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U.S. Citizenship
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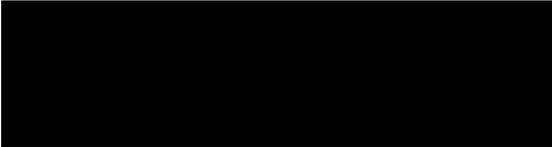
FILE: EAC 04 036 51971 Office: VERMONT SERVICE CENTER Date: JUN 05 2006

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, Chief
Administrative Appeals Office

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a dim sum and Chinese specialty chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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 denied the petition accordingly.

According to the petition filed in this matter, the petitioner's business was established in 1987, and, it employs two full-time and two part-time employees.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750

Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 30, 2003. The proffered wage as stated on the Form ETA 750 is \$10.72 per hour (\$22,297.60 per year). The Form ETA 750 states that the position requires three years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a Schedule C from the petitioner's U.S. Internal Revenue Service Form tax return for 2002; a support letter from the petitioner; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 28, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, the director requested petitioner submit a statement of recurring monthly expenses for the petitioner for 2002 and 2003. The director requested the petitioner's U.S. federal tax returns for 2002 and 2003.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted an explanatory letter; the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2002 and 2003; a W-3 statement; a State of Vermont tax return for 2003; a statement of average monthly expenses for 2002, 2003 and 2004; bank statements; a letter from a business agency dated September 22, 2004; a U.S. Department of Labor, Board of Alien Labor Certification Appeals (BALCA) case; a tax bill relative to the petitioner's residence; a mortgage instrument; a bank account statement and a 2003 U.S. federal tax return [REDACTED] a tax bill for realty owned [REDACTED] an affidavit from the petitioner; a newspaper article; and, excerpts of federal poverty guidelines.

The director denied the petition on November 2, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the balance of a bank account and "additional funds of \$571.40" together with equity in realty owned is evidence of the ability to pay the proffered wage. Counsel contends that the regulation relied upon by the director does not require proof of "liquid" assets, and, that the petitioner has evidenced his ability to obtain an equity loan by documents submitted. Counsel cites the case of *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) in support of the petitioner's case. Counsel wishes to qualify an expert who has opined relative to the petitioner's ability to pay the proffered wage, and requests that we consider the expert's opinion as probative of the ultimate issue in this case that is the petitioner's ability to pay the proffered wage from the priority date.

Counsel has submitted the following documents to accompany the appeal statement: a memorandum; a BALCA decision, and, the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. The beneficiary is not present in the United States, and, she has not been employed by the petitioner.

The tax returns¹ demonstrated the following financial information² concerning the petitioner's ability to pay the proffered wage of \$22,297.60 per year from the priority date of June 30, 2003:

- In 2002, the Form 1040 stated adjusted gross income of \$27,061.00.
- In 2003, the Form 1040 stated adjusted gross income of \$15,731.00.

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 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of two. In 2002, the sole proprietorship's adjusted gross income of \$27,061.00 barely covers the proffered wage of \$22,297.60 per year. It is improbable that the sole proprietor could support himself and his spouse on \$4,763.40 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. The petitioner has provided a statement of his monthly expenses³ for the year 2002. Petitioner stated that his monthly

¹ Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage.

² According to the petition, the petitioner employs two full-time and two part-time employees. However, Schedule C from the petitioner's 2002 tax return states wages paid that year of \$8,400.00, and in 2003, \$11,700.00. There is only one W-2 issued in 2002, and one in 2003.

³ The petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet her living costs, the director requested petitioner submit a statement of recurring household expenses for the petitioner's family. This statement must indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. For 2002, the petitioner only stated four items, insurance, utilities, clothing and transportation as personal expenses. Also, counsel has provided

expenses were \$1,107.67 monthly that calculates to \$13,316.04 yearly. Including the personal expense statement in the above calculation indicates that there exists a deficit of \$8,552.64 should the petitioner's pay the proffered wage.

In 2003, the sole proprietorship's adjusted gross income of \$15,731.00 does not cover the proffered wage of \$22,297.60 per year. The petitioner's stated he and his spouse's personal expenses to be \$1,263.30 monthly or \$15,159.60 yearly. The deficit to be made up for tax year 2003 would be \$21,726.20 should the petitioner pay the proffered wage.

No tax return was submitted for year 2004 for a determination to be made. In 2004, the petitioner's yearly personal expenses were \$15,420.96.

Therefore the two years, for which information has been provided, demonstrate the total deficit between the petitioner's adjusted gross incomes for years 2002 and 2003 (should the petitioner pay the proffered wage of \$22,297.60 per year and factoring in his personal expenses), is \$30,278.84 a shortfall, which averages over \$15,000.00 each year, more or less.

The record of proceeding contains bank statements from the petitioner's checking accounts with average monthly balances of between approximately \$11,000.00 to \$14,000.00 more or less. The average balances are not substantial enough to cover the above yearly deficits of approximately \$15,000.00. Further, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Counsel asserts in her memorandum accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

Counsel asserts that the balance of a bank account and "additional funds of \$571.40" together with equity in realty owned is evidence of the ability to pay the proffered wage. Counsel contends that the regulation relied upon by the director does not require proof of "liquid" assets, and, that the petitioner has examined his ability to obtain an equity loan. We have examined the petitioner's stated adjusted gross incomes for 2002 and 2003 together with the balances of the petitioner's bank account to determine that the petitioner would have a deficit for years 2002 and 2003 considering the proffered wage expense and the stated personal expenses for those years. Counsel has acknowledged this shortfall in her memorandum but states that there is realty assets that may be drawn upon to pay the proffered wage.

Counsel has introduced the opinion of an "enrolled agent" (eligible to provide representation before the U.S. Internal Revenue Service) to opine that the petitioner has "the ability from June 30, 2003 through the present, to pay \$10.72 per hour ... to a Dim Sum and Chinese Specialty Chef." According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability

excerpts of poverty guidelines. Since the petitioner has provided sufficient financial data to make the above determination, the CIS and AAO will rely on the petitioner's information without consideration of guidelines.

⁴ 8 C.F.R. § 204.5(g)(2).

to pay is determined. While CIS and AAO will review any evidence that the petitioner desires to submit, the probative value of that evidence must always be weighed. In this instance, the enrolled agent has opined to the ultimate issue to be decided in this matter, which is not within her prerogative. Therefore her opinion has no probative value in this matter.

However, based upon the enrolled agent letter dated September 22, 2004, that was submitted notarized as an affidavit, that agent is familiar with petitioner and his circumstances. The enrolled agent believes that the gross income of the petitioner is evidence of the ability to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985), (and also *Ubeda v. Palmer, supra.*), the court indicated that 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.

The enrolled agent opines that there is sufficient equity in realty owned by the petitioner to pay the proffered wage. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. There are no appraisals in the record to substantiate the fair market value of the petitioner's realty. Counsel has submitted tax bills that state the taxable valuation of the property. Counsel's assertions that there is sufficient equity, or that the petitioner would be willing to further mortgage his own residence to make up what has been demonstrated to be a yearly deficit of \$15,000.00 should the petitioner be responsible to pay the proffered wage, are not substantiated by independent, objective evidence.

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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel states that the petitioner is able to draw upon the assets of his parents to pay the proffered wage. Since the petitioner's parents have no legal obligation to pay the proffered wage, and there is no document in the record of proceeding that indicates this obligation, this assertion by counsel has no probative evidence in this matter. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988);

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business could not pay the proffered wage in 2003 stating an adjusted gross income of \$15,731.00, while in 2002 its stated adjusted gross income of \$27,061.00 could pay the proffered wage but not also the petitioner's living expenses. Attempts to include bank account funds and the equity value of realty⁵ owned by the petitioner to show the ability to pay the proffered also fail for the above stated reasons.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity

⁵ A home equity loan does not show the ability to pay because the loan is off-set by the repayment obligation.

in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner has not proven its ability to pay the proffered wage.

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), to support her contention that the petitioner had the ability to pay the proffered wage. *Ranchito Coletero* stands for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.