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**U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

Date: NOV 06 2007

WAC-06-112-50770

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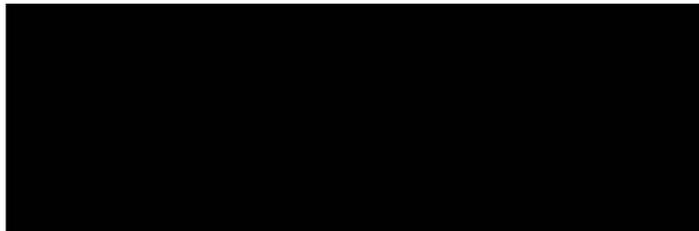
Petitioner:

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 donut shop. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL), accompanied the petition. The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Thus, PERM applies to the instant case. As set forth in the July 13, 2006 denial, 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.

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 ETA Form 9089 was accepted for processing by any office within the employment system of DOL. 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 ETA Form 9089 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on October 10, 2005. The proffered wage as stated on the ETA Form 9089 is \$10.20 per hour (\$21,216 per year). The ETA Form 9089 states that the position requires twenty-four (24) months of experience in the proffered position.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal counsel submits a brief and an analysis letter dated August 31, 2006 from [REDACTED] Certified Public Accountant, pertinent to the petitioner's ability to pay the proffered wage. Other relevant evidence in the record includes [REDACTED] and [REDACTED]'s Form 1040 U.S. Individual Income Tax Return for 2004 and 2005, bank statements for [REDACTED] personal checking account for the period from October 11, 2005 to April 9, 2006 and for the petitioner's business checking account for the period from January 1, 2006 to May 31, 2006, the petitioner's unaudited statement of income for 2005 and documents of real properties and vehicles. 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 \$108,754, to have a net annual income of \$29,327, and to currently employ 1 worker. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's net income of \$33,382 reflected on the schedule C of the Form 1040 for 2004 has established its ability to pay and that the monthly balances in the business checking account and personal checking account from October 2005 were sufficient to pay the proffered monthly wage of \$1,768. Counsel also argues that the equity in the sole proprietor's resident home and the totality of the circumstances should establish the petitioner's ability to pay.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 PERM application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2005 onwards.

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

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).

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 for adjusted gross income of the sole proprietor's Form 1040 U.S. Individual Income Tax Return. Counsel's reliance on the figure shown on line 31 of Schedule C or line 12 of the Form 1040 as the petitioner's net income in determining the petitioner's ability to pay the proffered wage is misplaced. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2004 and 2005. Since the priority date in the instant case is October 10, 2005, the tax return for 2004 is not necessarily dispositive. The AAO will review and consider the 2005 tax return in determining the petitioner's ability to pay the proffered wage of \$21,216 per year from the priority date. The sole proprietor's Form 1040 for 2005 stated adjusted gross income² of \$6,042.

In response to the director's request for evidence (RFE) dated April 21, 2006, counsel submitted a statement of the sole proprietor's household monthly expenses. The sole proprietor's household monthly expenses include: house payment \$1,320, household items \$1,000, PG and E \$100, water \$72, cable \$49, telephone \$17, and insurance \$125, totaling \$2,683 per month (\$32,196 per year).

In 2005, the sole proprietor's adjusted gross income was \$15,174 less than the proffered wage, and therefore, was not sufficient to pay the beneficiary the proffered wage even without taking into account the sole proprietor's household living expenses. The petitioner must demonstrate that the sole proprietor had extra liquefiable assets of at least \$47,370 at the end of the year 2005 to establish its ability to pay that year.

Therefore, the petitioner did not establish its ability to pay the proffered wage as well as the sole proprietor's household living expenses for 2004 and 2005 with the sole proprietor's adjusted gross income.

The record contains a copy of the petitioner's statement of income for 2005. However, counsel's reliance on unaudited financial records is misplaced. 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 this statement, the AAO cannot conclude that it is an audited statement. 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.

CIS will consider the sole proprietor'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 contains bank statements for the

² The line for adjusted gross income on Form 1040 is Line 37 for 2005.

petitioner's business checking account for the period from January 1, 2006 to May 31, 2006 and for the sole proprietor's personal checking account for the period from October 11, 2005 to April 9, 2006. 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, if the accounts represent what appear to be the sole proprietor's business checking accounts, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore, the petitioner's business checking account statements submitted in the record cannot be considered evidence to show that the sole proprietor had additional liquefiable assets to establish the petitioner's ability to pay.

The sole proprietor's personal checking account statements show the balances of \$12,406.73 on October 10, 2005, \$10,518.23 on November 7, 2005, \$7,248.57 on December 7, 2005 (with an average monthly balance in 2005 of \$10,057.84), \$4,290.83 on January 9, 2006, \$4,023.51 on February 7, 2006, \$2,245.57 on March 7, 2006, and \$4,505.54 on April 9, 2006 (with an average monthly balance of \$3,766.36 in the first four months of 2006). The average monthly balance in 2005 was not sufficient to cover the remaining proffered wage and the sole proprietor's household living expenses as each month's balance could not alone support the remaining proffered wage and the living expenses for a year. The average monthly balance in 2006 was not sufficient to cover the remaining proffered wage and the sole proprietor's household living expenses as each month's balance could not alone support the remaining proffered wage and the living expenses for a year. Counsel requests that CIS assume that personal monthly expenses have already been paid at the time the bank statements were issued monthly. We will not, however, assume that the balances of the sole proprietor's checking account represent the balances after paying the sole proprietor's monthly living expenses. Counsel must submit evidence that all the monthly expenses stated in the statement of monthly expenses for the sole proprietor's household have been paid prior to issuance of the checking statements. Counsel has not submitted such evidence. 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 visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

On appeal counsel also submits documents concerning the sole proprietor's real estate and automobiles as evidence of the petitioner's ability to pay the proffered wage. However, the AAO does not generally accept a claim that the sole proprietor relies on the value of his residential and/or rental real property, automobiles and personal property to show his ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. Moreover, if the proprietor were to obtain an equity loan or line of credit, CIS gives less weight to loans and debts as a means of paying salary since the debts will increase the proprietor's liabilities and will not improve his overall financial position. CIS must evaluate the overall financial position of a petitioner to determine whether the petitioner 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). Therefore, counsel's reliance on the sole proprietor's real properties and personal property to demonstrate the petitioner's ability to pay is misplaced.

Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) and asserts that the owner's personal funds made available to pay the proffered wage should be considered in determining the petitioner's ability to pay. Counsel does not state how the DOL Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all

its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel argues that the totality of the circumstance in the instant case should be considered in determining the petitioner's ability to pay and cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) to support his assertions. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *Id.* *Matter of Sonegawa* 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the year of 2005 was an uncharacteristically unprofitable year for the petitioner in its framework of profitable or successful years.

The petitioner in the instant case has been in business since 1997. Counsel claims that there are numerous other Tan's Donuts shops owned by the petitioner's family members in Sonoma County, CA and they have a reputation for providing high-quality, delicious baked goods. However, counsel did not submit any evidence of the good reputation for the petitioner. 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). The record shows that the petitioning entity had net profit of \$29,327 in 2004 and \$6,042 in 2005 respectively, and the petitioner did not pay any wages to its employee in these years although it claimed to employ one worker on the petition. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and that it has the ability to pay the proffered wage.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. Further, no detail or documentation has been provided to explain how the beneficiary's employment as a baker will significantly increase profits for the petitioner. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

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.

Therefore, from the date the ETA Form 9089 was accepted for processing by DOL, 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 2004 and 2005.

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.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience in the proffered position prior to the priority date with the regulatory-prescribed evidence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The ETA Form 9089, Part H, sets forth the minimum education, training, and experience that an applicant must have for the position of baker. In the instant case, the minimum requirement for the proffered position described in Part H is 24 months of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The only document submitted to establish the beneficiary's qualifications for the proffered position is an experience letter dated September 1, 2003 from [REDACTED] the shop owner of [REDACTED] in Cambodia. This letter is from the owner of the beneficiary's employer and verifies that the beneficiary worked as a night shift baker at the bakery shop for 37 months from May 8, 2000 to June 10, 2003. However, this faxed copy of the experience letter does not include the address of the writer as required by the

regulation. Without an address or other contact information, CIS cannot verify the business existence, the beneficiary's employment and the authenticity of the letter. The experience letter did not confirm the beneficiary's full-time employment. Nor did the letter include a specific description of the duties performed by the beneficiary. Without the description of the duties performed, the AAO cannot determine whether the experience with [REDACTED] qualifies the beneficiary to perform the duties described in Part H. 11 of the ETA Form 9089. Because of these defects, the experience letter from [REDACTED] on September 1, 2003 will be given little weight in these proceedings. The petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as a full-time baker as required by the ETA Form 9089, and further did not establish the beneficiary's qualifications for the proffered position with regulatory-prescribed evidence set forth at 8 C.F.R. § 204.5(g)(1).

It is noted that the record of proceeding contains a prevailing wage determination (PWD) by the California Employment Development Department (EDD) on May 16, 2005 for the instant petition. The PWD indicates that the prevailing wage is \$8.80 per hour and the petitioner used that figure as the prevailing wage for the instant case on the ETA Form 9089. However, the PWD also shows that the prevailing wage of \$8.80 per hour is for a baker with 6 months of experience instead of 24 months, while the instant ETA Form 9089 clearly requires 24 months of experience in the job offered. Therefore, the petitioner did not obtain a proper PWD for the instant case prior to the filing. Without an appropriate PWD determined for the instant case, the AAO cannot determine whether the petitioner offered the beneficiary a wage equal to or greater than the prevailing wage for a baker position requiring two years of experience. Therefore, the petitioner failed to demonstrate that it complied with the regulation pertinent to the prevailing wage requirements.

It is also noted that the ETA Form 9089 is not signed by the employer, the alien or the preparer as instructed by the ETA Form 9089³.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.

³ The ETA Form 9089 contains a note under the spaces for signatures from the alien, preparer and employer respectively. The note states: The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitted by mail. If the application is submitted electronically, any resulting certification *MUST* be signed *immediately upon receipt* from DOL before it can be submitted to USCIS for final processing.