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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 231 53937 Office: CALIFORNIA SERVICE CENTER Date: NOV 03 2005

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

PETITION: 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook and chef. 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 in 2001¹ and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is May 11, 2001. The proffered wage as stated on the Form ETA 750 is \$30,000 annually. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on August 8, 2003. On the petition, the petitioner claimed to have been established in 1990, to currently have 10 employees, to have a gross annual income of \$413,545, and to have a net annual income of \$249,669.

In support of the petition, the petitioner submitted:

- An original Form ETA 750;
- Translated documents from the beneficiary's employer in China in support of the beneficiary's qualifications;
- A July 24, 2000 certificate from the People's Republic of China certifying that the beneficiary passed a skills test for Chinese cook; and,

¹ The director singled out the petitioner's income for 2001 as inadequate to show ability to pay the proffered wage.

- The petitioner's 2001 and 2002 Form 1040 income tax returns.

The director did not issue a request for evidence (RFE) seeking additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Instead on May 13, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits no brief and additional evidence.

Counsel states on appeal, on the Form I-290B, that the petitioner's evidence establishes his ability to pay the proffered wage because it shows both his net income and net current assets are "much greater than the proffered wage."

On appeal, counsel submits:

- A copy of the May 4, 2004 Memo of William R. Yates, associate director of operations for CIS, entitled, "Determination of Ability to Pay under 8 CFR 204.5(g)(2);"
- Copies of the 2001-2003 Form 1040 tax returns of [REDACTED] owner of the petitioner;
- Copies of the petitioner owner's 2001-2003 Form W-2s;
- A copy of the petitioner's employer's 2003 quarterly federal tax return, Form 941, showing the petitioner had one employee during the quarter;
- Copies of the petitioner owner's personal bank statements for January and February, 2004, stating the account balance was \$204,298.28 on January 30, 2004; a \$105,641.84 balance on February 27, 2004;
- A copy of the petitioner's business checking account stating the average ledger balance was \$28,917.42 during April 2004;
- Records of two lien-free automobiles owned by [REDACTED] a 2001 Honda acquired in August 2001, and a 2004 Nissan acquired in February 2004;
- Land title records on a Maricopa County, Arizona lot acquired by [REDACTED] and his wife for \$136,000 on June 24, 2002, and with accompanying documents releasing two Bank of America liens for \$20,000 apiece; and,
- Another residential lot record in Maricopa County, Arizona, acquired on May 15, 1997, with a July 15, 2002 release of an American Savings Bank lien of an unknown amount created on May 21, 1997.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director issued no RFE, and therefore no grounds would exist to preclude any documents from consideration on appeal as having been previously requested by the director. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In

evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS first examines whether the petitioner employed the beneficiary at the time the priority date was established, which it did not, according to the record of proceedings.

Another means of determining the petitioner's ability to pay the proffered wage is the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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 *K.C.P. Food Co., Inc.*, 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 corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the director did not issue an RFE asking the petitioner to estimate his monthly household expenses, nor did the petitioner volunteer such information. On appeal, counsel has submitted additional evidence, none of which is of the petitioner's household expenditures. The new evidence, however, clearly indicates that the petitioner had sufficient liquid assets by 2004 to cover the proffered wage for that year. What remains to examine is whether any of the new evidence demonstrates the petitioner's ability to pay the proffered wage in 2001.

For a sole proprietorship, CIS considers net income to be the figure shown on line 35, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income:

Tax Year	Proffered* Wage	Adjusted Gross Income	Yearly House Expenses	Surplus or (Deficit)
2001	\$30,000	\$49,371	Unknown	Unknown
2002	\$30,000	\$70,055	Unknown	Unknown
2003	\$30,000	\$101,899	Unknown	Unknown

* The full proffered wage, since no wage payments were made to the beneficiary in any year listed.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. 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).

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 five. In 2001, the sole proprietorship's adjusted gross income of \$49,371 covers the proffered wage of \$30,000. The director correctly noted that it would be improbable that the sole proprietor could support himself and his family on \$19,371 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

In any event, in the instant petition, no bank statements for 2001–2003 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001–2003.

The evidence submitted on appeal, however, demonstrates that the petitioner has managed to buy two residential lots in Maricopa County, Arizona, one by deed dated May 15, 1997, and the other by deed dated June 24, 2002; on July 10, 2002, paying off two \$20,000 mortgage loans, each in about three years. The petitioner further bought two new automobiles in 2001 and 2004 without having to mortgage the vehicles as collateral. The petitioner has also managed to accumulate more than \$200,000 in a personal bank account in 2004 and to maintain nearly \$30,000 in his business bank account in early 2004. This office can infer from

such evidence that the petitioner and his family are thriving financially. While from the record it would appear that only \$19,371 would remain of the petitioner's adjusted gross income after taking the proffered wage into account, the petitioner has managed to draw on his other sources of income, such as rental property and stock, to acquire an impressive amount of property debt free. Accordingly, this office finds that the petitioner has established he had sufficient adjusted gross income among other sources in 2001 to pay the proffered wage. The evidence submitted on appeal suggests the petitioner sustained his family in 2001. The overall magnitude of the petitioner's business activities should be considered when the petitioner's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Accordingly, the petition will be approved.

After a review of the record of proceeding, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.