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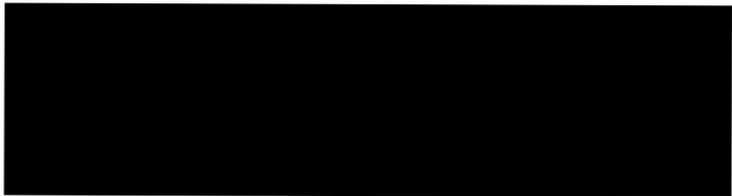


FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: SEP 06 2006
EAC-04-009-52432

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

A handwritten signature in black ink, appearing to read "Michael Valachi".

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 dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 20, 2004 decision denying the petition, 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$18.99 per hour, which amounts to \$39,499.20 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.

In the instant appeal, the petitioner submits no brief and submits additional evidence.

Relevant evidence submitted on appeal includes copies of Form W-2 Wage and Tax Statements of the petitioner's employees for 2001 and 2002 and a letter dated November 3, 2004 from the petitioner's owner. Other relevant evidence in the record includes copies of Form 1040 Schedule C's for the petitioning business for 2001 and 2002, but without the Form 1040's or other schedules, a copy of a personal financial statement of the petitioner's owner, copies of identity documents of the petitioner's owner and a copy of a letter from a previous employer of the beneficiary in Mexico.

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).

On appeal, counsel states that in hiring the beneficiary the petitioner intends to replace employees who are no longer with the petitioner and that copies of Form W-2 Wage and Tax Statements of the petitioner's employees submitted on appeal are additional evidence of the petitioner's ability to pay the proffered wage.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 February 6, 2001, 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 (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 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. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 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.

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. In the instant petition, however, the record contains copies of the Form 1040 Schedule C's for the petitioning business for 2001 and 2002. In a request for evidence dated June 7, 2004, the director specifically requested the rest of the pages from the owner's Form 1040 for 2001. However, the petitioner's response to that request did not include the requested pages, and the record does not contain copies of the owner's Form 1040 tax returns for 2001 or 2002 nor does it contain copies of any other schedules for either of those years. The petitioner's tax documents in the record therefore provide no means to determine the net income of the petitioner's owner.

The record contains a statement of monthly income and expenses and of assets and liabilities of the petitioner's owner dated August 31, 2004, submitted on a form of the Executive Office of Immigration Review and signed by the petitioner's owner under oath before a notary public. That financial statement is unaudited.

Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel states that in hiring the beneficiary the petitioner intends to replace employees who are no longer with the petitioner and that copies of Form W-2 Wage and Tax Statements of the petitioner's employees submitted on appeal are additional evidence of the petitioner's ability to pay the proffered wage.

The record contains a letter dated November 3, 2004 from the petitioner's owner in which the owner states the salaries of persons who were employees of the petitioner in 2001 and 2002 and who no longer are employed by the petitioner. The owner states that the beneficiary will work as a baker and will replace employees who are no longer employed by the petitioner. The record also contains copies of Form W-2 Wage and Tax Statements of those employees for 2001 and 2002, corroborating the salary levels stated in the owner's letter.

Each of the employees listed in the owner's letter was employed by the petitioner during 2001 and 2002. Nothing in the owner's letter states that one or more of those employees would have been terminated as of the April 27, 2001 priority date if the beneficiary had been hired on that date. Moreover, since the record lacks copies of complete Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001 and 2003 it is not possible to analyze the effect of the salaries paid to certain employees on the petitioner's overall financial condition. Although the record contains copies of Schedule C's for the petitioning business for 2001

and 2002, the finances of the petitioning business are not legally separate from the overall finances of the petitioner's owner, since the petitioner is a sole proprietorship.

In addition, the premise that the beneficiary would replace each of the employees listed in the owner's letter is undermined by the fact that the total amount of wages of the former employees suggests that those employees worked more than a single full-time employee. That is, the petitioner would need to replace all of those work hours with more than the hours which would be worked only by the beneficiary. Therefore, the total wages of those former employees would not all be available to pay the beneficiary.

For the foregoing reasons, the evidence fails to establish that the departure of one or more employees from the petitioner's payroll would provide the petitioner with additional financial resources sufficient to pay the proffered wage to the beneficiary as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails 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 incorrectly treated the net profit figures on the Schedule C's in the record as the petitioner's net income in 2001 and 2002. However, as discussed above, the correct figure for net income where a petitioner is a sole proprietorship is the adjusted gross income of the petitioner's owner. Since the record contains no Form 1040 tax returns of the petitioner's owner, the adjusted gross income of the petitioner's owner cannot be determined. Although the director's analysis was incorrect, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail 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 not met that burden.

ORDER: The appeal is dismissed.