

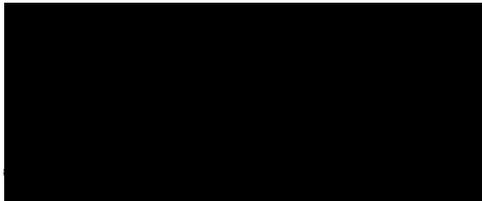
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U.S. Citizenship  
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Services

*BC*



FILE:



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Office: CALIFORNIA SERVICE CENTER

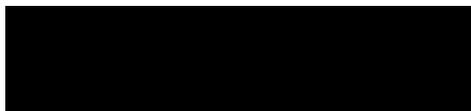
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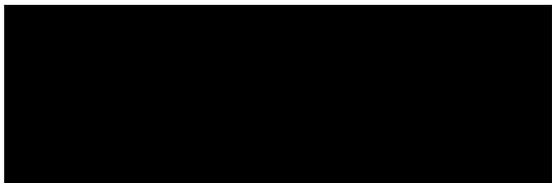
Petitioner:

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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 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 a statement and additional evidence.

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 granting 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 December 28, 1999. The proffered wage as stated on the Form ETA 750 is \$11.62 per hour, which equals \$24,169.60 per year.

On the petition, the petitioner stated that it was established during August 1996 and that it employs four workers. The petition states that the petitioner's gross annual income is \$152,310.<sup>1</sup> The amount of the petitioner's net annual income is not stated in the space provided for that information. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary at the El [redacted] restaurant at [redacted]. Evidence subsequently submitted, however, and detailed below, indicates that the restaurant at that location is not the beneficiary's proposed employer.

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<sup>1</sup> The evidence subsequently submitted failed to confirm that figure.

In support of the petition, counsel submitted the 1999 and 2000 Form 1065, U.S. Returns of Partnership Income for [REDACTED] California. Counsel also submitted California Form DE-6 Quarterly Wage and Withholding Reports for [REDACTED]. If those returns and wage reports pertain to a company other than the petitioner, then they are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 21, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's 1999, 2000, 2001, and 2002 tax returns. Further, the Service Center asked that the petitioner clarify the address discrepancy.

In response, counsel submitted a letter, dated November 11, 2002, from the petitioner's owner. That letter states that the address shown on the petition and the Form ETA 750 is not the job site, but that the job site is [REDACTED] the location of [REDACTED]. Because the job site is the [REDACTED], this office finds that restaurant, [REDACTED] to be the petitioner in this matter.

Counsel also submitted the 1999, 2000 and 2001 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. Those returns show that the petitioner's owner and owner's spouse had two dependents during those years. Schedules C, Profit or Loss from Business included with those returns show that during those years the petitioner's owner, [REDACTED] held the petitione [REDACTED] a sole proprietorship.

Although counsel did not provide the petitioner's 2002 tax returns, as the Service Center requested in the Request for Evidence, this office notes that the response to the Request for Evidence was required by November 13, 2002. Because the calendar year was not over, the petitioner's 2002 tax returns were clearly unavailable, and the petitioner is excused, therefore, from providing them.

The 1999 Schedule C shows that the petitioner earned a profit of \$10,034 during that year. The 2001 tax return shows that the petitioner's owner declared adjusted gross income of \$31,272 during that year, including the petitioner's profit.

The 2000 Schedule C shows that the petitioner earned a profit of \$24,577 during that year. The 2001 tax return shows that the petitioner's owner declared adjusted gross income of \$71,381 during that year, including the petitioner's profit.

The 2001 Schedule C shows that the petitioner earned a net profit of \$1,181 during that year. The 2001 return shows that the petitioner's owner declared adjusted gross income of \$45,925 during that year, including the petitioner's profit.

The director found 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 March 2, 2004, denied the petition.

On appeal, counsel notes that the petitioner's owner is the owner and co-owner of several restaurants in addition to the petitioner, and states that the combined income of those restaurants shows the ability to pay the proffered wage. Counsel submits those other restaurants' tax returns. Counsel makes no other argument pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual Federal tax return each year. The business-related income and expenses are reported on Schedule C and the net income is 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 (7<sup>th</sup> Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The other restaurants held in whole or in part by the petitioner's owner are sole proprietorships and partnerships. To the extent that they contributed to the petitioner's owner's income, that additional income is correctly a consideration in the determination of the petitioner's ability to pay additional wages. Because that additional income was included at Line 17 on the petitioner's owner's Form 1040 U.S. Individual Income Tax Returns, however, it was already in evidence. The additional tax returns submitted on appeal contain no relevant evidence not included in the petitioner's owner's personal income tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

The proffered wage is \$24,169.60 per year. The priority date is December 28, 1999.

During 1999 the petitioner's owner had adjusted gross income of \$31,272, including the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year he would have been left with \$7,102.40. To expect that the petitioner's owner could have supported his family of four on that amount is unreasonable. The petitioner has not shown that any other funds were available to the petitioner or the petitioner's owner with which the proffered wage could have been paid. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner had adjusted gross income of \$71,381, including the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year he would have been left with \$47,211.40. No reason exists to doubt that the petitioner's owner could

have supported his family of four on that amount during 2000. The petitioner has sufficiently demonstrated its ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner had adjusted gross income of \$45,925, including the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year he would have been left with \$21,755.40. Although that is a small amount upon which to support a family of four, this office is unable to find that the petitioner's owner would necessarily be unable to do so. The petitioner has sufficiently demonstrated its ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.