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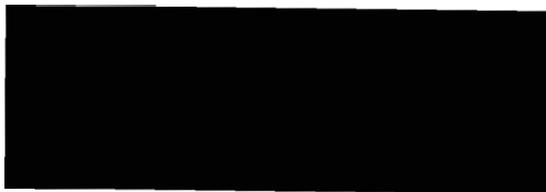
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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FILE: [REDACTED]  
EAC-03-261-53764

Office: VERMONT SERVICE CENTER

Date: MAY 19 2006

IN RE: Petitioner:  
Beneficiary:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont 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 restaurant. It seeks to employ the beneficiary permanently in the United States as an Ethnic 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 27, 2004 denial, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 January 8, 2002. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour, which amounts to \$27,040.00 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

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). The record in the instant case

provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the instant appeal, the petitioner submits a brief and additional evidence. Relevant evidence submitted on appeal includes documents relating to the value of the personal residence of the petitioner's owner, and a copy of an account statements for a bank account of the petitioner and an account statement for a line of credit account of the petitioner's owner. Evidence submitted previously includes copies of individual federal tax returns of the owner of the petitioner, which is a sole proprietorship.

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 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on June 15, 2003, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife for 2001 and 2002. The I-140 petition was submitted on September 20, 2003, and as of that date, the federal tax return of the petitioner's owner and his wife for 2002 was the most recent return available. The record before the director closed on August 24, 2004 with the receipt by the director of the petitioner's submissions in response to a request for additional evidence (RFE) which had been issued by the director on June 7, 2004. The RFE did not request further evidence pertaining to the petitioner's tax returns, but requested evidence relevant to the identity and citizenship of the petitioner's owner and evidence relevant to the monthly household expenses of the petitioner's owner for the year

2002. As of August 24, 2004, the federal tax return of the petitioner's owner for 2003 should have been available. However, a copy of that return was not submitted in prior to the director's decision, presumably because the RFE did not request a copy of that return.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal obligations 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 petition, the tax returns of the petitioner's owner are joint returns of the owner and his wife. Those returns show three dependents. Therefore the household size of the petitioner's owner is five persons.

The record contains two statements of monthly household expenses of the petitioner's owner for 2002. The first statement is dated August 15, 2004, which was submitted in response to the RFE. That statement shows monthly expenses totaling \$2,467.79. An amended statement of monthly household expenses dated October 6, 2004 was submitted on appeal. In his brief counsel refers to the amended statement as a "corrected monthly expense statement." (Brief, October 28, 2004). The amended statement shows monthly expenses totaling \$2,167.79. The line items on the two statements are identical, except that on the first statement monthly food and household supplies are stated as \$600.00, while on the amended statement those expenses are stated as \$300.00. For purposes of analysis, the amended statement will be used. Monthly expenses of \$2,167.79 are equivalent to \$26,013.48 on an annual basis.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns state amounts for adjusted gross income as shown in the following table.

Tax year	Adjusted gross income	Household expenses	Available income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$61,105.00	not applicable	not applicable	not applicable	not applicable
2002	\$55,678.00	\$26,013.48	\$29,664.52	\$27,040.00*	\$2,624.52

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in the year 2002, which is the only year at issue in the instant petition.

Counsel states that the petitioner's 2002 tax return shows business income of \$67,787.00. Although that statement is accurate, the business income of the petitioner is fully credited in the above evaluation of the adjusted net income of the petitioner's owner and his wife.

Counsel states that evidence submitted on appeal shows that the home of the petitioner's owner has a net value of approximately \$431,862.00, and an available credit line of \$150,000.00. Counsel also states that a bank statement shows more than \$42,941.00 on deposit.

Since the petitioner is a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, assets held in the name of the petitioner's owner are relevant to the issue of the petitioner's ability to pay the proffered wage. Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns.

The record contains a copy of deed dated April 21, 1997 showing a conveyance of a property on Sunset Lane, in Annandale, Virginia, to the owner and his wife for \$200,000.00. The record contains a letter dated October 6, 2004 from a real estate agent with an attached competitive market analysis for the Sunset Lane property. The agent finds that the market value of the property is \$500,000.00. Attached to the letter are market value analyses of three comparable properties with information from a real estate data base. In her letter, the agent notes that the lot size of the Sunset Lane property is 87,120 square feet, or approximately two acres, and the agent states that because of the large lot size, the value of the property may be even higher than her \$500,000.00 estimate. The record also contains a letter dated October 6, 2004 from a banker with the Bank of America which states that the petitioner's owner and his wife have a mortgage with that bank with a balance of \$68,137.53.

The record also contains a copy of a statement equity line of credit dated February 10, 2004, for a total line of credit of \$150,000.00, and available credit of \$150,000.00. Although the line of credit itself is not an asset of the petitioner's owner, the fact that it is an equity line of credit provides support for counsel's assertion that the petitioner's owner and his wife have substantial equity value in their home and that they have the ability to draw on that value if needed.

The deed indicates that the petitioner's owner and his wife purchased the house in 1997, therefore they already owned it as of 2002, the year of the priority date.

The documents pertaining to the personal residence of the petitioner's owner and his wife provides further evidence to help establish the petitioner's ability to pay the proffered wage.

The record also contains a copy of a bank statement dated August 10, 2004 for an account of the petitioner's owner and his wife showing an ending balance of \$1,870.32 and a copy of a business checking account statement dated September 30, 2004 of the petitioner's owner and his wife showing an ending balance of \$42,941.35.

Since each of those account statements covers only one month, the bank account statements provide no significant additional support to help establish the petitioner's ability to pay the proffered wage.

Nonetheless, based on the foregoing analysis, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in 2002. The director found that that amount was insufficient to establish the petitioner's ability to pay the proffered wage in those years. The record before the director did not contain the amended statement of monthly household expenses for the petitioner's owner, which shows slightly lower monthly expenses than the statement submitted in response to the RFE. Also, the record before the director did not include the documents discussed above pertaining to the value of the personal residence of the petitioner's owner and his wife. Those documents were submitted for the first time on appeal. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

It may be noted that an analysis based on the first statement of monthly household expenses of the petitioner's owner would indicate that the available income to pay the proffered wage would have been about \$1,000.00 less than the proffered wage. However, the other evidence in the record, notably the documents pertaining to the value of the personal residence of the petitioner's owner and his wife, would still be sufficient to demonstrate the petitioner's ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director.

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.