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Washington, DC 20529



U.S. Citizenship
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Services

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FILE:

[Redacted]
EAC 03 173 52605

Office: VERMONT SERVICE CENTER

Date: **JUL 24 2006**

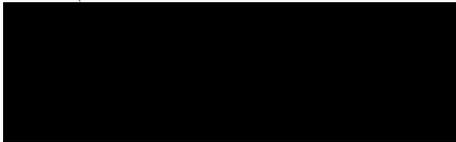
IN RE:

Petitioner:
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:



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 "Michael Valdez".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The previous decision of the director with regard to the petitioner's ability to pay the proffered wage as of the 2001 priority date will be withdrawn. The petition is remanded to the director for further consideration of the petitioner's continuing ability to pay the proffered wage.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Mexican specialty food. 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. Accordingly, the director denied the petition.

On appeal, counsel states that, as a sole proprietor, the petitioner had additional assets that the director should have considered in addition to the petitioner's adjusted gross income.

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.

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 Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 27, 2000. The proffered wage as stated on the Form ETA 750 is \$14.75 an hour, or an annual salary of \$30,680. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1995, to have two part-time employees, to have a gross annual income of \$72,000, and a net annual income of \$33,316. In support of the petition, the petitioner submitted a letter of employment verification for the beneficiary [REDACTED] de Bauer, Mexico City, that stated the beneficiary had worked in the restaurant Baby-O for ten years. The petitioner also submitted a copy of a prior AAO denial of

an appeal of a previous petition filed for the beneficiary dated August 28, 2001. In addition, the petitioner submitted a copy of a Time Certificate of Deposit from Commerce Bank, Camden, New Jersey, issued on March 12, 2001 for \$30,000. The petitioner also submitted its Form 1040, individual income tax return, for tax year 2001. This document indicated that the petitioner had an adjusted gross income of \$38,525 in 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 17, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide documentation as to the business owner's date of birth, and also to submit an itemized list of the sole proprietor's monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, and medical costs for 2001.

In response, counsel submitted a copy of the petitioner's alien resident card and a translated copy of his birth certificate. Counsel also submitted an itemized list of the sole proprietor's monthly expenses that totaled \$1,175 monthly, and \$14,100 yearly.

On July 14, 2004, the director denied the petition. In his denial, the director examined both the petitioner's 2001 adjusted gross income of \$38,525, and the petitioner's annual household expenses of \$14,100. The director subtracted the petitioner's annual expenses from his adjusted gross income, and determined that the petitioner had \$24,425 available to pay the beneficiary's proffered wage of \$30,680. The director then determined that this sum was not sufficient to pay the beneficiary's salary, and that the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel states CIS ignored evidence that the sole proprietor had a certificate of deposit for \$30,000 at his disposal during the priority year with which to pay the proffered wage. Counsel states that this evidence is relevant because the petitioner is a sole proprietor, and the certificate of deposit can be considered when assessing the petitioner's ability to pay the proffered wage. Counsel states that the petitioner had \$68,525 then available to him to pay the proffered wage.¹ Counsel states that CIS abuses its authority by not considering additional sources of funding for sole proprietors such as certificates of deposit which is money immediately available to the holder of such a certificate. Counsel cites to *Hong Kong T.V. Video Program Inc v. Ilchert*, 685 F. Supp. 712,718 (N.D. Calif. 1988), *Buletini y. INS*, 860 F. Supp 1222 (E.D. Mich 1994) and *Elatos Restaurant Corp. D/B/A Corner Lunch v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) and *Augat, Inc. v Tabor*, 719 Supp. 1158(D. Mass 1989) to support her assertion with regard to the CIS abuse of discretion.

With regard to the precedent cases cited by counsel, these cases, with the exception of *Elatos*, primarily involve decisions that examined the beneficiary's classification as a professional. Furthermore, CIS does not see how *Augat* and *Hong Kong TV* are binding precedents on CIS outside of the district of Massachusetts and California, respectively. In addition, *Hong Kong TV* is irrelevant as it involves nonimmigrant H-1B petitions, and not employment-based immigrant petitions. Nevertheless counsel is correct in questioning why the director did

¹ Counsel apparently added the sole proprietor's adjusted gross income and the value of the certificate of deposit to arrive at this figure. She did not consider the sole proprietor's monthly or annual expenses in her calculations.

not examine or consider the sole proprietor's certificate of deposit as a source of additional funding for the proffered wage. This issue will be addressed further in these proceedings.

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. As established by the ETA Form 750, the petitioner did not employ or pay the beneficiary prior to or following the priority date.

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 supports himself and two children. The petitioner's adjusted gross income in the year 2001 was \$38,525. In response to the director's request for an itemized list of household expenses, the petitioner provided a breakdown of monthly expenses that totaled \$1,175 a month, or \$14,100. When the monthly expenses of the petitioner are subtracted from the petitioner's gross adjusted wage for 2001, \$24,425 remains, which is \$6,265 less than the proffered wage. Thus, the petitioner has not established that it can pay the proffered wage, and sustain himself and his two children, based on his adjusted gross income.

Nevertheless the petitioner submitted to the record evidence a one year certificate of deposit in the amount of \$30,000 that was issued in March 2001, a date prior to the certification of the ETA 750. As stated previously,

the sole proprietor's assets are also considered as part of the petitioner's ability to pay. The sole proprietor's certificate of deposit, should be considered to be available, although subject to penalty for early withdrawal for the sole proprietor to pay the proffered wage and/or his personal expenses. In the instant petition, the funds available in the sole proprietor's certificate of deposit could easily cover the amount of \$6,265, the sum lacking if the sole proprietor's adjusted gross income, minus his annual expenses, were utilized to pay the proffered wage. Thus, the sole proprietor has established that it had the ability to pay the proffered wage as of the April 2001 priority date. The director's decision with regard to the sole proprietor's ability to pay the proffered wage in tax year 2001 is withdrawn.

What is not clear is whether the sole proprietor continues to have the ability to pay the proffered wage following the priority date. As stated previously, 8 C.F.R. § 204.5(g)(2) states, in pertinent part: "The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence."

It is noted that the Service Center received the sole proprietor's I-140 petition on May 12, 2003. By this date, the petitioner would have submitted its federal income tax return for tax year 2002, or documentation requesting an extension of time in which to file the 2002 tax return. However, the director in his request for further evidence did not request any further evidence of the sole proprietor's ability to pay the proffered wage, but rather addressed the provision of the sole proprietor's birth date and monthly expenses. Therefore the record is not complete as to whether the sole proprietor, through the use of additional certificate of deposits and continuing similar levels of adjusted gross income, continues to have the ability to pay the proffered wage.

In view of the foregoing discussion, the previous decision of the director will be withdrawn. The petition is remanded to the director for further consideration of the petitioner's continuing ability to pay the proffered wage. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The previous decision of the director with regard to the petitioner's ability to pay the proffered wage in 2001 will be withdrawn. The petition is remanded to the director for further consideration of the petitioner's continuing ability to pay the proffered wage. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.