

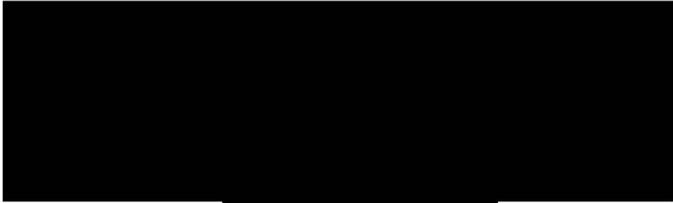
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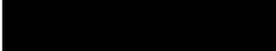
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

DEC 29 2006

WAC 03 199 52550

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, Chief
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 denied the petition accordingly.

On appeal counsel submitted a brief and additional evidence.

On appeal counsel requested oral argument to “afford the Petitioner a fair and reasonable opportunity to present a detailed statement of the case” The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unusual factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unusual factors or issues of law to be resolved or any other concrete reason that written submissions would not suffice in this case. This office finds that the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 granting 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 7, 1998. The proffered wage as stated on the Form ETA 750 is \$2,200 per month, which equals \$26,400 per year.

The Form I-140 petition in this matter was submitted on July 24, 2003. On the petition, the petitioner stated that it was established during August of 1998 and that it employs five workers. The petition states that the petitioner’s gross annual income during 2002 was \$566,465 and that its net annual income was \$27,613. On

the Form ETA 750, Part B, signed by the beneficiary on November 23, 1998, the beneficiary did not indicate that he had ever worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Rowland Heights, California.

In support of the petition, counsel [REDACTED] Schedule C from the 2002 Form 1040 U.S. Individual Income Tax Return of [REDACTED] and [REDACTED]. That document shows that those two are husband and wife and that they operated the petitioner as a sole proprietorship during that year. During that year the petitioner returned a net profit of \$27,613.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 26, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center noted that the tax return provided was incomplete and requested that any tax returns submitted be complete.

The service center also requested a statement of the petitioner's owner's recurring monthly expenses and requested that if the petitioner employed the beneficiary it provide copies of W-2 Wage and Tax Statements showing wages the beneficiary received from the start of that employment to the date of that request for evidence.

In response, counsel submitted (1) the 1998, 1999, 2000, 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, (2) seven checks drawn by the petitioner and payable to the beneficiary, (3) the petitioner's California Form DE-6 Quarterly Wage Statements for the second and third quarters of 2004, (4) an undated letter from the petitioner's accountant, and (5) a letter from counsel dated November 8, 2004.

The tax returns submitted include corresponding Schedules C and show that the petitioner's owner and owner's spouse held the petitioner as a sole proprietorship and had two dependents during each of the salient years.

During 1998 the petitioner returned a net profit of \$11,748. The petitioner's owner's adjusted gross income during that year, including the petitioner's profit offset by deductions, was \$11,292.

During 1999 the petitioner returned a net profit of \$13,458. The petitioner's owner's adjusted gross income during that year, including the petitioner's profit offset by deductions, was \$12,880.

During 2000 the petitioner returned a net profit of \$16,425. The petitioner's owner's adjusted gross income during that year, including the petitioner's profit offset by deductions, was \$15,264.

During 2001 the petitioner returned a net profit of \$19,355. The petitioner's owner's adjusted gross income during that year, including the petitioner's profit offset by deductions, was \$17,987.

During 2002 the petitioner returned a net profit of \$22,710. The petitioner's owner's adjusted gross income during that year, including the petitioner's profit offset by deductions, was \$21,105.

During 2003 the petitioner returned a net profit of \$55,513. The petitioner's owner's adjusted gross income during that year, including the petitioner's profit offset by deductions, was \$54,371.

The seven checks are dated April 30, May 31, July 7, July 31, August 31, September 30, and October 31, all of 2004. Those checks are drawn to the beneficiary's order and are each in the amount of \$1,772.06. Together those checks attest to payment of \$12,404.42 to the beneficiary during 2004. Of that amount, \$5,316.18 appears to be attributable to the second quarter of 2004,¹ another \$5,316.18 to the third quarter, and the remaining \$1,772.06 to the final quarter of 2004.

The petitioner's quarterly wage statements show that it paid total wages of \$17,307.28 and \$18,609.42 during the second and third quarters of 2004, respectively. Those amounts include \$6,600 paid to the beneficiary during both of those quarters for a total of \$13,200. This office concludes that the beneficiary's gross pay was \$2,200 per month during those quarters.

The accountant's undated letter states that the petitioner's disposable income should be calculated by summing its net profit, its depreciation deduction, and its amortization deduction.

In his November 8, 2004 letter counsel stated that the petitioner's profits shown during the salient years are net of depreciation and amortization deductions, which counsel characterized as paper losses. Counsel urged, as the accountant did, that those amounts be added back to the petitioner's net profits during the various years to show amounts available to it to pay additional wages during those years.

Counsel noted that the petitioner paid wages greater than the annual amount of the proffered wage during each of the salient years. Counsel stated that the petitioner has employed the beneficiary since April 1, 2004. Counsel asserted that the evidence provided shows that the petitioner is now employing the alien and has been paying her the proffered wage for some time. Finally, counsel stated that the petitioner's owner and owner's spouse are unwilling to provide personal budget information.

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 February 16, 2005, denied the petition.

¹ The checks are drawn at approximately one-month intervals and are in equal amounts. Other than the July 7 check each is drawn on the last day of the month. The checks appear, therefore, to represent payment for one month's employment. This office concludes from these facts that the July 7 check represents late payment of the beneficiary's June wages and is attributable, therefore, to the second quarter of 2004 rather than the third.

On appeal, counsel stated,

Under the criteria stated in a USCIS Interoffice Memorandum Re: Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(92) [sic] dated 5-4-12004, [sic] the instant petition should be approved based on the record.

Subsequently counsel submitted (1) a 2004 W-2 form, (2) five additional checks, (3) various documents in Korean with English translations, (4) a statement of the petitioner's owner's monthly expenses, and (5) a brief to supplement the appeal.

The 2004 W-2 form submitted shows that the petitioner paid the beneficiary \$19,800 during that year. The additional checks submitted are dated November 30 and December 31, 2004 and January 31, February 28, and March 31 2005, and were drawn by the petitioner to the beneficiary in the amount of \$1,772.06 each.

The Korean documents pertain to ownership of Korean real estate and a Korean business, profits allegedly derived from those Korean investments, and fund transfers from Korea.

As to the statement of the petitioner's owner's expenses, this office notes that the service center directly and specifically requested that information on August 26, 2004, and that counsel replied that the petitioner's owner declined to provide it. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under the circumstances, this office need not and does not consider that evidence in deciding the case.

In the brief counsel stated that the petitioner's current owner purchased the petitioner during September 1998 and has since generated sufficient revenue to support its operations and pay its employees. Counsel asserts that this shows the petitioner's continuing ability to pay the proffered wage.

Counsel also reiterated his assertion that the petitioner's depreciation and amortization deductions should be added back to its net income in assessing its ability to pay the proffered wage.

Counsel cited the Korean documents and translations as evidence that the petitioner's owner's Korean real estate holdings have been yielding \$1,200 per month and his Korean business has yielded an additional \$2,000 per month.

Counsel notes that the petitioner has been paying the beneficiary \$2,200 per month since April 2004, and states that this, by itself, reflects the petitioner's ability to pay the proffered wage in accordance with the May 4, 2004 memorandum of the Associate Director for Operations of CIS.

This office notes that if the documents pertinent to the petitioner's owner's alleged Korean holdings actually show income to the petitioner's owner, as counsel represents, then that income should have been included on the petitioner's owner's income tax returns. Those amounts are not shown on those returns. Under these

circumstances this office cannot conclude that those documents show additional income paid to the petitioner's owner. Those documents will not be further considered.

Counsel's suggestion, citing the May 4, 2004 Yates memorandum, that the petitioner's recent payment of the proffered wage demonstrates its continuing ability to pay the proffered wage beginning on the priority date is unconvincing.

The nine checks drawn to the beneficiary during 2004 and three drawn during 2005 do not show that the petitioner was able to pay any additional portion of the proffered wage during those years or during any other years. If the petitioner had demonstrated that it had been paying the beneficiary the proffered wage since the priority date that would show its continuing ability to pay the proffered wage beginning on the priority date. Here the photocopied checks only demonstrate that the petitioner was able to pay the beneficiary \$19,800 during 2004 and \$6,600 during 2005.²

Counsel's argument that the petitioner's depreciation and amortization deductions should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that depreciation and amortization deductions do not require or represent specific cash expenditures during the year claimed. They are the systematic allocation of the cost or other basis of long-term assets, tangible and intangible, respectively. A depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost or other basis of assets and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While that expense does not require or represent the current use of cash, neither is it available to pay wages. The deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient.

² Although the checks themselves only show payments of \$1,772.06, a comparison with the petitioner's quarterly wage reports shows that amount is the net pay remaining from gross pay of \$2,200 per month. Therefore the nine checks drawn during 2004 represent gross pay of \$19,800 (9 x \$2,200) which amount the 2004 W-2 form confirms. The three checks drawn during 2005 represent payment of \$6,600, (3 x \$2,200).

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.³ Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Showing that the petitioner paid wages during the salient years is insufficient. Unless the petitioner actually paid the proffered wage to the beneficiary during the salient years it is obliged to demonstrate the ability to pay those additional wages.

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 established that it employed the beneficiary during 2004 and 2005, and paid her \$19,800 and \$6,600 during those years, respectively.

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 period, 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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. In *K.C.P. Food Co., Inc. v. 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.

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 owner'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

³ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The proffered wage is \$26,400 per year. The priority date is December 7, 1998.

During 1998 the petitioner's owner declared adjusted gross income of \$11,292, including the petitioner's profit. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner has submitted no reliable evidence of any other funds at its disposal during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner declared adjusted gross income of \$12,880, including the petitioner's profit. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner has submitted no reliable evidence of any other funds at its disposal during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner declared adjusted gross income of \$16,245, including the petitioner's profit. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner declared adjusted gross income of \$19,355, including the petitioner's profit. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$22,710, including the petitioner's profit. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared adjusted gross income of \$55,513, including the petitioner's profit. That amount is greater than the annual amount of the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income, however, he would have been left with only \$29,113 with which to support his family of four during those years.

The petitioner's owner did not provide his monthly budget in a timely manner when requested, and that evidence will not, as was provided above, be considered on appeal. The petitioner has not, therefore, shown that the petitioner's owner was able to support his family of four on the \$29,113 he would have had remaining if he had paid the proffered wage out of his adjusted gross income during 2003.⁴ The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

⁴ The petitioner's owners' budget shows that he requires \$3,900 per month, or \$46,800 per year, to support his family of four. The annual amount of the proffered wage is \$26,400. Those two amounts total \$73,200. The petitioner's owner's adjusted gross income during 2003 was \$55,513. If this office were to consider the budget the petitioner's owner provided on appeal then that the petitioner had failed to show its continuing

The petition in this matter was submitted on July 24, 2003 and the request for evidence was issued on August 26, 2004. On those dates the petitioner's 2004 income tax return was unavailable. The petitioner is therefore excused from showing its ability to pay the proffered wage during 2004 and later years.⁵

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests an additional issue that was not addressed in the decision of denial. The service center requested a copy of the petitioner's owner's budget on August 26, 2004. In response counsel stated that the petitioner's owner declined to provide that information.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis as well. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

ability to pay the proffered wage beginning on the priority date would be yet clearer.

⁵ This office notes that if the petitioner were obliged to show its ability to pay the proffered wage during subsequent years the evidence that demonstrates that the petitioner paid the beneficiary \$19,800 during 2004 and \$6,600 during 2005 would have been insufficient to show the ability to pay the proffered wage during those years.