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**U.S. Citizenship
and Immigration
Services**

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BL

FILE: [Redacted]
EAC 03 125 50601

Office: VERMONT SERVICE CENTER

Date: **SEP 16 2005**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant organized as a sole proprietor. It seeks to employ the beneficiary permanently in the United States as a kitchen manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petitioner has substituted the beneficiary for the prospective employee named in the application. 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 and denied the petition accordingly.

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 November 21, 1997. The proffered wage as stated on the Form ETA 750 is \$17.86 per hour, which amounts to \$37,148.80 annually. On the Form ETA 750B, which was signed on November 13, 1997, by the previous employee whom the beneficiary has since replaced, the previous employee claimed to have worked for the petitioner beginning in August 1996, and continuing through the priority date established by the filing of the Form ETA 750B.

The Form I-140 petition was submitted on February 10, 2003. On the petition, the petitioner claimed to have been established in 1994, to currently have three employees, to have a gross annual income of \$310,000, and to have a net annual income of \$65,000.

In support of the petition, the petitioner submitted:

- A Form G-28 naming counsel as the petitioner's representative;
- A statement by a former employer on letterhead dated December 12, 2002, stating that the current beneficiary worked in Lebanon as the hospital's kitchen manager and food caterer from July 1, 1995 until September 30, 1997.

- The 2001 Form 1040 tax return of [REDACTED] the sole proprietor of the petitioner restaurant.

In a request for evidence (RFE) dated November 13, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage for 1997, and its federal tax return for 1997. The director also specifically requested copies of the petitioner's Form W-2 Wage and Tax Statements for 1997.

In response to the RFE, the petitioner submitted:

- The petitioner's 1997 Form 1040 with Schedule C; and,
- The 1999 Form W-2 the petitioner issued to De Oliveira, listing wages paid of \$9,100.

On April 15, 2004, 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, and denied the petition.

On the I-290B, signed by counsel on May 13, 2004, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO and specified he would do so within 60 days. However, no further documents have been received by the AAO to date. On August 19, 2005, the AAO in a facsimile transmission gave counsel an additional five days in which to submit evidence or a brief. To date, again, the AAO has received no further documents in this matter. Accordingly, the AAO will decide based upon the existing record of proceedings.

Counsel states on appeal that the petitioner has demonstrated its ability to pay the proffered wages. In particular, he states that the petitioner has hired the beneficiary "as the substituted beneficiary in the Labor certification [sic]," adding that the proffered position was an existing one.

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 first year of 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner has employed the beneficiary and his predecessor in the job since the priority date. If the petitioner were to establish by documentary evidence that it employed the beneficiary or his predecessor 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 previous holder of the proffered position on November 13, 1997, claimed to have worked for the petitioner beginning in 1996 and continuing through the date of the ETA 750B. However, the beneficiary did not sign a Part B of a supplemental

labor certification application, making uncertain whether the proffered position replaces a worker in an existing job.¹

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, the AAO will consider compensation the beneficiary or the predecessor beneficiary actually received from the petitioner as proven, and therefore only require the petitioner to establish its ability to pay the remainder of the proffered wage. However, the record does not contain any Form W-2 Wage and Tax Statements for the current beneficiary but only a 1999 Form W-2 statement issued to the predecessor showing \$9,100 in wages paid that year.

While counsel states on the Form I-290B that the petitioner has hired the current beneficiary, there is nothing in the record that documents counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

¹ The final paragraph of the decision discusses the requirement that a substituted beneficiary must also sign the ETA 750.

Tax Year	Adjusted Gross Income	Wage Increase Needed To Pay The Proffered Wage	Surplus Or ² (Deficit)
1997	\$44,044	\$37,148.80	\$6,895.20
2001	\$70,676	\$37,148.80	\$33,527.20

Even without inquiring into the petitioner's adjusted gross income for the intervening years from 1997 to 2001, the above calculations still do not establish the petitioner's ability to pay for 1997. In 1997, the sole proprietor's tax return lists the sole proprietor, his spouse, and four other dependents. Further, even without a list of the petitioner's monthly household expenses to take into account, it is not likely that the sole proprietor could have afforded the proffered wage and met his household expenses as well. Similarly, the record of proceeding does not establish that the sole proprietor could have paid the wage and met his personal expenses in 2001, although with documentation of expenses, it may be possible to demonstrate his ability to pay for 2001.

Although the RFE did not request a list of the petitioner's monthly expenses or documents beyond 1997, such as for 2000–2002, this office agrees with the director's decision denying the petition because the petitioner failed to demonstrate the ability to pay the proffered wage in 1997 or in 2001. Any further proceedings, in this matter should, however, include consideration of the petitioner's ability to pay in 2001–2002, and should consider the petitioner's monthly household expenses.

The petitioner has thus not established that it has the ability to pay the proffered wage for the proffered position by demonstrating either that it employed the beneficiary and his predecessor from the priority date forward, or that, accounting for its monthly household expenses, still leaves the petitioner with enough to pay the proffered wage.

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.

Beyond the decision of the director, this office notes that the petitioner may substitute a beneficiary for one named in an approved Form ETA 750 application so long as the succeeding beneficiary also signs a supplementary Part B to the application and also qualifies for the position as of the priority date. See Memo, Crocetti, Assoc. Comm., Adjudications, HQ 204.25-P (March 7, 1996), Ira Kurzban, *Immigration Law Sourcebook* (9th Ed.), 721-2. While the December 23, 2003 statement of the Lebanese Canadian Hospital shows the beneficiary would qualify for job, nothing in the record indicates that the beneficiary has signed Part B of a supplemental Form ETA 750 declaring whether or not he has worked for the petitioner.

ORDER: The appeal is dismissed.

² This amount does not reflect the amount the petitioner needs to support his family household.