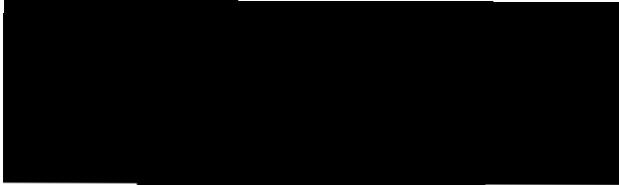


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U.S. Citizenship
and Immigration
Services



B6

FILE:



EAC-04-251-53590

Office: VERMONT SERVICE CENTER

Date: MAY 17 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 Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a continental restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (continental specialty cook). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 14, 2005 denial, the single issue in this case is whether or not the petitioner has the 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 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 December 3, 2002. The proffered wage as stated on the Form ETA 750 is \$13.01 per hour (\$23,678.20 per year¹). The Form ETA 750 states that the position requires two (2) years of experience in the job offered or in related occupation of assistant continental specialty cook.

¹ Based on working 35 hours per week and being paid \$13.01 per hour as indicated on the Form ETA 750.

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 appeal². Relevant evidence in the record includes [REDACTED]'s Form 1040 U.S. Individual Income Tax Return for 2002 through 2004, the petitioner's unaudited financial statements as of December 31, 2004³, a letter from Freedom National Bank, a letter from [REDACTED] CPA, a letter from the petitioner and press materials regarding the petitioner's temporary closure due to renovations for 7 months in 2003. 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 a sole proprietorship. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$150,000, to have a net annual income of \$50,000, and to currently employ 4 workers. On the Form ETA 750B, signed by the beneficiary on November 15, 2002, the beneficiary did not provide his employment history after September 2000. On the form G-325A signed by the beneficiary on June 10, 2004, he claimed to have been unemployed since September 2000.

On appeal, counsel asserts that the petitioner's \$88,000 in depreciation added to \$20,000 taxable income reflected on schedule C for 2005 easily cover the proffered wage of \$23,678.20.

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).

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 beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any W-2 forms, 1099 forms or other documentary evidence showing that the petitioner employed and paid the beneficiary the proffered wage from the priority date in 2002 onwards. Therefore, the petitioner failed to

² 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).

³ 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. **Unaudited financial statements are the representations of management.** The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for these years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2002 to the present.

As previously noted, the evidence indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33⁴, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. Counsel's reliance on gross income and depreciation reported on Schedule C is misplaced. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2002 through 2004. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

- In 2002, the Form 1040 stated adjusted gross income of \$3,867.
- In 2003, the Form 1040 stated adjusted gross income of \$(41,916).
- In 2004, the Form 1040 stated adjusted gross income of \$21,873.

The record does not contain any statement of the sole proprietor's household monthly expenses. Without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietorship established its ability to pay the proffered wage as well as to sustain his family's living expenses.

In 2002 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage in that year without taking into account the sole proprietor's household living expenses. On appeal counsel asserts that the priority date in the instant case is December 3, 2002 and implicitly requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. The sole proprietor's annual adjusted gross income was not sufficient to pay the annual proffered wage of

⁴ The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002, Line 34 for 2003 and Line 36 for 2004.

\$23,678.20, nor was his monthly income, i.e. 1/12 of the annual adjusted gross income (\$322.25), sufficient to pay the prorated proffered wage for December of 2002 (i.e. \$1,973.18).

In 2003 the adjusted gross income was not sufficient to pay the beneficiary the full proffered wage that year even without taking into account the sole proprietor's family living expenses. Counsel submits letters from the sole proprietor and printed materials confirming that the petitioner closed for 7 months in that year. The sole proprietor's adjusted gross income for 2003 was a negative, the petitioner did not have the ability to pay the full proffered wage, nor did it have the ability to pay the four months of proffered wage for the period the petitioner was in operation.

The petitioner submitted a letter from a commercial credit manager of Freedom National Bank dated December 5, 2003. It states that "[o]n October 3, 2003, Freedom National Bank granted a loan in the amount of \$50,000 to [the sole proprietor] for the purpose of expanding his restaurant, [REDACTED] Restaurant, located at [REDACTED] Providence, RI. The proceeds of the loan will also be used to bring on additional employees as well as retain existing staff." However, the petitioner did not submit any evidence to show that the loan funds in the sole proprietor's account was available to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Therefore, it is not clear whether the loan from Freedom National Bank is a "commitment to loan", such as a line of credit. If it is, the petitioner has not established that the unused funds from the line of credit are available at the time of filing petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, if it is an existent loan, the petitioner's existent loan will be reflected in the balance sheet provided in the tax return or audited financial statement and was fully considered⁵. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In 2004 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage in that year without taking into account the sole proprietor's household living expenses. On appeal counsel asserts that the petitioner had depreciation of \$88,000 in 2004 and argues that the depreciation as a non-cash expenses should be added to the net income in considering the petitioner's ability to pay according to the letter from [REDACTED] CPA. However, counsel's reliance on depreciation in determining the petitioner's ability to pay is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

⁵ The loan appears to be a current liability resulting in negative net current assets based on the unaudited financial statements.

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

In conclusion, the sole proprietor's adjusted gross income was insufficient to pay the beneficiary the proffered wage in 2002 through 2004 even without taking into account the sole proprietor's household living expenses. Therefore, the petitioner failed to establish its ability to pay the proffered wage and the sole proprietor's household living expenses for 2002, 2003 and 2004.

CIS will consider the sole proprietorship's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the shortage between the proffered wage plus the sole proprietor's living expenses and the adjusted gross income at the end of each year 2002, 2003 and 2004.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The AAO notes that the petitioner in the instant case was temporarily closed for 7 months in 2003 due to renovations. This unusual circumstance appears to parallel those in *Sonegawa*. However, the petitioner in the instant case did not establish that 2003 was an uncharacteristically unprofitable or difficult year in a framework of profitable or successful years due to the unusual circumstance. In fact, its gross receipts were higher in 2003 than in 2002 and the petitioner failed to establish that it had sufficient net income or net current assets in 2002 and 2004 to pay the beneficiary the proffered wage. Total wages paid were approximately \$10,000 in 2002 and 2003 while the restaurant review in the Providence Journal indicates that

the renovations improved the petitioner's reputation and its 2004 gross receipts increased, the petitioner has still failed to show its ability to pay the proffered wage during the priority date year of 2002 or in 2003.⁶

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2002 through 2004.

Counsel's assertions cannot overcome the director's decision and the evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on 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.

ORDER: The appeal is dismissed.

⁶ 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."