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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 11 2007

WAC-06-109-51266

IN RE: Petitioner:
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, 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 an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook (Italian style cook). 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). As set forth in the director's July 25, 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 to the present. 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 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).

Here, the Form ETA 750 was accepted on November 19, 2003. The proffered wage as stated on the Form ETA 750 is $12.25 per hour ($25,480 per year). The Form ETA 750 states that the position requires two (2) years 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 appeal[1]. On appeal, counsel submits a brief and Form 1040 U.S. Individual Income Tax Return for 2005 filed by [redacted] and [redacted][2] Other relevant evidence in the record includes Schedule Cs to [redacted] and [redacted] Form 1040 U.S. Individual Income Tax Return for 2003 through 2005. 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 1998, to have a gross annual income of $765.00[3], to have a net annual income of $67,000, and to currently employ 8 workers. On the Form ETA 750B, signed by the beneficiary on October 5, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal counsel asserts that "Congress in its wisdom has amended 8 CFR 204.5(g)(2) by eliminating specific reference to ability to pay replaced it with the statutory requirement that the petitioner establish its bona fides as a U.S. employer (i.e., viability and longevity)" and also submits a copy of the new rule without a citation. However, counsel's reliance on proposed amendment of the current regulation at 8 C.F.R. § 204.5(g)(2) is misplaced. The proposal is not a regulation and the currently effective regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner establish its continuing ability to pay the proffered wage. 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, 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 Sonegawa*, 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 beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any evidence showing that the petitioner employed and paid the beneficiary any compensation during the

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[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).

[2] On the Form I-290B, counsel indicated that she would be submitting a separate brief and/or evidence to the AAO within 30 days. The appeal was received by the Texas Service Center on August 18, 2006. Since the AAO has received nothing further, the AAO sent a fax to counsel on September 26, 2007 informing counsel that no separate brief and/or evidence was received, to confirm whether or not she would send anything else in this matter, and as a courtesy, providing her with five (5) days to respond. To date, more than eight (8) weeks later, no reply has been received. Therefore, the AAO will evaluate the decision of the director, based on the evidence submitted in the record.

[3] This figure appears to be a typo, but counsel did not provide another figure for the petitioner's gross annual income.

relevant years from 2003 to the present. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary.

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 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 37[4], Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. However, the record does not contain any copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2003 and 2004 or any other regulatory-prescribed evidence, such as annual reports or audited financial statements for 2003 and 2004, to establish the petitioner's ability to pay the proffered wage in the years 2003 and 2004. The schedule C to the Form 1040 does not contain the sole proprietor's adjusted gross income and thus is not sufficient to be considered as primary evidence to establish the sole proprietor's ability to pay the proffered wage. The record before the director closed on July 17, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date the sole proprietor's federal tax returns for 2003 and 2004 should have been available. However, the petitioner did not submit the sole proprietor's 2003 and 2004 tax returns, nor did counsel explain why the tax returns were not submitted. 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). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns, annual reports or audited financial statements for 2003 and 2004. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2005. The Form 1040 stated adjusted gross income of $70,205 for 2005.

The above information shows that in 2005, the sole proprietor's adjusted gross income was $44,725 more than the proffered wage, and therefore, the sole proprietor had sufficient adjusted gross income to pay the

[4] The line for adjusted gross income on Form 1040 varies every year, however, it is Line 37 for 2005.

proffered wage in 2005. However, it is not clear that the petitioner could sustain a family of four with the amount of $44,725 since the petitioner did not submit a statement of monthly expenses for the sole proprietor's household. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, at 493. The petitioner failed to meet the burden by not submitting the statement of monthly expenses for the sole proprietor's household, and therefore, failed to establish the petitioner's ability to pay for 2005.

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 proffered wage plus the sole proprietor's living expenses in any relevant year.

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 in 2003 through 2005.

On appeal, counsel asserts that the petitioner has been in business over 12 years and consistently showing income ranging from $662,732 in 2003 to $894,946 in 2005. However, CIS examines 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). Reliance on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Counsel did not submit any evidence showing that the petitioner had the ability to pay the proffered wage in any relevant year with the growing gross receipts despite it has been in business over 12 years. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not established its ability to pay the proffered wage.

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, the petitioner has not established that it has made a bona fide job offer to the beneficiary.[5] Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or

[5] 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).

through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). In the instant case, the evidence in the record shows that the petitioner, a sole proprietorship, is owned by [redacted] and the beneficiary is [redacted]. The proprietor and the beneficiary appear to be related. Therefore, the petitioner cannot establish that it has made a *bona fide* job offer to the beneficiary.

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.