

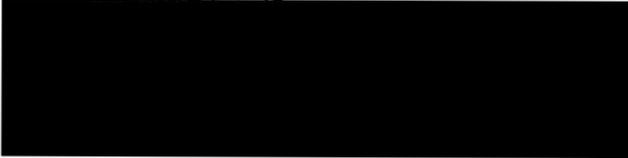
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAY 24 2007**

WAC-04-245-51945

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

Cc:



DISCUSSION: The preference visa petition was denied by the Director, California Service Center. After granting a motion to reopen, the director affirmed the decision and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook (Korean food 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 as well as to sustain the sole proprietor's living expenses. 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.

The instant appeal was filed on October 28, 2005 through an attorney named [REDACTED] with the Form G-28, Entry of Appearance as Attorney or Representative, signed by this counsel and a person named [REDACTED] as the owner of [REDACTED] (previously named [REDACTED] on behalf of the petitioner. However, the record shows that the petitioner in the instant case is Buffet Land and the sole proprietor/the owner of [REDACTED] is [REDACTED]. Counsel did not submit any evidence that the petitioner's name has been changed from [REDACTED] to [REDACTED] that [REDACTED] is the successor-in-interest to [REDACTED] or that [REDACTED] is the authorized representative of the petitioner, [REDACTED] to sign the immigrant petition on behalf of [REDACTED]. Citizenship and Immigration Services' (CIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Without the Form G-28 signed by both the counsel and the petitioner's authorized representative, the AAO cannot consider the counsel filing the appeal is the recorded attorney for this case. The record of proceeding contains a properly executed Form G-28 signed by the petitioner's representative, [REDACTED], and an attorney different than the counsel filing the instant appeal. Therefore, [REDACTED] is considered as the petitioner's counsel in this matter. Since it is uncertain whether or not the petitioner obtained new counsel, a copy of this decision will be provided to [REDACTED].

As set forth in the director's September 26, 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 as well as to cover the sole proprietor's living expenses.

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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year). The Form ETA 750 states that the position requires two (2) 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. Relevant evidence in the record includes [REDACTED] Form 1040 U.S. Individual Income Tax Return for 2001 through 2004, bank statements for [REDACTED] business checking account for April 2001 through April 2005, documents pertinent to a condominium purchased by [REDACTED] and the related escrow documents, personal financial statements for [REDACTED] a statement of monthly expenses for [REDACTED] household, the petitioner's W-3 forms for 2001 through 2003, the petitioner's Form DE-6 quarterly wage reports from the third quarter of 2003 to the third quarter of 2005, the beneficiary's W-2 form for 2004, and the beneficiary's pay stubs issued by the petitioner from December 2004 to July 2005. 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 1999, to have a gross annual income of \$1,389,816, to have a net annual income of \$44,619, and to currently employ 16 workers. On the Form ETA 750B, signed by the beneficiary on April 13, 2001, the beneficiary did not claim to have worked for the petitioner. However, she claimed to have worked for the petitioner since August 2002 to the present on her Form G-325A signed on August 30, 2004.

On appeal, the petitioner asserts that its prior counsel failed to submit evidence of business assets and that the petitioner has more than sufficient business assets to establish its ability to pay the proffered wage.

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

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).

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).

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 its W-3 forms for 2001 through 2003, its quarterly wage reports from the third quarter of 2003 to the third quarter of 2005, the beneficiary's W-2 form for 2004 and the beneficiary's paystubs issued by the petitioner from December 22, 2004 to July 22, 2005. These documents show that the petitioner has been paying the beneficiary \$1,100 bi-weekly since December 2004. Therefore, the petitioner is obligated to demonstrate that it could pay the difference of \$30,100 in 2004 and \$100 biweekly in 2005 (since biweekly proffered wage is \$1,200 as set forth on the Form ETA 750 in the instant case) between wages actually paid to the beneficiary and the proffered wage.

On appeal, the petitioner asserts that since it has paid the beneficiary at the proffered wage rate since December 2004, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* May 4, 2004 Memorandum from William R. Yates. The petitioner asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges CIS to consider the wage rate paid in December 2004 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 24, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when the petitioner claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Moreover, as discussed above, the wage the petitioner paid to the beneficiary from December 2004 was less than the proffered wage and therefore, the petitioner has not established that it has actually been paying the proffered wage rate since December 2004.

The petitioner did not submit any evidence of the beneficiary's compensation from the petitioner for 2001 through 2003. On appeal the petitioner submits a letter dated November 21, 2005 from its owner, Kyung Chun Hong. The letter states in pertinent part that:

[The beneficiary] has been employed by [REDACTED] as a Cook, Korean style food since 1999 until the present time. [The beneficiary] was paid independently and was not issued Form W-2 during this time.

However, the petitioner does not submit any objective evidence to support its assertions, instead, the record contains inconsistent information with the petitioner's assertions. First of all, the record does not contain any 1099 forms or other documentary evidence to show that the petitioner paid any compensation to the beneficiary for any of these years; secondly, the petitioner's tax returns do not show that the petitioner paid any cost of labor to any independent contractors in these relevant years; and third, the petitioner's assertion is inconsistent with the beneficiary's claim on the Form ETA 750B and Form G-325A where the beneficiary claimed that she was unemployed from October 1999 to at least April 2001 and that she started working for the petitioner from August 2002. 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)). The petitioner failed to demonstrate that it hired and paid the beneficiary any compensation in 2001 through 2003. Therefore, the petitioner is obligated to demonstrate that it could pay the full proffered wage in 2001 through 2003, and that it could pay the difference of \$30,100 in 2004 and \$100 biweekly in 2005 between wages actually paid to the beneficiary and the proffered wage.

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 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2004. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage:

² The line for adjusted gross income on Form 1040 is Line 33 for 2001, Line 35 for 2002, Line 34 for 2003, and Line 36 for 2004.

In 2001, the Form 1040 stated adjusted gross income of \$(41,934).
In 2002, the Form 1040 stated adjusted gross income of \$(8,912).
In 2003, the Form 1040 stated adjusted gross income of \$25,654.
In 2004, the Form 1040 stated adjusted gross income of \$58,309.

In response to the director's request for evidence (RFE) dated July 11, 2005, the petitioner submitted a statement of monthly expenses for the sole proprietor's household. The sole proprietor's monthly expenses include housing (mortgage and tax) \$1,650, utilities (electric, gas, water, garbage disposal, phone, cell phone, cable, internet) \$400, food \$400, automobile (insurance, gas, parking) \$400, insurance (life, home, health) \$200, entertainment \$300, after school lessons \$200 and clothing \$150, totaling \$3,500 per month (\$42,000 per year).

In 2001 the sole proprietor's adjusted gross income on Form 1040 was negative \$41,934, therefore, there was a deficit of \$115,134 for the sole proprietor to pay the beneficiary the full proffered wage as well as to cover his or her household living expenses in that year; in 2002 the adjusted gross income was also negative \$8,912, therefore, there was a deficit of \$82,112 for the sole proprietor to pay the beneficiary the full proffered wage as well as to cover his or her household living expenses in that year; in 2003 the adjusted gross income was \$25,654, therefore, there was a deficit of \$47,546 for the sole proprietor to pay the beneficiary the full proffered wage as well as to cover his or her household living expenses in that year; in 2004 the sole proprietor had an adjusted gross income of \$58,309, which is sufficient either to pay the difference of \$30,100 between wages actually paid to the beneficiary and the proffered wage or to cover his or her household living expenses, but there was a deficit of \$13,791 for the sole proprietor to cover both in that year. Therefore, the petitioner failed to establish its ability to pay the proffered wage as well as its household living expenses for 2001 through 2004.

CIS will consider the sole proprietor's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding contains bank statements for the petitioner's business checking account for April 2001 through April 2005. The petitioner asserts the monthly average balance in that account was sufficient to pay the monthly proffered wage to the beneficiary from the priority date to the present. However, the balance of \$4,222.94 at the end of 2001 was insufficient to match the shortage of \$115,134 that year, and the balance of \$23,658.25 at the end of 2002 was not sufficient to match the shortage of \$82,112 that year, although the balance of \$49,105.57 at the end of 2003 and the balance of \$26,054.24 at the end of 2004 might be sufficient to match the shortage of \$47,576 and \$13,791 respectively. Moreover, since the statements represent the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. However, the petitioner did not submit any evidence for balances in the sole proprietor's savings accounts, money market accounts, certificates of deposits, or other similar accounts.

The petitioner submits documents pertinent to a condominium purchased by the sole proprietor and the related escrow documents, and personal financial statements for the sole proprietor as evidence of the sole proprietor's other liquefiable assets to be used in determining the petitioner's ability to pay the proffered wage and living expenses. The personal financial statement lists investment in [REDACTED] of \$800,000 and Real Estate of \$500,000 as part of the proprietor's assets. However, the AAO does not generally accept a claim that the sole proprietor relies on the value of his or her homes and business to show his or her ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. Therefore, the

petitioner's reliance on the sole proprietor's real properties and equity in the business to demonstrate his or her ability to pay is misplaced.

The personal financial statement also lists \$35,950 of cash on hand and in bank and \$12,000 of cash surrender value of life insurance as part of the sole proprietor's assets. However, the financial statement does not state how much of \$35,950 is in the petitioner's business checking account. Nor does the statement document the cash surrender value of the life insurance for the sole proprietor. 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)). Moreover, 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that the petitioner submitted are not persuasive evidence. The accountant's report dated June 2, 2005 that accompanied those financial statements makes clear that they were not audited or reviewed. As the accountant's report also makes clear, a compilation is limited to presenting in the form of financial statement information that is the representation of individual whose financial statements are presented. The unsupported representation of individual is not reliable evidence and is insufficient to demonstrate the ability to pay the proffered wage.

On appeal the petitioner submits another letter dated October 5, 2005 from the same accounting firm as evidence that the petitioner's total net assets were sufficient to cover the proffered wage and the sole proprietor's living expenses. The letter states that the petitioner has the total net assets of \$413,000 in 2001, \$413,500 in 2002, \$414,700 in 2003, \$420,000 in 2004 and \$429,000 in 2005. Although the letter mentions that copies of the relevant profit and loss statements are attached, the petitioner did not submit the mentioned profit and loss sheets. Without audited financial statements, the contents of the CPA's letter cannot be considered as primary evidence to establish the sole proprietor's liquefiable assets in determining the petitioner's ability to pay. 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, 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 2001 through the present.

In addition, CIS record shows that the petitioner has filed other Immigrant Petitions for Alien Workers (Form I-140) for five other workers using the priority dates in March and April 2001 reflected on a Form ETA 750 since November 2002. One of them was denied while the other four petitions were approved by the California Service Center in 2003 and 2005.³ Therefore, the petitioner must show that it had sufficient income to pay all the five

³ WAC-03-035-55190 filed on November 8, 2002 with the priority date of March 19, 2001 and approved on May 27, 2003; WAC-04-236-53508 filed on August 27, 2004 with the priority date of April 24, 2001 and approved on June 22, 2005; WAC-05-162-53043 filed on May 18, 2005 with the priority date of April 24, 2001 and approved on September 23, 2005; and WAC-05-144-53484 filed on April 25, 2004 with the priority

beneficiaries including the instant beneficiary the proffered wages from 2001, the year of the priority date, to the time when each of these beneficiaries obtains their lawful permanent residence. However, as discussed above in the instant case, the petitioner did not have sufficient income and liquefiable assets to pay a single beneficiary the proffered wage as well as to sustain the sole proprietor's household living expenses during the period from 2001 to 2005. It is most likely that the petitioner failed to demonstrate that it could pay all the proffered wages in 2001 through 2005.

On appeal the petitioner submits two previous approvals on the immigrant petitions (WAC-04-236-53508 and WAC-05-162-53043) filed by the petitioner as evidence that the petitioner has successfully petitioned for and established its ability to pay wages on labor certification cases by presenting evidence of business assets and asserts that CIS should approve this instant petition. However, CIS, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On appeal the petitioner asserts that this appeal is based upon a claim of prior counsel's negligence. An appeal based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In the instant case, the petitioner submits an affidavit from [REDACTED] a manager of the petitioner, claiming the petitioner's prior attorney failed to request evidence of business assets from the petitioner to support ability to pay the stated wage and therefore failed to submit this evidence to the CIS. The AAO finds that the affidavit of [REDACTED] does not meet the requirements set forth for an appeal based upon a claim of ineffective assistance of counsel.

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.

date of March 12, 2001 and approved on October 14, 2005.