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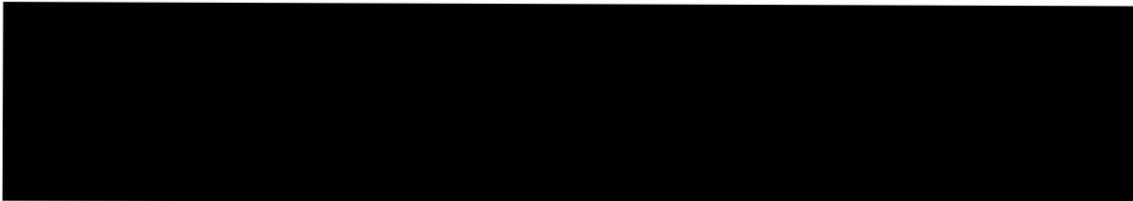
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 26 2007
WAC-05-103-50871

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:



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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a chef and head cook (Italian specialty chef). 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).¹ 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.

As set forth in the director's September 22, 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.

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).

¹ The instant petition is the second immigrant petition the petitioner filed on behalf of the beneficiary based on a same approved labor certification. The previous immigrant petition (WAC-03-110-54416) was filed on February 24, 2003 and denied on October 1, 2003. No further action was pursued against the denial of the previous petition. The petitioner filed the instant petition with a photocopy of the certified Form ETA 750, however, the record of proceeding contains the original copy of the DOL certified Form ETA 750 with the previous petition.

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour (\$41,600 per year)². The Form ETA 750 states that the position requires three (3) years of experience in the job offered.

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 appeal³. Relevant evidence in the record includes [REDACTED] Form 1040 U.S. Individual Income Tax Return for 2001 through 2004, [REDACTED] income statement for January through June 2005, [REDACTED] payroll summary for April through May 2003, a statement of monthly expenses for [REDACTED] family and corporate documentation of [REDACTED]. 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 was a sole proprietorship. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$130,000, and to currently employ 6 to 8 workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that the director should recognize the long standing history of the business, the fact that the petitioner transformed the company from a sole proprietorship into a corporation and the beneficiary will further boost the business revenue.

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 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,

² The petitioner filed the instant petition with a new prevailing wage determination (PWD) issued by California Employment Development Department (EDD) on November 9, 2004. The new PWD indicates that the prevailing wage is \$21.86 per hour. However, the AAO will consider the proffered wage set forth on the Form ETA 750 in determining the petitioner's ability to pay since the approved labor certification is still valid and used by the petitioner with the original priority date.

³ 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).

the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, neither the beneficiary nor the petitioner claimed that the beneficiary ever worked for the petitioner. The submitted [REDACTED] payroll summary for April through May 2003 indicates that the petitioner paid wages to its employees, however, the beneficiary was not among them. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not established that it employed and paid the beneficiary any amount of compensation from the priority date in 2001 onwards. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage in each relevant year.

As previously noted, the evidence indicates that the petitioner in the instant case was a sole proprietorship when the labor certification application was filed. 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 the line⁴ for 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:

In 2001, the Form 1040 stated adjusted gross income of \$21,450.
In 2002, the Form 1040 stated adjusted gross income of \$23,706.
In 2003, the Form 1040 stated adjusted gross income of \$23,356.
In 2004, the Form 1040 stated adjusted gross income of \$130,491

The record contains a statement of monthly expenses for the sole proprietor's family of three as of June 23, 2003. The petitioner stated the sole proprietor's household monthly expenses as follows: mortgage \$1,917, car payments \$617, auto insurance \$300, homeowner insurance \$210, health insurance \$280, dental insurance \$20, life insurance \$95, utilities (water & power/gas/cable/telephone) \$200, credit cards \$350, student loans \$55, clothing \$500, totaling \$4,544 per month (\$54,528 per year).

In the years 2001 through 2003 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage in each of these years without taking into consideration the sole proprietor's household living expenses. However, in 2004 the adjusted gross income was sufficient to pay the

⁴ 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.

proffered wage of \$41,600 as well as to cover the sole proprietor's family living expenses of \$54,528 that year. Therefore, the petitioner established its ability to pay the proffered wage as well as its household living expenses for 2004, but failed to establish that it had sufficient income to pay the proffered wage to the beneficiary and cover its household expenses for years 2001, 2002 and 2003.

CIS will consider the sole proprietorship'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 does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the shortage between the proffered wage plus the sole proprietor's living expenses and the adjusted gross income at the end of each year 2001, 2002 and 2003. The petitioner should address this issue in any subsequent proceedings.

Counsel asserted that the petitioner ran the business as a sole proprietorship until he converted into an S corporation named [REDACTED] in July 2004. The record contains corporate documentation for [REDACTED] including the article of incorporation, by laws, minutes, etc. These documents show that [REDACTED] on July 26, 2004, and that he is the 100% owner and sole shareholder of the corporation. However, there is no evidence to establish that [REDACTED] owns or runs [REDACTED] that [REDACTED] is a part of or the trade name of [REDACTED] or that [REDACTED] purchased or acquired the business of [REDACTED] from [REDACTED] and thus that [REDACTED] qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that [REDACTED] is the sole shareholder of [REDACTED] and was also the sole proprietor of the petitioner does not establish that [REDACTED] is a successor-in-interest to the petitioner as a sole proprietorship. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the successor-in-interest must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant petition, if it had been established that [REDACTED] is the successor-in-interest to the petitioner, [REDACTED] would have had to demonstrate that it had the ability to pay the proffered wage from July 2004, and that the instant petitioner as a sole proprietorship had the continuing ability to pay the proffered wage from the priority date in 2001 to July 2004. As previously discussed, the petitioner established its ability to pay the proffered wage and to cover the sole proprietor's household living expenses in 2004, but failed to demonstrate such ability in 2001 through 2003. The income statement for the six months from January through June 2005 appears to be submitted by counsel as evidence trying to establish [REDACTED]'s ability to pay the proffered wage for the first half of the year 2005. However, the income statement is not audited. 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 these statements, the AAO cannot conclude that they are audited statements. 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.

The petitioner mentioned in its supporting letter that the sole proprietor has been working for the restaurant as the owner and chef, and that the beneficiary would replace the sole proprietor's chef function. However, the petitioner did not verify how many hours per week the sole proprietor worked as a chef, and did not document

the sole proprietor's compensation for his chef services rendered. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, if the sole proprietor worked as a part time chef, then the beneficiary cannot replace him because the labor certification is approved for a full time chef.

Counsel's argument concerning the petitioner's gross income and longevity, however, cannot be overlooked. 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. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was in business for five years at the time the labor certification application was filed, and employs 6 – 8 employees. Among the four years 2001 through 2004 that the record contains financial information for the business under a sole proprietorship, 2004 was the best. The Schedule C of Form 1040 for 2004 indicates that the business' gross receipts were \$367,678, that the petitioner did not pay any salaries, and that the net income from the business was \$117,679. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001, 2002 and 2003 were uncharacteristically unprofitable years or difficult years but in a framework of profitable or successful years. Instead, it appears that 2004 was the only fairly profitable year. 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 not established that it had the continuing ability to pay the proffered wage.

On appeal counsel also asserts that the petitioner transformed the company from a sole proprietorship into a corporation in order to elevate the business, that the petitioner faced new challenges over the last 2 years, and that the beneficiary, if under its employ, will further boost the business' revenue. Counsel here urges the consideration of the petitioner's incorporation and the beneficiary's proposed employment as an indication that the petitioner's income will increase. 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 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 from 2001 through 2003.

Counsel's assertions cannot overcome the director's decision that the petitioner does not have 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.