

PUBLIC COPY

Identifying data deleted to
prevent clear & unambiguous
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

AB6
MAR 08 2015



FILE: WAC 01 280 56404 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be withdrawn and the petition will be approved.

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, accompanies 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. The AAO concurred with the director's decision on appeal.

On motion, counsel submits a brief 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 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 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 2, 2001. The proffered salary as stated on the labor certification is \$10.09 per hour or \$20,987.20 per year.

On motion, counsel submits copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements, a copy of a personal account for the petitioner, a copy of an unaudited balance sheet for 2002, copies of the petitioner's 2001 and 2002 Forms 941, Employer's Quarterly Federal Tax Returns, and copies of the petitioner's 2001 and 2002 Forms DE-6, Quarterly Wage and Withholding Reports. The beneficiary's 2001 and 2002 Forms W-2 reflect wages earned by the beneficiary of \$8,348.80 and \$19,800, respectively. The Forms DE-6 show that the beneficiary was the only employee working for the petitioner from the third quarter 2001 through the end of 2002. Counsel states:

Service, in its denial dated May 20, 2002, did not take into account the item 26 (wages) of the schedule C of the 2001 tax returns. Service seems to have relied [on] 2000 w-2 records in reaching its decision. Petitioner had hired the alien (beneficiary of this petition) in the month of August 2001 and since then the beneficiary has been on the payroll as a cook and being paid the proffered wages. Per 2001 tax return adjusted gross income was \$17,202 plus depreciation of \$1,735 totaling \$18,937. In the same year 2001 the alien was paid \$8,649 in wages (which amounts to about 5 months of salary). Taking the ongoing in account petitioner had sufficient funds to pay the alien worker for the months preceding August year 2001. And the worker had been paid since August of the year 2001.

* * *

Petitioner employed and placed the alien on its payroll from the time I-140 petition was filed i.e. since August 2001. Moreover, petitioner has already submitted his bank statements for the period March 31, 2001 through May 31, 2002. Even if viewed independently, Petitioner had enough funds to pay the proffered wages from its bank account alone. Failure to consider the totality of the circumstances is an abuse of discretion under the Elatos Standard enunciated supra.

Employment of the Alien cook (Preetpalwinder Singh) has resulted in Increased Productivity.

Petitioner wants to highlight and bring to AAO's attention the fact that since the hiring of the beneficiary the sales have gone up the clientele has increased and overall productivity has gone up. Petitioner has been able to apply his management skills in augmenting the business, as he is free from the stress of cooking and kitchen affairs now being well handled by the alien. Petitioner is able to meet its payroll obligations and is regularly paying the alien worker the proffered wages. The restaurant's financial health is better than ever and prospects are promising. Petitioner has about \$38,000.00 in his account the verification of which by the bank is attached herewith and marked as Exhibit "E". The above clearly goes to show that the employer has ability to pay the proffered wage, now at present and in the future as well. In sum this small business is financially viable.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 petitioner did not establish that it employed the beneficiary at a salary equal to or greater than the proffered wage in 2001 and 2002.

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 is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of two in 2001 and 2002. The beneficiary's 2001 and 2002 Forms W-2 reflect wages earned by the beneficiary of \$8,348.80 in 2001 and \$19,800 in 2002. When these amounts are subtracted from the beneficiary's proffered wage, the resulting figures are \$12,638.40 (\$1,053.20 per month) and \$1,187.20 (\$98.94 per month), respectively. In 2001, the sole proprietorship's adjusted gross income was less than the proffered wage. However, a review of the record of proceeding reveals that the restaurant's bank statements for the period March 1, 2001 through May 31, 2002 show balances (a low of \$2,311.47 to a high of \$13,866.15) above that needed to pay the beneficiary the proffered wage of \$20,987.20 per year. ($\$20,987.20 \text{ proffered wage} / 12 \text{ months} = \$1,748.93 \text{ per month}$) In addition, the petitioner's personal bank account reflected a balance of \$26,739.58 as of June 6, 2002 and \$38,271.75 as of June 6, 2003. Even though a statement of monthly expenses was not provided, it is concluded that the petitioner and one family member could live off the balance in his personal account.

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 sustained that burden. Accordingly, the previous decision of the AAO will be withdrawn, and the petition will be approved.

WAC 01 280 56404

Page 5

ORDER: The AAO's decision of June 5, 2003 is withdrawn. The petition is approved.