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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 02 2007

EAC 05 107 52420

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, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the instant preference visa petition, which 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 foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL) accompanied the petition. The acting 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 DOL. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 27, 2004. The proffered wage as stated on the Form ETA 750 is $400 per week, which equals $20,800 annually.

The Form I-140 petition in this matter was submitted on March 3, 2005. On the petition, the petitioner stated that it was established during 1998 and that it employs two workers. The petition states that the petitioner's gross annual income is $286,165 and that its net annual income is $32,395. On the Form ETA 750, Part B, signed by the beneficiary on October 20, 2004, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Juana Diaz, Puerto Rico.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) the petitioner's owner's 2003 English-language Commonwealth of Puerto Rico Individual Income Tax Return, (2) the petitioner's owner's 2004 Spanish language Commonwealth of Puerto Rico Individual Income Tax Return, (3) a blank copy of a 2004 English language Commonwealth of Puerto Rico Individual Income Tax Return, (4) the petitioner's compiled December 31, 2004 balance sheet and income and expense statement in Spanish and an English translation, (5) an English language version of the petitioner's reviewed[2] December 31, 2004 balance sheet and income and expense statement, and (6) two Notice of Interest Paid documents in both English and Spanish. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's owner's tax returns show that he is married, has two dependents, and holds the petitioner as a sole proprietorship.

The 2003 tax return includes a Schedule K Industry or Business Income form. During 2003 the petitioner returned net income of $34,015. The petitioner's owner's adjusted gross income, which included the petitioner's net income, was also $34,015. This office notes that because the priority date of the instant petition is October 27, 2004 evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Although the 2004 return is not accompanied by an English translation, *per se*, a blank copy of the same form in English accompanies it. That blank form in English was apparently intended to serve as a translation of the Spanish words and phrases on the Spanish-language return and will be considered a translation that fulfills the requirements of 8 C.F.R. 103.2(b)(3). This office will consider the petitioner's owner's 2004 tax return.

The petitioner's owner and his spouse filed a joint 2004 return. That return also includes a Schedule K Industry or Business Income form. During 2004 the petitioner returned net income of $31,415. The petitioner's owner's adjusted gross income, which included the petitioner's net income, was also $31,415. The petitioner's owner and owner's spouse claimed deductions for two children during that year.

The interest notices state the amount of interest the petitioner's owner paid during 2004. The proposition those documents were intended to support is unknown to this office.

The acting director denied the petition on November 30, 2005.

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[1] On the form appeal counsel indicated that she would file a brief or additional evidence within 30 days. On May 24, 2007 this office sent counsel a facsimile transmission inquiring whether she had submitted any additional evidence or argument. Counsel responded that she had not. The visa petition will be adjudicated based on the evidence of record.

[2] The accountant's report states that it is a "Revision Report," and states, "A revision is substantially less than an audit . . . ." The context demonstrates that the use of the word revision is merely a poor translation from the Spanish and that the report is a review report.

On appeal, counsel asserted,

> That the decision of [CIS] was erroneous since they did not take into account that there is a schedule of income for the business, in spite of being a solely owned enterprise, in which there are salaries being paid in the amount of $32,240 and thus the income of the owner of $31,415 is clean for him and his family. [T]he list of espenses [sic] are [sic] close to $20,000 but he has left around $11,000 for the living expenses after deducting credit card, automobile loan and mortgage. According to the poverty guidelines for a family of four the income is $24,187 and their income is over $31,000. [CIS] erred when it failed to consider the scdedule [sic] for the business submitted as part of the 2004 tax return in which the net income of the business was $268,735 and there is $32,240 in salaries and another $4,385 in payroll that is money that is used to pay the workers. The proferred [sic] salary is $20,800 and the evidence submitted and properly evaluated clearly establishes the ability to pay the proferred [sic] salary. [W]e appeal this decision as erroneous and request the approval of the same and we will provide a brief in support.

What counsel means when she says, ". . . the income of the owner of $31,415 is clean for [the petitioner's owner] and his family . . . ." is unclear. Her point pertinent to the ". . . schedule of income for the business . . . ." is also unclear. She appears, however, to be stating that the petitioner's adjusted gross income includes the petitioner's net income, after payment of all business expenses.

Counsel's reliance on the unaudited financial statements in the record 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. The accountant's reports that accompanied those financial statements make clear that one was produced pursuant to a compilation and the other pursuant to a review. Neither was produced pursuant to an audit.[3] As that report also makes clear, the accountant therefore provided no assurance of the accuracy of those financial statements and did not even express an opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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,

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[3] Both the reviewed and the compiled versions of the petitioner's financial statements were produced on February 10, 2005. This office notes that a compilation report indicates, among other things, that the accountant produced the report himself. As such he is not independent of the report and is unable to review it. A review report, as the name implies, indicates that the accountant reviewed the report.

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 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.

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, however, is a sole proprietorship. 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 income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is $20,800 annually. The priority date is October 27, 2004.

On his 2004 return the petitioner's owner declared adjusted gross income of $31,415. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income he would have been left with $10,615 on which to support himself, his wife and two dependents during that year. The record contains no evidence pertinent to the petitioner's owner's family's expense. To assume that he could have supported a family of four for a year on $10,615, however, seems unreasonable.

The petitioner's owner's 2004 tax return does not demonstrate that he was able to pay the proffered wage and continue to support his family. The record contains no other reliable evidence pertinent to the petitioner's ability to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The visa petition in this matter was submitted on March 3, 2005. On that date the petitioner's 2005 tax return was unavailable. On May 10, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests additional issues that were not addressed in the decision of denial.

In the May 10, 2005 request for evidence the service center requested ". . . an itemized list of [the petitioner's owner's] monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. . . ." The petitioner did not submit the petitioner's owner's budget as requested.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied for this additional reason. If the petitioner wishes to further pursue this matter, however, however, it should address this issue.

Further, this office notes that the family name of the petitioner's owner is [redacted], as is the family name of the beneficiary. This suggests that they may be related either by blood or marriage.

Pursuant to 20 C.F.R. §656.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and 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 the relationship may be financial, by marriage, or through friendship." *See Matter of Summart,* 374, 00-INA-93 (BALCA May 15, 2000)

Because the decision of denial did not discuss this issue, the petitioner has not been accorded the opportunity to address it, and today's decision does not rely on that issue. If the petitioner wishes to further pursue this matter, however, however, it should address the relationship, if any, between the petitioner's owner and the beneficiary.

The petitioner has not demonstrated its 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 and the petition may not be approved.

ORDER: The appeal is dismissed.