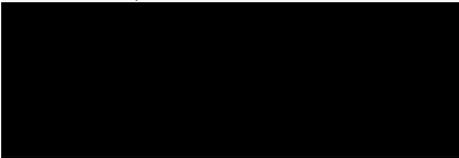




U.S. Citizenship
and Immigration
Services

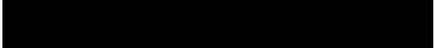
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



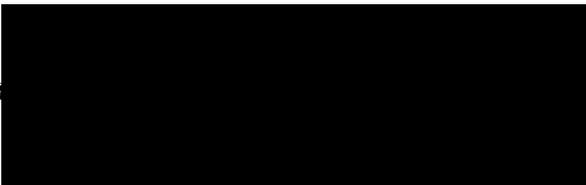
106

FILE: WAC 01 290 57532 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 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 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 dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food 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. The director denied the petition accordingly.

On appeal, counsel submits a brief 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 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 January 2, 2000. The proffered wage as stated on the Form ETA 750 is \$11.68 per hour or \$24,294.40 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted a copy of the owner's 2000 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The 2000 tax return reflected an adjusted gross income of \$27,984, and Schedule C reflected gross receipts of \$363,073, wages paid of \$56,931, and net profit of \$43,491.

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 February 22, 2002, 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 January 1, 2001 and

continuing to the present. The director further requested that the petitioner provide copies of its Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California to include the names, social security numbers, and number of weeks worked by each employee.

In response, the petitioner submitted a complete copy of the owner's 2001 Form 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, and copies of Forms DE-6, Quarterly Wage Reports, for the year 2001 and the first quarter of 2002. The 2001 tax return reflected an adjusted gross income of \$31,944, and the 2001 Schedule C reflected gross receipts of \$382,815, wages paid of \$69,650, and net profit of \$45,597. The petitioner's Forms DE-6 for the year 2001 and the first quarter of 2002 showed that the petitioner did not employ the beneficiary during that time frame.

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 May 4, 2004, denied the petition.

On appeal, the petitioner, through counsel, submits previously submitted documentation, a copy of a memorandum, dated May 4, 2004, from William R. Yates, Associate Director for Operations, copies of the owner's 2002 and 2003 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, and copies of property evaluations, tax statements, and loan documents. The 2002 tax return reflects an adjusted gross income of \$36,630, and Schedule C reflects gross receipts of \$373,341, wages paid of \$56,352, and net profit of \$55,575. The 2003 tax return reflects an adjusted gross income of \$25,033, and Schedule C reflects gross receipts of \$374,358, wages paid of \$49,519, and net profit of \$35,903.

Counsel states:

Based solely upon the adjusted income reported on petitioner's Form 1040's, as petitioner's net income is equal to or greater than the preferred [sic] wage, counsel submits that the Yate's [sic] Memo requires a positive determination with regard to petitioner's ability to pay the proffered wage.

Counsel further respectfully submits that a more accurate measure of the petitioner's ability to pay the wage than the adjusted gross income amount used by the Center Director, is the "taxable income" figure, augmented, as appropriate, by any legitimate depreciation deductions taken by the tax payer.

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 employed and paid the beneficiary an amount equal to or greater than the proffered wage from 2000 through 2003.

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 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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 supported a family of five. In 2000, after paying the beneficiary's salary of \$24,294.40, the petitioner would have had \$3,689.60 remaining to support a family of five. In 2001, after paying the beneficiary's salary of \$24,294.40, the petitioner would have had \$7,649.60 remaining to support a family of five. In 2002, after paying the beneficiary's salary of \$24,294.40, the petitioner would have had \$12,335.60 remaining to support a family of five. In 2003, after paying the beneficiary's salary of \$24,294.40, the petitioner would have had \$738.60 remaining to support a family of five. As the petitioner failed to provide a statement of monthly expenses for the years 2000 through 2003, the AAO cannot determine if the petitioner was able to pay the proffered wage and his household expenses with the remaining incomes.

Counsel cites a memorandum from William Yates addressing the issue and instructing adjudicators on when to grant or deny an I-140 petition based on a Petitioner's ability to pay. Memorandum by William R. Yates, Associate Director of Operations, "Determination of Ability to Pay Under 8 C.F.R. § 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004). However, in the instant case, while the net profit from the petitioner was greater than the proffered wage from 2000 through 2003, that profit was used to arrive at an adjusted gross income,

and, as stated above, 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). Again, as the petitioner has not provided a list of his expenses, it is impossible for the AAO to determine if the petitioner could pay the proffered wage and support a family of five.

Counsel also requests that depreciation be considered when determining the petitioner's ability to pay the proffered wage. However, counsel does not provide a published citation relating to the use of depreciation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel has submitted evidence of the petitioner's owner's real property holdings as evidence of its ability to pay the proffered wage. However, counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. *See* 8 C.F.R. § 103.9(a). In addition, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. The unambiguous language of the regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases" CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record.

The record of proceeding does not contain any other evidence of unencumbered and/or liquefiable personal assets that the petitioner could use to establish its ability to pay the proffered wage from 2001 and continuing to the present. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed.