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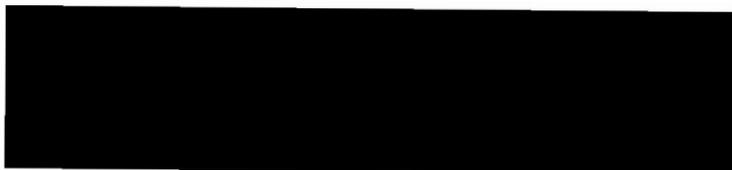
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 178 53782 Office: CALIFORNIA SERVICE CENTER Date: **JUL 05 2006**

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 preference visa petition was denied by the Director, California Service Center. The petitioner appealed. The appeal will be dismissed.

The petitioner operates a Thai cuisine [sic] restaurant. He seeks to employ the beneficiary permanently in the United States as a cook-Thai food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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, and, that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director 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 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor (“USDOL”). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$9.04 per hour (\$18,803.20) per year.¹ The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; correspondence to the USDOL; U.S. Internal Revenue Service Form tax returns for 1999, 2000, and 2001.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on March 24, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements from March 15, 2001, to present.

The director also requested additional evidence of the beneficiary's prior job experience.

In response to the above requests, the petitioner submitted a letter dated September 30, 1991, of the beneficiary's prior job experience as well as the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 1999, 2000, 2001, 2002 and 2003.

The director again requested on June 12, 2004, additional pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, and, additional evidence of the beneficiary's prior job experience.

In response to the above requests, the petitioner submitted on September 1, 2004, the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax return for year 2003, a statement of personal expenses of the petitioner; and, a prior job reference letter.

The director denied the petition on November 8, 2004, finding 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, that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, the counsel asserted that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition based upon the petitioner's gross incomes stated upon the tax returns submitted and, and, that the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition although since, that employer went out of business, additional information could not be secured.

¹ It has been five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

The petitioner has submitted a letter dated September 30, 1991, of the beneficiary's prior job experience to accompany the appeal statement.

The tax returns² demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$18,803.20 per year from the priority date of March 15, 2001:

- In 2001, the Form 1040 stated adjusted gross income of \$9,951.00.
- In 2002, the Form 1040 stated adjusted gross income of \$15,372.00.
- In 2003, the Form 1040 stated adjusted gross income of \$13,473.00.

Therefore in tax years 2001, 2002, and 2003, the petitioner adjusted gross income was insufficient to pay the proffered wage of \$18,803.20 per year. The petitioner's personal expenses must also be considered for all years as discussed below.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. 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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports a family of three. In 2001, 2002 and 2003 the sole proprietorship's adjusted gross incomes of \$9,951.00, \$15,372.00, and, \$13,473.00 respectively were insufficient to pay the proffered wage of \$18,803.20 per year.

In 2001, the petitioner's adjusted gross income was \$9,951.00. There is also a statement of monthly personal expenses for 2004 of \$784.00 per month that calculates to a yearly expense of \$9,408.00.³ The petitioner could not pay the proffered wage of \$18,803.20 per year and pay his family's living expenses even as stated.

² Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 1999, the Form 1040 stated an adjusted gross income² of \$10,081.00. In 2000, the Form 1040 stated an adjusted gross income of \$11,435.00.

³ The statement for monthly personal expenses included auto: gas, life insurance; telephone; credit card and

The petitioner stated in the record of proceeding available in this case that that the receipt of the visa by the beneficiary will increase the restaurant income.” He argues that consideration of the beneficiary’s potential to increase the petitioner’s revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. Proof of ability to pay begins on the priority date, that is March 15, 2001, when petitioner’s Application for Alien Employment Certification was accepted for processing by the USDOL. Petitioner’s taxable income is examined from the priority date. It is not examined contingent upon some event in the future. In tax years 2001, 2002 and 2003, the petitioner stated taxable incomes below the proffered wage of \$18,803.20 per year (i.e. \$9,951.00; \$15,372.00; and, \$13,473.00 respectively). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary’s employment as a cook-Thai food will significantly increase petitioner’s profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel asserted that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition based upon the petitioner’s gross incomes stated upon the tax returns submitted. CIS had properly relied on the petitioner's adjusted gross income figures, as stated on the petitioner's income tax returns, rather than the petitioner's gross income.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel’s contentions cannot be concluded to outweigh the evidence presented in the tax returns for 2001, 2002 and 2003 including the petitioner’s personal expenses as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

A second issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification 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 is March 3, 2000. *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. Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

rent. The AAO does not find this to be a credible statement. This statement should indicate all of the family’s household living expenses. Such items should include (but are not limited to) the following: food, car payments (whether leased or owned), insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, internet, etc.), student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of cook-Thai food.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	<u>6</u>
	High School	<u>6</u>
	College	==
	College Degree Required	<u>N/A</u>
	Major Field of Study	<u>N/A</u>
	Training	<u>N/A</u>
	Experience	
	Job Offered - Years/Mos.	<u>2/ N/A</u>
	Related Occupation	<u>N/A</u>
	Years/Mos.	<u>N/A</u>

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience for the position of cook-Thai food:

WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER



Thailand

NAME OF JOB

Thai cook

DATE STARTED

Month - 11 [November] Year 1987

DATE LEFT

Month - 09 [September] Year 1991

KIND OF BUSINESS

Restaurant

DESCRIBE IN DETAIL DUTIES...

Prepare and cooked various Thai dishes ...

NO. OF HOURS PER WEEK

50

An amendment was included in the record of proceeding as received by the State of California Employment Development Department that stated the beneficiary was employed 40 hours weekly by Café College Front, 850 N. Vermont Ave., Los Angeles California 90024 as a "Cook Thai Food" whose job duties were "Prepare and cook Thai food, deserts and appetizers" according to the beneficiary statement. The above item is stamped indicating that the beneficiary corrected the item in the review process to obtain certification. The Form ETA 750 B section (b) was amended from "unemployed" from January 1998 to present (i.e. 1/12/2001) to list employment experience with the Café College Front from March 15, 1998 to March 15, 2001 *by the beneficiary not the Café College Front.* There was no explanation why the change was made or why the

beneficiary did not originally disclose the employment with Café College Front. Further, no mention by counsel was made of Café College Front on appeal or was there a letter of employment verification submitted from the second prior employer Café College Front. Under the factual circumstances of the case, we cannot consider the beneficiary's contention that he was employed by the Café College Front without some corroboration. 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)).

On appeal, counsel resubmitted the letter dated September 30, 1991 from the Sei Light Suki-yari Coffee Shop Co Ltd, and although requested by the director to provide in a letter verification of hours worked and job experience, counsel said he could not provide it since the prior employer went out of business. The letter submitted does not meet the requirements of the regulation as discussed below.

The fact that the employer went out of business is not a valid excuse without further elaboration. The personnel that worked there presumably are able to provide verification, and in similar instances, we have accepted such corroboration. The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part: "Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters ... employers giving the name, address, and title of the trainer, and, a description of the training received or the experience of the alien." "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." "The minimum requirements for this classification are at least two years of training or experience. The beneficiary evidence is minimal and since he has, in effect, changed his sworn statement of his work experience (i.e. "unemployed" to employment with Café College Front) there is doubt cast on an aspect of the petitioner's proof that 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 (BIA 1988).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible 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.