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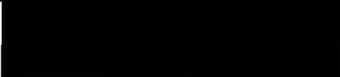
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FILE:



Office: TEXAS SERVICE CENTER

Date: **DEC 03 2007**

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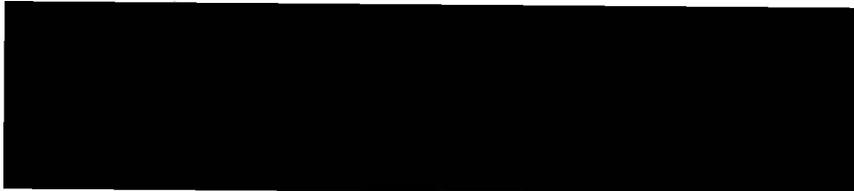
IN RE:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and maintains that the petitioner has the financial ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on November 17, 2003. The proffered wage as stated on the Form ETA 750 is \$11.05 per hour, which amounts to \$22,984 per year. On Part B of the ETA 750, signed by the beneficiary on November 9, 2003, the beneficiary does not claim that he has worked for the petitioner.

On Part 5 of the preference petition, filed on January 20, 2006, the petitioner claims that it was established on May 17, 1997, claims a gross annual income of \$450,000, a net annual income of approximately \$26,000, and currently employs six part-time workers.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2003 and 2004. The returns reflect that the beneficiary filed as a head of household and claimed three dependents in 2003 and 2004. The tax returns contain the following information:

	2003	2004
Petitioner's gross receipts (Schedule C)	\$ 445,959	\$461,819
Petitioner's wages paid (Schedule C)	\$ 76,938	\$ 69,766
Petitioner's total expenses (Schedule C)	\$ 225,817	\$234,030
Sole Proprietor's taxable interest (Form 1040)	\$ 337	\$ 289
Business net profit (Sched. C) and (Form 1040)	\$ 25,704	\$ 25,941
Sole Proprietor's adjusted gross income (Form 1040)	\$ 20,137	\$ 22,613

On April 18, 2006, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer, advising the petitioner that the tax return(s) did not establish its ability to pay the proffered salary. The director additionally requested that the petitioner provide a copy of monthly expenses.

In response, the petitioner submitted a copy of an internally generated, unaudited¹ financial statement covering the first quarter of 2006.

The director determined 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, on September 7, 2006, denied the petition. The director concluded that the sole proprietor's adjusted gross income in 2003 and 2004 did not indicate sufficient funds to pay the proffered wage and cover any household expenses.

On appeal, counsel asserts that the sole proprietor may demonstrate the ability to pay the \$22,984 through her individual holdings. He claims that she is willing to use personal assets in paying the proffered wage. Counsel submits copies of documentation including a 2007 property tax assessment and 2001 loan documents relating to the sole proprietor's real estate at [REDACTED] in Sacramento, California, copies of money market account statements for March 2006, May 2006, and August 2006 indicating that three accounts contained approximately \$37,000 during those periods. Counsel also provided a summary of the sole proprietor's household expenses totaling approximately \$2,000 per month.

¹ The regulation at 8 C.F.R. § 204.5(g)(2) states that either audited financial statements, federal tax returns or annual reports must be provided.

In this case, counsel's assertions are not persuasive. At the outset, it is noted that although the petitioner filed the preference petition in January 2006, no financial documentation consistent with the requirements of the regulation at 8 C.F.R. § 204.5(g)(2) in the form of federal tax returns or audited financial statements relevant to 2005 was ever provided.

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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 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. In the instant case, as noted above, there is no indication that the petitioner has employed the beneficiary.

In determining the petitioner's ability to pay the proffered wage, the CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As discussed above, the petitioner is a sole proprietorship; a business in which an individual 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. As noted above, 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. See *Ubeda v. Palmer*, supra. Because a sole proprietor's personal expenses are part of the review of the ability to pay a certified wage, sole proprietors are asked provide summaries of their monthly household expenses.

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 the instant case, starting with 2003, after payment of living expenses of approximately \$24,000 per year, the proffered wage of \$22,984 could not be covered by the resulting shortfall of -\$3,863. In 2004, the shortfall of -\$1,387 resulting after covering household expenses could not meet the proffered wage of \$22,984. Based on these figures, and the evidence contained in the record, we conclude that is unlikely that the sole proprietor could have had sufficient funds to pay the full proffered wage as well as support herself and three dependents during the period under consideration.

It is noted that we do not disagree with counsel that a sole proprietor's individual assets (and liabilities) may also factor into the determination of a petitioner's ability to pay the proffered salary. In this matter, however, the petitioner's evidence of her real estate holdings' rental income is already included in her income declaration on her income tax returns. Moreover, real property itself 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.² With respect to the money market accounts, while the selected 2006 statements demonstrate that they were funds available in 2006, no evidence was submitted to show what amounts, if any, would have been available in prior years. No tangible evidence consisting of cash or cash equivalent unrestricted liquid assets belonging to the sole proprietor and available to support the payment of the proffered wage has been submitted that would have been readily available in 2003, 2004, or 2005. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *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).

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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.

² 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.