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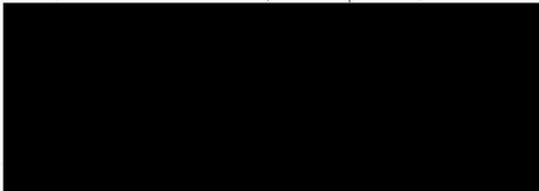


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2006
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 March 21, 2005 denial, the single issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(i) of 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, 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. 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 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 CFR § 204.5(d). The priority date in the instant petition is January 14, 2004. The proffered wage as stated on the Form ETA 750 is \$1,713 per month or \$20,556 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on

¹ 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

appeal includes counsel's brief, a certified copy of the petitioner's 2004 Schedule C, Profit or Loss Form Business, and a sworn affidavit from [REDACTED] attesting to the beneficiary's employment with the petitioner since May 2000, the time [REDACTED] frequenting the establishment. Other relevant evidence includes a copy of the petitioner's 2003 Schedule C, copies of the petitioner's 2004 Forms 941, Employer's Quarterly Federal Tax Return, copies of the beneficiary's 2000 through October 8, 2004 bank balances, and copies of payroll checks issued by the petitioner for the beneficiary in 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2003 Schedule C reflects gross receipts of \$53,950, wages paid of \$3,400, and a net profit of \$10,745.

The petitioner's 2004 Schedule C reflects gross receipts of \$130,474, wages paid of \$17,663, and a net profit of \$14,954.

The beneficiary's bank balances do show monthly deposits of approximately \$2,000; however, there is no evidence that those deposits were due to his employment with the petitioner.

The payroll checks issued by the petitioner to the beneficiary in 2004 indicate wages earned by the beneficiary of \$30,400. However, those checks do not show any cancellation stamps that would establish that the beneficiary actually received those checks. In addition, some of the checks appear to have been issued out of order (i.e. #1110 was issued in April 2004, #1231 was issued in December 2004, #1307 was issued in June 2004, #1175 was issued in August 2004, etc.).

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$20,556 based on its payroll checks issued to the beneficiary for 2004. Counsel also states that the petitioner has a net profit after payment of wages to the beneficiary for the past five years and to the present, and also, that the petitioner is not obligated to pay the proffered wage until adjustment of status is granted.

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 December 31, 2003, the beneficiary claims to have been employed by the petitioner from October 1999 to the present. However, the petitioner has only

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).

provided non-cancelled payroll checks for 2004 as evidence that it employed the beneficiary in 2004. Therefore, CIS has no evidence that the petitioner compensated the beneficiary for his employment in 1999 through 2003. Therefore, any funds paid to the beneficiary in those years cannot be used as evidence of the petitioner's ability to pay the proffered wage in 2004 to the present.

As an alternative 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, 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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 CIS 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 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 petitioner did not provide a complete copy of its 2004 Form 1040, U.S. Individual Income Tax Return. Therefore, CIS is unable to determine the petitioner's adjusted gross income or the number of individuals supported by the tax return. In addition, the petitioner did not submit nor did the director request a list the petitioner's monthly personal expenses that would help determine if the petitioner possessed sufficient funds to pay the proffered wage and support the petitioner and his dependents. Evidence regarding additional funds with which to pay the proffered wage was also not requested. However, it appears from the 2004 non-cancelled payroll checks that the petitioner paid the beneficiary \$30,400 or \$9,844 more than the proffered wage of \$20,556 in 2004.

The director must afford the petitioner reasonable time to provide evidence of its ability to pay the beneficiary the proffered wage of \$20,556, to provide copies of the 2004 cancelled checks paid to the beneficiary, a list of the petitioner's monthly expenses, additional funds to pay the proffered wage, and any other evidence the

director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. 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 director's March 21, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.