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U.S. Citizenship and Immigration Services

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[redacted]

B6

DEC 07 2004

FILE: WAC 02 213 54074 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Thai style specialty food cook. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on May 17, 1999. The proffered wage as stated on the Form ETA 750 is $13.87 per hour, which amounts to $28,849.60 annually. The ETA 750B, signed by the alien beneficiary on April 16, 1999, indicates that the alien has not worked for the petitioner.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a partial copy of the sole proprietor's 2001 individual tax return, consisting only of Schedule C, Profit or Loss from Business. It shows that the petitioning business reported $266,772 in gross receipts or sales, paid $32,400 in wages and declared a net loss of -$23,968.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on November 19, 2002. The director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning 1999 to the present. The director also specifically requested complete copies of the sole proprietor's federal tax returns for 1999 through 2002.

In response, the petitioner submitted the requested copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1999 through 2002. They show that the sole proprietor filed jointly with his spouse and declared one dependent.

The tax returns reflect the following information for the following years:

| | 1999 | 2000 | 2001 | 2002 |
|---|---|---|---|---|
| Proprietor's adjusted gross income (Form 1040) | $ 32,691 | $ 25,975 | $ 9,704 | $ 50,071 |
| Petitioner's gross receipts or sales (Schedule C) | $189,868 | $227,695 | $266,772 | $363,637 |
| Petitioner's wages paid (Schedule C) | $ 54,000 | $ 37,800 | $ 32,400 | $ 32,400 |
| Petitioner's net profit from business (Schedule C) | - $ 17,461 | -$ 11,825 | -$ 23,968 | $ 23,980 |

The petitioner also submitted a copy of its state withholding and wage report for the quarter ending December 231, 2002. It shows that the petitioner employed four workers including the sole proprietor and his spouse during this period. The petitioner further includes a letter from its accountant and a letter from the sole proprietor expressing confidence that the petitioning business can afford to add another employee as the alien is intended to replace the sole proprietor's wife who has done most of the cooking.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 10, 2003, denied the petition.

On appeal, counsel maintains that the petitioner has had sufficient funds to pay the proffered wage of $28,849.60 if one reviews the petitioner's increasing gross receipts, the substantial other savings of the sole proprietors, the accolades and other awards that the petitioner has received, and the mortgage and depreciation deduction taken in 2001 when the sole proprietors officially took over the restaurant.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. The record fails to indicate that the petitioner has previously employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts or gross profits exceeded the proffered wage or reached a particular level is insufficient because such a review must necessarily include consideration of the expenses incurred in order to generate such revenue. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. Wages already expended in paying other salaries are not available to pay the proffered wage beginning on the visa priority date.

Although it is suggested that the alien would have somehow replaced Mrs. Hutchavinyu as a cook, the hypothesis that her salary would have been applied to the alien's proffered wage at the time of filing in 1999 is not sufficiently persuasive enough to outweigh the other evidence presented in the tax returns. Moreover, with the exception of one 2002 state wage report, the record does not appear to distinguish Mrs. Hutchavinyu's earnings from Mr. Hutchavinyu's wages. A visa petition may not be approved based on speculation of future eligibility or after eligibility is established under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). It is further noted that in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a Thai style specialty food cook will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the federal tax returns.

The petitioner is a sole proprietorship, a business in which one or more persons operate a business in their personal capacities. [redacted] (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner(s). *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. *See Ubeda v. Palmer, supra.*

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the tax returns reflect that the sole proprietors consist of a family of three. Although the sole proprietor's household was comprised of fewer dependents than in *Ubeda*, the comparison of the beneficiary's proposed wage measured against the sole proprietor's adjusted gross income in each of the relevant years shows that it represented 88% of the sole proprietor's adjusted gross income in 1999; 111% in 2000; 297% in 2001; and 58% in 2002. Although the director failed to request an itemization of reasonable living expenses, these comparisons do not suggest that a great deal of income would be remaining to pay household expenses. 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).

More promising is the additional evidence submitted on appeal that suggests that the sole proprietors' have other cash resources available to pay the proffered wage. In reviewing these various bank accounts, which consist of one IRA in Mr. Hutchavinyu's name and approximately eight accounts opened in Mrs. Hutchavinyu's name, from

the isolated dates given on the various savings and CD accounts, in which none appear to be dated earlier than the year 2000, it is impossible to determine which of the monies represent duplicate sources opened and closed at various times and which amounts represent a sustainable source present during the entire relevant period. It must be noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its continuing ability to pay a proffered wage as of the priority date. In this matter, that date was April 16, 1999. From a review of the bank statements provided on appeal, the AAO cannot conclude that the amounts in various accounts shown on given dates illustrate a sustainable ability to pay the proffered wage.

In the context of the financial information contained in the record and the favorable reviews that the petitioning business has received in the media from time to time as shown by the submissions on appeal, counsel argues that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, although the record contains favorable newspaper articles from 2001 and 2002 praising the petitioner's cuisine, and notwithstanding counsel's argument that the sole proprietors took a mortgage expense in 2001, it is noted that the petitioner's net profit figures set forth in the tax returns in all years but 2002, show losses The petitioner has not demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

Based on a review of the record and considering the evidence and argument presented on appeal, the AAO cannot conclude that the director erred in finding that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa 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.