



U.S. Citizenship
and Immigration
Services

Identifying info deleted
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



BE

FILE: LIN 03 201 50671 Office: NEBRASKA SERVICE CENTER Date: **OCT 20 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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese and Vietnamese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Vietnamese style food. 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. Accordingly, the director denied the petition.

On appeal, the petitioner submits a brief with 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 21, 2002. The proffered wage as stated on the Form ETA 750 is \$2,005 a month, or an annual salary of \$24,060. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in January of 2001, to have a net annual income of \$82,252, a net annual income of \$27,440, and to currently employ four workers. In support of the petition, the petitioner submitted a letter of employment verification for the beneficiary from [REDACTED] Vietnam. This letter stated the beneficiary worked as a chef from October 20, 1999 to the time the letter was signed, April 16, 2002. The petitioner also submitted its Form 1040, individual income tax return, for 2002. This document indicated the petitioner had an adjusted gross income of \$25,501. The petitioner also submitted an unaudited three-page document that contained a two-page balance sheet and an income statement. This document indicated the petitioner had total current assets of \$7,880.84 as of March 31, 2003.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 27, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its 2002 federal tax return and an itemized list of monthly recurring household expenses including but not limited to: mortgage or rent payments, automobile payments, installment loans, credit card payments, household expenses, and checking and savings account balances.

In response, the petitioner resubmitted a copy of its Form 1040 for 2002. The petitioner also submitted a list of monthly recurring household expenses. This list indicated that the petitioner had no mortgage payments, automobile payments, installment loans, and credit card payments. The petitioner listed her monthly household expenses, which included \$60 for automobile insurance, \$25 for US West, \$75 for public service, \$25 for water, and \$75 for food. The petitioner's total household monthly expenses were \$260. The petitioner also indicated that its checking account with Wells Fargo Bank had a balance of \$8,500.

On March 2004, the director denied the petition. In his denial, the director stated that the petitioner had a business income of \$27,440, and that the beneficiary proffered wage was \$24,060. The director also noted that the household expenses listed by the petitioner included no mortgage payments, automobile payments, installment loans or credit car payments. The director then noted the petitioner's household monthly expenses, and stated that these monthly figures, in particular the \$75 spent on food, appeared to be extremely low for a family of four living in Lakewood, Colorado. The director also stated that it seemed "impractical" that the petitioner had no mortgage or rent payment.

The director also noted that the petitioner on the petition had indicated that she had four employees, and yet the 2002 federal income tax return did not indicate any salaries paid out. The director then stated that it appeared that the four unpaid claimed employees were the petitioner, her husband, and two children. In conclusion, the director stated that the petitioner had not established that she had the ability to pay the proffered wage as of the priority date and to the present.

On appeal, counsel cites to 8 C.F.R. § 204.5(g)(2) and states that the initial evidence of a petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. Counsel then states that in 2003, the petitioner reported total income of \$31,239, which is more than the proffered wage of \$24,060. Counsel submits the petitioner's 2003 federal income tax. Counsel also states that the petitioner and her family are the only employees working at the restaurant, and that the household's expenses remain low because they work in a restaurant, are currently living with the petitioner's daughter, and do not have the need to buy groceries. Counsel submits an affidavit from [REDACTED] the petitioner. In her affidavit, the petitioner states that she, her husband and her children are the petitioner's only employees; and that they spend the majority of our time together at the restaurant. The petitioner states that usually she and the other employees arrive early in the morning and do not get home until eleven o'clock at night. The petitioner states that she and her family live in a four-bedroom house that belongs to her daughter, and that the family does not need to buy groceries at supermarkets because they cook their meals and eat at the restaurant.

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 she 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. As established by the ETA Form 750, the petitioner did not employ or pay the beneficiary prior to or following 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 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 (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 herself, her husband, and two dependents. The petitioner's adjusted gross income in the years 2002 and 2003 are the following: \$25,501, and \$30,271. In response to the director's request for an itemized list of household expenses, the petitioner provided a breakdown of monthly expenses that totaled \$260 a month, or \$3,120 a year. While the director is correct in questioning the low annual expenses of the petitioner, some of the director's remarks are speculative, in particular, his statement in the decision that it seemed "impractical" that the petitioner had no mortgage or rent payment. What would be more relevant to the discussion of the petitioner's annual expenses are items that are not listed in the monthly expenses statement. For example, there are no funds listed to pay for clothes for two children, or for the petitioner and her husband, or any funds required to pay for medical coverage. In addition, while counsel and the petitioner on appeal assert that she and her three dependents live with another daughter, and that as a consequence, they pay no rent or mortgage, neither counsel nor the petitioner provide any further documentation to substantiate this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, for tax year 2002, if the annual household expenses of the petitioner, as presently stated in the record as \$3,120, are subtracted from the petitioner's gross adjusted wage for 2002, the sum of \$21,381 remains, which is less than the proffered wage. With regard to the year 2003, if the annual household expenses of \$3,120 are subtracted from the petitioner's adjusted gross income, the remaining sum is \$27,151, which is sufficient to cover the proffered wage of \$24,060. Nevertheless, a petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has to establish that she has the ability to pay the proffered wage as of the priority date, which is May 21, 2002. Without more persuasive evidence, the petitioner has not established that she can pay the proffered wage, cover her existing business expenses, and sustain herself and three dependents, based on her adjusted gross income.

In addition, while the petitioner submitted an unaudited balance sheet that indicated the petitioner's net current assets as of March 2003, according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

On the list of monthly expenses submitted in response to the director's request for further evidence, the petitioner stated that her joint Wells Fargo Banking Account has a balance of \$8,500. Again, the petitioner provided no further evidentiary documentation to substantiate this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). However, even if the petitioner had submitted the actual monthly statements from the bank account, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

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 with regard to the petitioner's ability to pay. The director's decision shall stand and the petition will be denied.

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