 2001, the sole proprietorship's adjusted gross income of \$14,889 is less than the proffered wage of \$17,347.20. Reducing the sole proprietor's adjusted gross income by his claimed annual expenses of \$18,420 leaves him with a deficit for the year that would make it impossible for the petitioner to pay one proffered wage.

In 2002, the sole proprietorship's adjusted gross income of \$26,460 is greater than the proffered wage of \$17,347.20. Reducing the sole proprietor's adjusted gross income by his claimed annual expenses of \$18,420 leaves him with \$8,040 for the year, which is less than the proffered wage and makes it impossible for the petitioner to pay one proffered wage.

Finally, the petitioner maintains a balance of \$50,999.19 on July 24, 2003 in a checking account. The AAO notes that the petitioner is obligated to pay three proffered wages for the three immigrant visa petitions it filed including the instant one. It is argued that the petitioner could use these funds to pay the proffered wage. While that amount could almost pay three proffered wages at the \$17,347.20 rate in 2003, it does not reflect (1) a continuing source of available income to pay wages since that money would be gone after paying the wages one year, and (2) an ability to pay the proffered wages in 2001, which is the priority date, and the date when the petitioner became obligated to demonstrate it could pay the proffered wage, or 2002. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has still failed to demonstrate that it had sufficient funds to pay the proffered wage at the priority date and continuing.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO is concerned about inconsistent representations made about the beneficiary's prior employment experience<sup>1</sup>. Part of establishing eligibility for an employment-based immigrant

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<sup>1</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

visa is establishing that the beneficiary meets the requirements of the proffered position. Thus, for a visa petition to be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is July 6, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of slipcover cutter. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	12
	College	0
	College Degree Required	None
	Major Field of Study	Blank

The applicant must also have three years of experience in order to perform the job duties listed in Item 13, which states the following: "Plans menus and cooks Thai style dishes, dinners, appetizers and desserts. Prepares meats, soups, sauces, vegetables and other foods [sic] prior to cooking, seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions and purchases supplies." The applicant could also have two years of experience in the related occupation of employment in a restaurant featuring Southeast Asian cuisine. Item 15 indicates that there are no other special requirements.

The beneficiary set forth her credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she worked for [redacted] Thailand from August 1990 to September 1995. The description of her work for [redacted] reflects duties similar to the duties of the proffered position. No other experience is listed.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications to perform the duties of the proffered position.

The director requested evidence of the beneficiary's qualifications on July 9, 2003 pursuant to 8 C.F.R. § 204.5(l)(3). In response, the petitioner submitted two translated letters. One letter stated that the beneficiary worked at [redacted] Thailand from March 1987 to July 1989 as a cook. Another letter stated that the beneficiary worked at [redacted] Thailand from February 1983 to December 1985 as a cook. Both letters' content comply with the requirements of 8 C.F.R. § 204.5(l)(3) and have certified translations.

The director's decision failed to discuss the issue of the beneficiary's qualifications.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

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(9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

(ii) *Other documentation*—

(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.

In connection with the beneficiary's application to adjust status to lawful permanent resident, she submitted a Form G-325, Biographic Information sheet, which she signed above a penalty warning for knowingly and willfully falsifying or concealing a material fact, that states that she was a cook for [REDACTED] in Bangkok, Thailand from June 1997 to December 2002.

The problem is the inconsistency among the information and representations concerning the beneficiary's employment background. On the Form ETA 750B, the beneficiary represented that she worked for [REDACTED] from August 1990 to September 1995, but on a form accompanying her adjustment of status application, she represented that she worked for [REDACTED] from 1997 to 2002. No evidence was submitted from Wittaya Restaurant to corroborate her employment experience with it, or if there are two [REDACTED] with either of them. If the beneficiary were relying upon her employment experiences with [REDACTED] to evidence her qualifying work experience, then her omissions of those experiences on the various immigration forms contained in the record of proceeding raises suspicions concerning the credibility of the letters from those entities.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Any additional proceedings in this matter would need to address the apparent inconsistencies in the evidentiary submissions and representations made concerning the beneficiary's qualifying employment experience and qualifications for the proffered position.

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.