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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

MAR 23 2005



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC-03-148-52167

IN RE: Petitioner: [REDACTED]
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:



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

The petitioner is a full services Chinese 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, accompanied 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 director also found that the petitioner had submitted inconsistent information on the issue of whether the beneficiary had been employed by the petitioner as of the priority date. The director accordingly denied the petition.

On appeal, counsel states that the petitioner has been paying the beneficiary in cash for his service as a cook with the petitioner and that the petitioner has the ability to pay the proffered wage

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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.50 per hour, which amounts to \$21,840.00 annually. On the Form ETA 750B, signed by the beneficiary on December 6, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$588,519.00, to have a net annual income of \$77,152.00, and to currently have six employees.

In support of the petition, the petitioner submitted copies of newspaper advertisements for the offered position; a copy of a written statement dated August 12, 2002 by [redacted] the petitioner's general manager, regarding the posting of a notice of job opportunity; a copy of a Posting Notice with posting dates from July 29, 2002 to August 12, 2002; a Statement Regarding Original Documents dated April 22, 2003

signed by counsel; an undated letter from Thuy Huong Pham stating the beneficiary's employment by him as a cook from November 1999 until December 2001; a copy of Schedule C Profit and Loss for a Business for the petitioner for 2001; a copy of Schedule E, for [REDACTED] and [REDACTED] with the title of the schedule illegible, showing income or loss from partnerships and S corporations for 2001; a copy of a menu for seven restaurants operating under the name China Cafeteria; and a letter dated April 22, 2003 from Than [REDACTED] the petitioner's general manager, stating the beneficiary's employment with the petitioner as a cook from January 2002 until the date of the letter.

In a request for evidence (RFE) dated October 10, 2003 the director requested further evidence on the petitioner's ability to pay the proffered wage. The director also requested an explanation of a correction appearing on the ETA 750 relating to the priority date, with no initials on the correction.

In response to the RFE, counsel submitted a letter dated December 1, 2003 and the following evidence: a copy of Schedule C Profit or Loss from a Business (though with the title of the schedule illegible) for the petitioner for 2002; a copy of Schedule C Profit or Loss from a Business (again with the title of the schedule illegible) for China Cafeteria #6 for 2002; and a letter dated November 26, 2003 from a certifying officer, Employment and Training Administration, U.S. Department of Labor stating that the correction of the priority date on the ETA 750 had been made by the U.S. Department of Labor, and that a stamp showing that correction had been mistakenly left off the Form ETA 750.

In a decision dated December 17, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also found that the petitioner had submitted inconsistent information on the issue of whether the beneficiary had been employed by the petitioner as of the priority date. The director accordingly denied the petition.

On appeal, counsel submits no brief and no additional evidence. On the Form I-290B notice of appeal, signed by counsel on January 15, 2004, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days and counsel also made a separate statement to that effect in block 3 of the form. However, no further documents have been received by the AAO to date.

Counsel states in the notice of appeal that the correction to the ETA 750 was acknowledged by the U.S. Department of Labor, that no incorrect information had been submitted to the director, and that the petitioner is extremely profitable and has sufficient funds to pay the proffered wage.

Since no new evidence has been submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on December 6, 2001, the beneficiary did not claim to have worked for the petitioner. In counsel's letter dated April 22, 2003, which was submitted with the I-140 petition, counsel stated the following: "[The beneficiary] is employed by [the petitioner]. His responsibilities are to prepare, season and cook oriental dishes for a full service Chinese restaurant. His wages are \$10.50/hour."

In a letter dated April 22, 2003, which was submitted with the I-140 petition, the petitioner's general manager states "[The beneficiary] has been employed with [the petitioner] since January, 2002. [The beneficiary] is employed as a Cook. He is currently earning an annual salary of \$21,840.00. [The petitioner] continues to employ and support [the beneficiary's] application for permanent residency in the U.S."

The I-140 petition was received by CIS on April 25, 2003, along with the two letters mentioned above and other supporting documentation.

With the I-140 petition submitted by the petitioner, the beneficiary concurrently filed a Form I-485 Application to Register Permanent Residence or Adjust Status. In support of that application the beneficiary submitted a Form G-325A Biographic Information, signed by the beneficiary on April 23, 2003, which states that the beneficiary had been employed by the petitioner from January 2002 through the date of the Form G-325A.

In the RFE, which was dated October 10, 2003, the director specifically requested copies of W-2 forms, copies of all pages of the petitioner's income tax return for 2002 and copies of the I-9 documentation which had been submitted to the petitioner by the beneficiary.

In response to the RFE, in a letter dated December 1, 2003, counsel stated the following:

You requested W-2s and all pages of 2002 Income Tax Return plus I-9 for the beneficiary. [The beneficiary] is not employed by [the petitioner.] Unfortunately our cover letter was incorrect and should have stated that he would be employed by [the petitioner]. I have enclosed a copy of the 2002 tax return as requested.

Counsel's statements in his December 1, 2003 letter are inconsistent with the evidence submitted by the beneficiary and by the petitioner's general manager. Counsel's denial of the petitioner's employment of the beneficiary was offered as an explanation for the absence of W-2 forms requested by the director in the RFE. The assertions of counsel, however, 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). The only evidentiary statements pertaining to the dates of the beneficiary's employment with the petitioner are those of the beneficiary on the Form ETA 750B and on Form G-325A and those of the petitioner's general manager in his letter dated April 22, 2003. On the Form ETA 750B, signed on December 6, 2001, the beneficiary states no employment with the petitioner. On the Form G-325A, signed a year and three months later on April 23, 2003, the beneficiary states that he had begun working for the petitioner in January 2002. In his letter dated April 22, 2003, the petitioner's general manager also states that the beneficiary began working for the petitioner in January 2002. No inconsistencies exist in the evidentiary statements. Counsel's statement in his earlier letter of April 23, 2003 that the beneficiary was then employed by the petitioner is also consistent with the evidence submitted by the beneficiary and by the petitioner's general manager.

In the notice of appeal, signed by counsel on January 15, 2004, counsel abandons his earlier explanation for the absence of W-2 forms for the beneficiary and states that the beneficiary began working for the petitioner in January 2002, but counsel states that because of the lack of a social security number or other number for withholding tax, the beneficiary was paid in cash. Counsel states that the petitioner had denied that the beneficiary was an employee because of confusion over terminology, due to the limited English of the petitioner's owner and the beneficiary. However, the only statement in the record denying employment of the beneficiary after January 2002 is that of counsel himself. No such denial is found in the statements of the petitioner's general manager or of the beneficiary. Although counsel's contradictory statements create confusion in the record, they are not evidentiary inconsistencies. *Cf. Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record is sufficient to establish that the petitioner began employing the beneficiary as a cook in January 2002. Nonetheless, no evidence establishes the amount of compensation paid by the petitioner to the beneficiary for this work. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, the evidence pertaining to the petitioner's employment of the beneficiary fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The evidence in the instant petition, however, contains no complete Form 1040 tax returns for the petitioner's owner. The only tax documents in the record consists of copies of Schedule C Profit and Loss for a Business for the petitioner for 2001 and 2002, a copy of Schedule E for the petitioner's owner and his wife showing income or loss from partnerships and S corporations for 2001, and a copy of Schedule C Profit and Loss for a Business for 2002 for China Cafeteria No. 6. The tax documents submitted by the petitioner do not contain information on the adjusted gross income of the petitioner's owner, nor do they contain any other information which could serve as the basis for determining the net income of the petitioner's owner. Moreover, the tax documents in the record lack any information about any dependents of the petitioner's owner, thereby preventing any determination of the size of the household of the petitioner's owner.

For the foregoing reasons, the tax documents submitted in evidence fail to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) quoted on page two permits annual reports or audited financial statements as alternative forms of acceptable evidence, but the petitioner submitted no such evidence, nor any of the other types of evidence described in that regulation.

The record contains a copy of a menu of China Cafeteria, which is the petitioner's name. That menu states a total of seven locations for restaurants of that name, in Decatur, Atlanta, and College Park, all apparently in Georgia. Six of those restaurants are numbered, 1 through 6, and the seventh is identified as "Jr." The address corresponding to the petitioner's address is that for China Cafeteria No. 3. The menu does not indicate whether all seven restaurants share a common ownership. The Schedule C in the record for China Cafeteria No. 6 gives the name of its proprietor as the same name as the petitioner's owner. But the record does not indicate whether the other five restaurants operating under that name are also owned by the same owner. In any event, the menu provides no significant additional information pertaining to the petitioner's ability to pay the proffered wage.

No other evidence in the record pertains to the petitioner's ability to pay the proffered wage. The evidence therefore fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

In his decision, the director stated that the petitioner's response to the RFE had included the requested income tax return for 2002. However, in fact no complete income tax return was submitted in evidence. The only portions of a return for 2002 were the copies of the two Schedules C Profit and Loss from a Business discussed above. The director concluded that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Although the director's analysis of that issue was incomplete, the director was correct in concluding that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period, for the reasons discussed above.

Concerning the petitioner's employment of the beneficiary, the director stated that the petitioner had submitted "conflicting evidence." (Director's Decision, page 1). But in fact, as discussed above, no conflicts exist in the evidentiary documents concerning the beneficiary's employment. The only conflict exists in counsel's letter of December 1, 2003, where counsel denies that the beneficiary is then an employee of the petitioner. But, as noted above, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506.

The director cited Section 212(a)(6)(C) of the Act concerning fraud and willful misrepresentation. But that section pertains only to actions by an alien in terms of his or her admissibility, and the record in this petition contains no indications of any incorrect or inconsistent statements made by the alien in this case, that is, by the beneficiary. Counsel's statements in his December 1, 2003 letter denying that the petitioner was then employing the beneficiary are inconsistent with the evidence and with other statements by counsel. But even if counsel's statements in his December 1, 2003 letter are assumed to be incorrect, nothing in the record indicates that such statements constitute either fraud or willful misrepresentation.

For the foregoing reasons, although the decision of the director contained errors in analysis, the decision of the director to deny the petition was correct, since the evidence fails to establish the petitioner's ability to pay

the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The assertions of counsel in the notice of appeal fail to overcome the decision of the director.

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.