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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

*BG*



FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **AUG 30 2005**  
EAC 03 061 51509

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner states that it is a Greek restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty 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 states that the petitioner has the capability of paying the proffered wage and that when determining the economic viability of a company, alternative ways of calculating the petitioner's cash flow, profitability and profits exist. Counsel further states that pay stubs for the beneficiary's work in 2003 should also establish that the petitioner has the ability to pay the proffered wage. Counsel resubmits documentation.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 annually.

The petitioner is structured as a sole proprietorship. The petitioner stated that it was established in 1989, has 12 employees, and has a gross annual income of \$311,933. With the petition, the petitioner submitted a letter of support from the petitioner as to the beneficiary's position, the petitioner's Form 1040 income tax return for 2001, with a copy of the petitioner's Schedule C for 2001. The petitioner also submitted a letter from the beneficiary's previous employer in Greece, with accompanying menu of Greek dishes.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 7, 2003, the director requested additional evidence pertinent to that ability. The director noted that the petitioner's 2001 Form 1040 indicated an adjusted gross income of \$28,634.<sup>1</sup> The director stated that based on the petitioner's 2001 income tax return, the petitioner must establish an ability to both pay the proffered wage and support his or her family. The director stated that the

<sup>1</sup> The petitioner's Form 1040 on line 33 indicates the petitioner's adjusted gross income is \$26,369 in 2001. The director erroneously used the petitioner's net profit figure of \$24,632, reflected on the petitioner's 2001 Schedule C, as the petitioner's adjusted gross income.

evidence did not clearly establish the petitioner's ability to pay the proffered wage of \$24,960. The director also requested that evidence be submitted that the employer had the ability to pay the proffered wage, a weekly salary of \$480, as of April 27, 2001, and continuing to the present.

In order to establish the petitioner's ability to pay the proffered wage, the director requested the petitioner's 2002 federal income tax return with all schedules and attachments, or annual reports for 2001 and 2002, accompanied by audited or reviewed financial statements. The director also requested that the petitioner submit the beneficiary's W-2 forms, if the petitioner had ever employed the beneficiary, and also an itemized list of the petitioner's monthly expenses for 2001, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, among other items. Finally the director stated that additional evidence such as accredited profit/loss statements, bank account records, or personnel records could be considered to establish the petitioner's ability to pay the proffered wage, but only as supplementary evidence.

In response, counsel resubmitted the petitioner's income tax return for 2001, and stated that the depreciation expenses of \$5,571 should be added to the petitioner's profit of \$24,632 to demonstrate the petitioner's cash flow, according to the Uniform Commercial Code (UCC).<sup>2</sup> Counsel stated that based on these calculations the petitioner had a cash flow of \$30,203, which was sufficient to pay the proffered wage of \$24,960. Counsel also submitted nine pay stubs for the beneficiary for his employment at the petitioner's restaurant from April 4, 2003 to October 2003, either for weekly or monthly wages. The weekly pay stubs indicated a weekly salary of \$480. Counsel stated that the beneficiary's pay stubs clearly indicated the petitioner's ability to pay the proffered wage, on either a yearly basis of \$24,960 or \$460 a week.

On February 19, 2004, the director denied the petition. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to both pay the proffered wage beginning on the priority date, and to support himself and two dependents. The director specifically referred to counsel's assertion with regard to depreciation deductions, and stated that Citizenship and Immigration Services (CIS) examines the petitioner's net income, without adding any expenses back to the net income. The director further noted that the 2003 pay stubs of the beneficiary did not establish the petitioner's ability to pay the proffered as of the 2001 priority date.

On appeal, counsel reiterates that the petitioner's cash flow is calculated by adding depreciation to the petitioner's net profit. Counsel again states that the petitioner's cash flow for 2001 was \$30,203, which exceeds the proffered wage of \$24,960. Counsel refers to four AAO decisions, EAC 0101850419, *Matter of X* WAC 98 07153033, EAC 00 088 52774, and EAC 02 009 53358. Counsel states that in the first AAO decision, an appeal was sustained because the petitioner's depreciation and ordinary income showed a profit of \$50,965, even though the petitioner had registered liabilities of \$129,862. Counsel states that in *Matter of X*, depreciation and cash at the end of the year established the petitioner's ability to pay the proffered wage. With regard to the third and fourth AAO decision, counsel states that the two decisions examined businesses where a combination of net profit, depreciation and retained earnings yield sums sufficient to pay the proffered wages.

Counsel also examines the petitioner's financial resources using quality income ratio and profit margin analysis. Counsel states that these analytical tools assess the petitioner's profitability and viability. Counsel states that both accounting tools are general principles of accounting accepted by followed by both the UCC and the U.S.

<sup>2</sup> Counsel also stated that the petitioner's net profit was calculated by subtracting its depreciation from its wages listed on the petitioner's 2001 Schedule C. The petitioner's net profit is calculated by subtracting the petitioner's total expenses of \$142,446 from its gross income of \$167,078. These figures are found on the petitioner's Schedule C for 2001.

Securities and Exchange Commission. Based on the use of the quality income ratio, counsel states that the petitioner's ratio is 6.78. According to counsel, a quality of income ratio higher than 1 is considered to indicate profitable quality earnings. With regard to the petitioner's profit margin, counsel states that in 2001, each \$1 of the petitioner's restaurant sales generated a 53 per cent profit. Based on these two methods of analyzing business assets, counsel states that the petitioner is financially viable and has the ability to pay the proffered wage. Counsel also refers to the director's comments on the beneficiary's 2003 pay stubs and states that these documents should be considered as part of the ability to pay in the future and cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

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 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. The petitioner submitted nine pay stubs for the beneficiary for a period of time from April to October 2003. As counsel correctly notes, these pay stubs are sufficient documentation to establish that the petitioner paid the beneficiary wages that were commensurate with the weekly salary noted on the I-140 petition during part of 2003. However, the pay stubs cannot establish that the petitioner paid the beneficiary the proffered wage, on a yearly or weekly basis, as of the priority date, namely April 27, 2001, or during 2002 and up to April 2003. Without more persuasive evidence, the petitioner has not established that it has previously employed the beneficiary and paid the beneficiary the proffered wage from April 2001 and onward.

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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return.

In sole proprietorships, the proprietor's adjusted gross income, as outlined on line 32 of the first page of Form 1040, as opposed to the net profit on Schedule C, would be examined to establish whether the petitioner had sufficient net income to pay the proffered wage. The petitioner's 2001 Form 1040 tax return document reflects the following information:

|  |            |
|--|------------|
| Proprietor's adjusted gross income (Form 1040)     | \$ 26,369  |
| Petitioner's gross receipts or sales (Schedule C)  | \$ 311,933 |
| Petitioner's wages paid (Schedule C)               | \$ 37,805  |
| Petitioner's net profit from business (Schedule C) | \$ 24,632  |

Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor is married and filing separately. The 2001 Form 1040 reflects that the petitioner only supports himself. As previously stated, the sole proprietor's adjusted gross income in 2001 is \$26,369. The sole proprietorship's adjusted gross income for 2001, minus the proffered wage of \$24,960, leaves \$1,409 to support the petitioner's monthly expenses. It is noted that in his request for further evidence, the director did ask for an itemized list of the petitioner's monthly expenses, which the petitioner did not submit. Even if such an itemized list of expenses had been submitted, it does not appear that, based on the petitioner's 2001 adjusted gross income, that the sole proprietor can pay the proffered wage, cover existing business expenses, and sustain herself or himself. Furthermore the petitioner did not submit its federal income tax returns for 2002, or an explanation of why the 2002 return could not be submitted to the record. This document would have to be analyzed to determine whether the petitioner had the ability to pay the proffered wage and to support himself continuing after 2001.

In his response to the director's request for further evidence and on appeal, counsel refers to AAO decisions that allegedly involved petitions in which depreciation costs were considered in addition to net profits in determining the petitioner's ability to pay the proffered wage. Counsel does not provide any published citations. 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, unpublished 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). Furthermore as noted by the director, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 537.

Counsel also referred to two other AAO decisions that involve the examination of the petitioners' profit, depreciation, and retained earnings to establish the s ability to pay a proffered wage, and again did not provide any published citations. Once again, 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, unpublished 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). The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel comments on the director's statement that the pay stubs for part of the beneficiary's employment in 2003 should be considered as part of the petitioner's ability to pay the proffered wage in the future, and cites to *Matter of Sonogawa*. Counsel's reference to *Sonogawa* does not appear to be relevant to the instant petition. *Matter of Sonogawa*, 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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In contrast, the record is devoid of any information as to the petitioner's business operations prior to and following the filing of the labor certification application in 2001 and the filing of the instant petition in 2002. No circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Without more persuasive evidence with regard to the petitioner's assets, the petitioner has not established that it has the ability to pay the proffered wage as of 2001 and onward. 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 with regard to the petitioner's ability to pay the proffered wage. The appeal will be dismissed. The petition will be denied.

**ORDER:** The appeal is dismissed.