

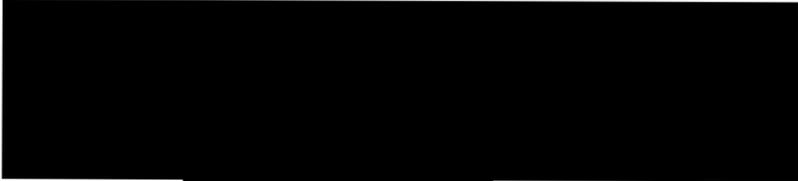


U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: APR 11 2007

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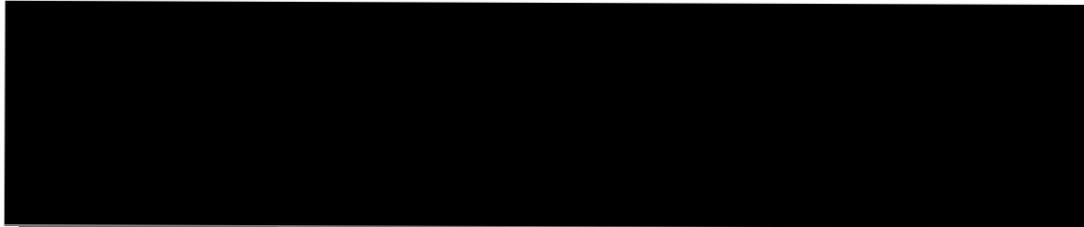
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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 dismissed.

The petitioner is a Thai restaurant/market. It seeks to employ the beneficiary permanently in the United States as a head cook. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner, through counsel contends that it has demonstrated its continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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.

Eligibility in this case rests upon the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on October 13, 2004. The proffered wage is \$12.30 per hour, which amounts to \$25,584 per year set forth on Form ETA 750. On Form ETA 750B, the beneficiary does not claim to have worked for the petitioner.

Part 5 of the Immigrant Petition for Alien Worker (I-140), indicates that the petitioner was established in August 1998, has a gross annual income of \$235,235, a net annual income of \$131,187, and currently employs three workers.

The record shows that the petitioner is organized as a sole proprietorship. Thus, it is a business in which it is operated in a single individual(s) personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). In this matter, the record indicates that the petitioner files a U.S. Individual Income Tax Return as a married person filing separately and declares no dependents.

Relevant to the petitioner's ability to pay the proposed annual wage offer of \$25,584, the petitioner provided a copy of her Form 1040, U.S. Individual Income Tax Return for 2004. It reflects the following information:

Gross Receipts or Sales (Schedule C)	\$235,235
Gross Income (Schedule C)	\$131,187
Total Expenses (Schedule C)	\$110,703
Business Net Profit (Schedule C)	\$ 20,484

Wages (Form 1040)	\$ none listed
Taxable Interest	\$ none listed
Business Income (Form 1040)	\$ 20,484
Adjusted Gross Income	\$ 19,037

On February 22, 2006, the director issued a request for additional evidence relevant to the petitioner's ability to pay the proffered wage as well as an itemized list of "all your monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. for 2004."

The director failed to specify that he was seeking such information relative to the sole proprietor's household expenses. In response, the petitioner's itemization of monthly expenses appears to include either only business expenses or a mixture of the sole proprietor's household expenses and the petitioner's expenses. As such, the sole proprietor's individual household expenses cannot be reliably calculated.

The petitioner also provided copies of its business bank statements from October 31, 2004 to March 2006, as well as an affidavit from the sole proprietor. The affidavit describes the sole proprietor's current residence as unencumbered by any mortgage or lien and jointly owned with her husband. Submitted with the affidavit are the deed, mortgage discharge, and real estate assessment of value. Also described is real property jointly owned with her spouse in Florida, which she states has increased in worth from \$4,512 in 2004 to \$19,552 in 2006. A copy of the tax assessment for 2006 is submitted with the affidavit. Further provided are copies of statements of a money market checking account in which the sole proprietor holds a 50% interest. The five statements cover a period between October 21, 2005 and February 21, 2006. The balances are \$6,399.82, \$11,900.14, \$11,900.61, \$11,901.17, and \$11,901.64, respectively. Also supplied are copies of two savings account statements in which the sole proprietor states that she holds a 50% interest. The first statement, dated September 30, 2005, shows a balance of \$6,430.85. The other statement, dated December 31, 2005, reflects a balance of \$8,432.72.

The director denied the petition on May 26, 2006. The director concluded that the petitioner cannot cover the full proffered salary of \$25,584 per year based on his review of the sole proprietor's 2004 reported adjusted gross income of \$19,037 and the submitted bank statements.

On appeal, counsel asserts that the director failed to consider the sole proprietor's personal assets consisting of her bank accounts and real property and failed to appreciate that the business' bank accounts average monthly balances were sufficient to cover the proffered wage. Referring to *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), counsel asserts that the overall circumstances of a sole proprietorship must be considered. While we agree that the overall circumstances of a sole proprietorship must be considered where it is the named petitioner, in this case, we do not find that the petitioner has sufficiently demonstrated that it has the continuing ability to pay the proffered wage of \$25,584 beginning on the priority date.

In determining a petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that wages less than the full proffered salary have been paid, those amounts will also be considered. In the instant case, there is no evidence to indicate that the petitioner has employed the beneficiary.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will also examine the net taxable income figure 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. 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). Showing that the petitioner's business operation achieved a certain gross income is insufficient because it does not include consideration of the expenses incurred in order to generate such revenue. 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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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, personal cash or cash equivalent 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, Profit or Loss from Business as noted above, and the net profit or loss is carried forward to line 12 of the first page of the tax return. It is observed that the petitioner has not shown how the balances on the petitioner's business bank statements reflect additional monies that would not already be reflected, at least in part, as part of the day-to-day operations encompassed within the figures of receipts and expenses already presented on Schedule C of the 2004 tax return. It is also noted that in this case, according to her 2004 tax return, the sole proprietor derives her entire income from the operation of her business.

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). For that reason, in cases involving a sole proprietorship a summary of his or her personal household expenses is often requested.

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 himself, his spouse and five dependents on a gross income of slightly more

than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, even without considering the sole proprietor's personal household expenses, which were not properly provided to the record, the proffered wage of \$25,584 exceeds the sole proprietor's 2004 adjusted gross income of \$19,037. Although the evidence included documentation related to the sole proprietor's bank accounts, which are properly included in the determination of the petitioner's ability to pay the proffered wage, they are not shown to exist until almost a year after the priority date of October 13, 2004. Her 50% interest in the two individual accounts was collectively worth approximately \$10,166 as of the end of 2005. If her 2005 tax return, or audited financial statement had been supplied, this amount could have supplemented the information that return could have provided. As it is, even if this money had been applied to the proffered wage, it is more than \$15,000 short of the full salary of \$25,584. Moreover, as to the evidence of the two pieces of real property held by the sole proprietor, including her personal residence, real estate is considered to be a long term asset and not a cash or cash equivalent asset that would be readily available to pay the proffered wage.¹ Based on the evidence presented, we cannot conclude that the petitioner has had sufficient financial resources to demonstrate its continuing ability to pay the proffered wage beginning at the priority date.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.

¹ It is noted that the willingness to borrow against real property holdings is not considered probative of a petitioner's financial ability to pay a proffered wage as it represents the acquisition of debt and a potential encumbrance upon the petitioner.