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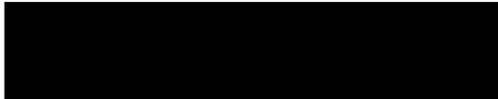
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FILE: WAC 05 226 50695 Office: CALIFORNIA SERVICE CENTER

Date: JUL 23 2007

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

The petitioner is a Japanese sushi restaurant. It seeks to employ the beneficiary permanently in the United States as a chef of Japanese food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's April 20, 2006 decision, the director determined that the petitioner, as a sole proprietorship, did not have sufficient adjusted gross income in tax years 2001 to 2004 to both pay the proffered wage and support himself and one dependent. The director also noted that the 2005 federal poverty guidelines indicate an income of \$16,037 for a two-person family. The director 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 in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$20.60 an hour, or \$42,848 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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. On appeal, counsel submits a brief and the following documentation: the sole proprietor's Form 1040 for tax year 2005, with accompanying Schedule C; the sole proprietor's bank statement for March 2006 from Wells Fargo bank, N.A., Portland, Oregon, that indicates an ending balance of \$26,447.27 in the sole proprietor's basic business checking account; the sole proprietor's Bank of America business checking statement for the month of April 2006 that indicates a balance of \$5,997.83; the sole proprietor's savings account from California Bank Trust that indicates a balance of \$6,423.51 as of April 7, 2006; and finally, a bank statement for a jointly held Moneyplus account that indicates a balance of \$55,731.50 as of April 30, 2006. In response to the director's request for further evidence dated January 30, 2006, the petitioner submitted the sole proprietor's Forms DE-6 for the fourth quarter of 2004 and the first three quarters of 2005, and an itemized list of the sole proprietor's monthly expenses. This document indicates monthly expenses of \$2,338.45, or yearly expenses of \$28,140.60. The record also contains the sole proprietor's Forms 1040 tax returns for tax years 2001 to 2004, with accompanying Schedules C. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner did not indicate when it was established, its annual or gross net income, or the number of current employees.² On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the sole proprietor has the ability to pay the proffered wage and that the director's decision, based on the sole proprietor's adjusted gross income and net profit, did not fully take into account the petitioner's ability to pay the proffered wage. Counsel refers to an interoffice memorandum written by William Yates³ and that states that the considerations in the Yates memo were quite distinct from the director's conclusions. Counsel states that the purpose of the ability to pay determination is to examine whether the petitioner has the ability to pay the proffered and not to focus on one aspect of the petitioner's financial statements and make a negative determination. Counsel states that the Yates memo only suggests that in certain circumstances a positive determination should be found when examining net income, net current assets or the beneficiary's wages.

Counsel states that a more accurate reflection of the petitioner's ability to pay the proffered wage results from examining Line 1 (gross receipts and sales) and Line 5 (gross profit) of Schedule C. Counsel states that based on the amount of gross receipts for tax years 2001 to 2004, the sole proprietor could have hired multiple employees at the proffered wage, asserting that in tax year 2001 alone, the petitioner could have paid the proffered wage approximately 7.5 times based on the sole proprietor's gross receipts. Counsel states that the sole proprietor's adjusted gross income and net profits do not illustrate the petitioner's ability to pay the

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 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).

² In the petitioner's response to the response to the director's request for further evidence with regard to these information items on the Form I-140 petition, counsel for the sole proprietor responded that since the sole proprietor was not a corporation, he did not have to provide such information.

³ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

proffered wage because they do not reflect the total amount of money that the petitioner could have spent on hiring the beneficiary nor do they reflect the potential reallocation of resources if the sole proprietor had hired the beneficiary beginning in 2001. Counsel states that the district director could have taken into account the sole proprietor's gross sales and receipts and the sole proprietor's gross profits because the Yates memo allows the petitioner to submit information such as "profit/loss statements". When the petitioner submitted its Forms 1040, counsel states that the petitioner's submission included profit/loss statements on the accompanying Schedules C.

Counsel also notes that the petitioner's gross sales and receipts and gross profits do not reflect the increased gross receipts and sales that the petitioner would have received if the beneficiary was employed with the petitioner since 2001, and that it is possible the numbers used to determine the petitioner's ability to pay the proffered wages are lower than they should be. Counsel then notes that the petitioner's 2005 Form 1040, in Schedule C, indicates gross receipt or sales of \$472,523 and a gross profit of \$289,757.

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 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).

On appeal, counsel states that the petitioner's ability to pay the proffered wage should be determined by an examination of the petitioner's gross receipts and sales and its gross income as documented on Schedules C of its tax returns for the year 2001 to 2005. Counsel's assertions are not persuasive. The AAO does not consider the sole proprietor's gross receipts and sales or gross income indicated on the petitioner's Schedules C without also considering the petitioner's expenses. Counsel's reference to the Yates memo is also not viewed as persuasive. The Yates memo identifies the beneficiary's wages, and the petitioner's net income and net current assets as three criteria for evaluating a petitioner's ability to pay the proffered wage. The AAO will explain in these proceedings how a sole proprietor's adjusted gross income identified on the first page of the Form 1040 is considered the equivalent of a corporate petitioner's net income described in the Yates memo for purposes of evaluating a petitioner's ability to pay the proffered wage.

Finally counsel states that because the Yates memo mentions the submission of loss/profit statements to the record to establish the petitioner's ability to pay the proffered wage, the AAO should consider the Schedules C submitted by the petitioner to the record as a profit/loss statements. Counsel completely misconstrues the intent of the Yates memo in regard to any mention of profit/loss statements, and the role such documents would play in the present proceedings. The regulation 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.

Accordingly, the Yates memo identifies initial evidence to be submitted with the I-140 petition as copies of annual reports, federal tax returns or audited financial statements. *See* page two of Yates memo. On page three, the Yates memo then states that “in certain instances, petitioners may submit financial statements in lieu of initial evidence and/or additional evidence such as profit/loss statements, bank account records, or personnel records.” However, in the instant petition, the sole proprietor submitted his federal income tax returns, which included the accompanying Schedules C. Thus, the Schedule C is not regarded as an additional piece of evidence, such as a profit/loss statement, but rather part of the initial evidence submitted by the petitioner. Counsel’s assertion that the director should consider the sole proprietor’s submitted Schedules C as an additional financial statement mentioned in the Yates memo, is without merit. In his decision, the director correctly analyzed both the petitioner’s Forms 1040 and the accompanying Schedules C in his examination of the petitioner’s ability to pay the proffered wage. Furthermore, even if the sole proprietor had submitted additional financial statements beyond the federal tax returns, such statements would have to be audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited.

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner 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, the petitioner submitted a Form DE-6 for the third quarter of 2005 that indicated the beneficiary received wages of \$80 during that quarter. The petitioner submitted no further evidence of any wages paid to the beneficiary as of the 2001 priority date. Thus the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. The petitioner has to establish that it has the ability to pay the entire proffered wage in tax years 2001 to 2004, and the difference between the beneficiary’s actual wages and the proffered wage in tax year 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net 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).

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. As counsel notes, 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 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, the sole proprietor supports a family of two. The tax returns reflect the following information for the following years:

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040)	\$ 20,286	\$ 18,785	\$ 20,692
Petitioner's gross receipts or sales (Schedule C)	\$ 329,780	\$ 368,996	\$ 418,193
Petitioner's wages paid (Schedule C)	\$ 63,919	\$ 76,534	\$ 96,852
Petitioner's net profit from business (Schedule C)	\$ 22,104	\$ 21,867	\$ 25,797
	2004	2005	
Proprietor's adjusted gross income (Form 1040)	\$ 22,361	\$ 42,669	
Petitioner's gross receipts or sales (Schedule C)	\$ 441,620	\$ 472,523	
Petitioner's wages paid (Schedule C)	\$ 88,345	\$ 84,148	
Petitioner's net profit from business (Schedule C)	\$ 28,320	\$ 49,333	

In the 2001 priority year and through tax year 2004, the sole proprietorship's adjusted gross income fails to cover the proffered wage of \$42,848. Furthermore the petitioner would have no funds available to pay yearly household expenses of \$28,140.60. In tax year 2005, the sole proprietorship's adjusted gross income of \$42,669 is almost sufficient to cover the difference between the beneficiary's wages of \$80 and the proffered wage; however, the sole proprietorship could not also cover yearly household expenses. It is improbable that the sole proprietor could support two individuals on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage in all the relevant years in the period of time in question.

On appeal, counsel states that the sole proprietor's gross receipts and sales and gross profits, as identified on the sole proprietor's Schedule C for the pertinent tax years can be used to establish the petitioner's ability to pay the proffered wage. However, as previously noted, the AAO does not examine the sole proprietor's gross receipts and sales, without also examining the sole proprietor's expenses.

On appeal, counsel also submits the sole proprietor's business checking account statements for Wells Fargo Bank and Bank of America, as well as April 2006 statements for the sole proprietor's savings and Moneyplus accounts with California Bank. With regard to the funds in the sole proprietor's business checking accounts, the AAO notes that these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. While the sole proprietor's savings accounts, and Moneyplus accounts with California bank are available for the sole proprietor to pay the proffered wage and/or personal expenses, the sole proprietor provides only evidence of funds held by the sole proprietor as of April 2006. The record does not reflect any evidence as to the sole proprietor's financial assets in his savings or Moneyplus or similar bank

account as of the 2001 priority date and onward. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant case, the sole proprietor has not established that as of the 2001 priority date and through tax year 2005, he had sufficient funds in either his savings or MoneyPlus bank account or other similar financial instruments such as brokerage accounts, to pay both the proffered wage and his yearly household expenses.

Finally on appeal, counsel asserts that if the petitioner had employed the beneficiary during the 2001 priority year, the record may have reflected increased gross receipts and sales. Counsel states that it is possible that the figures used in the director's analysis of the sole proprietor's ability to pay the proffered wage may be lower than they should be. However, counsel offers no evidentiary documentation to further substantiate his assertion with regard to higher gross receipts or gross income based on a theoretical employment of the beneficiary by the sole proprietor. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Thus the sole proprietor has not established that he has the ability to pay the proffered wage as of the 2001 priority date and until the beneficiary obtains his legal permanent residence.

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.