

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

B6

PUBLIC COPY



FILE: LIN 05 275 52168 Office: NEBRASKA SERVICE CENTER Date: JUN 05 2007

IN RE: Petitioner:
Beneficiary:



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 sustained.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 director denied the petition accordingly.

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 February 17, 2006 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 3, 2003. The proffered wage as stated on the Form ETA 750 is \$29,286 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, copies of the petitioner's 2004 and 2005 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business, and a copy of a Warranty Deed showing the sole proprietor purchased a piece of land in 2004, paying over \$80,000 for it. Counsel states that the property purchased in 2004 has been paid off. Other relevant evidence includes copies of the petitioner's 2001 through 2003 Forms 1040, a copy of the petitioner's monthly expenses for the years 2003 through August 2005, and copies of cancelled checks and bank statements for the petitioner for the period December 12, 2002 through August 11, 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2005 Forms 1040 reflect adjusted gross incomes of \$39,195, \$54,686, \$50,823, \$113,415, and \$123,487, respectively.²

The copy of the Warranty Deed submitted by counsel reflects that the owners of the petitioner bought the property for \$87,000 on March 24, 2004.

The petitioner's owners' bank balances reflect balances ranging from a low of \$3,446.47 to a high of \$69,095.95 in 2003, from a low of \$3,691.78 to a high of \$17,890.32 in 2004, and from a low of \$7,513.57 to a high of \$12,959.55 from January 13, 2005 to August 11, 2005.

The petitioner's owners reported recurring monthly household expenses of \$3,988.75 in 2003 with additional expenses for mortgage deposits of \$62,964.27 in January and \$42,000.00 in September. In 2004 and 2005, the petitioner's owners' recurring monthly household expenses were \$6,461.17 and \$7,189.12 up to August 2005, respectively. Therefore, the petitioner's owners' recurring yearly household expenses were \$47,865 in 2003, \$77,534.04 in 2004, and \$86,269.44 in 2005 with the one time mortgage deposits totaling \$104,964.27 in 2003.

On appeal, counsel states that "the petitioner, [REDACTED] is a sole proprietor of a Chinese restaurant. The sole proprietor failed to submit its tax returns of 2004 and 2005, which resulted in the denial of this case. Now, the sole proprietor is submitting those documents to indicate its ability to pay the proffered wage to the beneficiary, [REDACTED]

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).

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 Please note that the petitioner's 2001 and 2002 tax returns are before the priority date of January 3, 2003; and, therefore, have little evidentiary value when determining the petitioner's continuing ability to pay the proffered wage of \$29,286 from the priority date. Thus, the 2001 and 2002 tax returns will not be considered when determining the petitioner's ability to pay the proffered wage in the instant case.

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 5, 2002, the beneficiary does not claim the petitioner as a past or present employer. In addition, the petitioner has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, to demonstrate that it employed the beneficiary during the pertinent years of 2003 through 2005. Therefore, the petitioner has not established that it employed the beneficiary from the priority date of January 3, 2003 through 2005.

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 sole proprietor supported a family of six in 2003 through 2005. In 2003, the petitioner's adjusted gross income of \$50,823 was \$21,537 more than the proffered wage of \$29,286. However, the petitioner's monthly personal expenses were \$3,988.75 per month or \$47,865 annually in 2003 or \$26,328 more than the \$21,537 remaining after paying the proffered wage to the beneficiary in 2003. In addition, the director included the one time mortgage deposits totaling \$104,964.27 in his denial of the visa petition. Therefore, it appears that the petitioner has not established its ability to pay the proffered wage and support a family of six in 2003. However, the AAO does not agree with the director when including the one

time mortgage deposits of \$104,964.27 as part of the sole proprietor's recurring monthly expenses. It is noted from the cancelled checks provided by the petitioner's owner that the two checks were both paid by the sole proprietor's bank when the checks were written, and the sole proprietor's bank balance remained positive even after those deductions. The \$26,328 needed to cover the remaining recurring household expenses for 2003 could have been taken from the sole proprietor's bank account as each month the sole proprietor would have needed only \$2,194 to insure that it had sufficient funds to meet the \$26,328. The sole proprietor's bank account balances in 2003 ranged from a low of \$3,446.47 to a high of \$69,095.95 (even after deducting the mortgage deposits). Therefore, the petitioner has shown that it had sufficient funds to cover the monthly \$2,194 needed to cover the \$26,328 remaining recurring household expenses after paying the proffered wage of \$29,286 to the beneficiary.

In 2004, the petitioner's adjusted gross income of \$113,415 was \$84,129 more than the proffered wage of \$29,286. The remaining \$84,129 was \$6,594.96 more than the sole proprietor's recurring monthly expenses of \$77,534.04, thereby, establishing that the sole proprietor possessed sufficient funds to pay the proffered wage of \$29,286 and to support its family of six with monthly recurring expenses totaling \$77,534.04 in 2004.

In 2005, the petitioner's adjusted gross income of \$123,487 was \$94,201 more than the proffered wage of \$29,286. The remaining \$94,201 was \$7,931.56 more than the sole proprietor's recurring monthly expenses of \$86,269.44, thereby, establishing that the sole proprietor possessed sufficient funds to pay the proffered wage of \$29,286 and to support its family of six with monthly recurring expenses totaling \$86,269.44 in 2005.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition is approved.