U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 06 2007
WAC-03-056-53288

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because the petitioner had not established that the beneficiary had the requisite experience as stated on the labor certification application at the time the request for certification was filed and the petitioner had not established that it had the ability to pay the proffered wage from the priority date. On the subsequent appeal, the AAO affirmed the director's decision.

Counsel filed the instant motion on April 3, 2006. As of the beneficiary's requisite experience, counsel does not submit any additional evidence, but asserts that: "[t]he report issued by the investigating officer provides a conclusion that the beneficiary was never employed at [redacted] His statements were contrary to the facts. Upon being questioned by the beneficiary's sister regarding his statements to the investigator, [redacted] apologized to her for misstating the fact of [the beneficiary]'s employment as a chef at his restaurant. [redacted] could not recall that [the beneficiary] had worked the evening and night shifts to earn additional money due to his son's medical treatment expenses. [Counsel's] office contacted [redacted] to confirm the mistake and asked for a notarized affidavit to support his statement. The petitioner made later efforts to obtain the affidavit but [redacted] had closed the restaurant and could not be located." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The motion to reopen does not qualify for consideration on this issue under 8 C.F.R. § 103.5(a)(2) because the petitioner is not providing new facts with supporting documentation not previously submitted. Nor does the motion to reconsider qualify for consideration on this issue under 8 C.F.R. § 103.5(a)(3) because the petitioner does not assert that the director and the AAO made an erroneous decision through misapplication of law or policy.

As to the issue of whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date to the present, counsel submits the petitioner's 2004 and 2005 tax returns to support the claim that the petitioner is steadily generating more revenue and expanding the payroll for additional employees. The motion to reopen qualifies for consideration on the second issue under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

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 or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form ETA 750 was accepted for processing on March 16, 2001. The certified Form ETA 750 in the instant case states that the position of chef requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on March 10, 2001, the beneficiary did not claim to have worked for the petitioner. The proffered wage as stated on the Form ETA 750 is $2002 per month ($24,024 per year).

To be eligible for approval, 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 the Department of Labor. *See* 8 CFR § 204.5(d).

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.

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 record of proceeding does not contain any evidence that the petitioner hired and paid any amount of compensation to the beneficiary during the relevant years, including 2004 and 2005. Therefore, the petitioner did not demonstrate that it paid the beneficiary the proffered wage beginning on the priority date of March 16, 2001 to the present.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2005. 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).

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage and/or the difference between the wage already paid to the beneficiary and the proffered wage of $24,024 per year from the priority date.

> In 2001, the Form 1040 stated adjusted gross income[1] of $(97,301).
> In 2002, the Form 1040 stated adjusted gross income of $(123,721).

[1] IRS Form 1040 for 2001, Line 33.

In 2003, the Form 1040 stated adjusted gross income of $(85,275).
In 2004, the Form 1040 stated adjusted gross income of $(35,050).
In 2005, the Form 1040 stated adjusted gross income of $(4,538).

The sole proprietor supports a family of three (3). Counsel does not submit a statement of monthly expenses for the sole proprietor on motion. However, the above information indicates that the petitioner's adjusted gross income for 2001 through 2005 is negative. Therefore, the petitioner did not demonstrate that there was sufficient adjusted gross income to pay the beneficiary the proffered wage in 2001 through 2005 even without taking into account the sole proprietor's living expenses.

CIS will consider the sole proprietorship's income and his or her 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 documents showing the petitioner's liquid assets.

The new evidence submitted on motion does not establish that the petitioner had ability to pay the proffered wage in 2001, the year of the priority date, and 2002 to 2003. The newly submitted tax returns for 2004 and 2005 even cannot establish the petitioner's ability to pay the proffered wage in 2004 and 2005 respectively.

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 as of the priority date.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the investigation report conducted by the officer in charge in Seoul, Korea that demonstrates that the beneficiary did not possess the requisite experience. Counsel's assertions and newly submitted evidence on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The evidence submitted on motion does not demonstrate that the beneficiary possessed the requisite experience for the proffered position prior to the priority date, and that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date to the present.

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 motion to reopen is granted. The previous decision of the AAO, dated March 1, 2006, is affirmed. The petition is denied.