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U.S. Citizenship
and Immigration
Services

B6

FILE:

SRC 05 227 50739

Office: TEXAS SERVICE CENTER

Date:

JUN 05 2007

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.

Robert P. Wiemann, Chief
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 Thai food restaurant. It seeks to employ the beneficiary permanently in the United States as a Thai specialty cook. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its continuing financial 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 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 case rests upon the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on May 10, 2002. The proffered wage is \$9.56 per hour, which amounts to \$19,884.80 per year set forth on Form ETA 750. On Form ETA 750B, signed by the beneficiary on December 1, 2001, the beneficiary does not claim to have worked for the petitioner.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on August 15, 2005, indicates that the petitioner, [REDACTED] was established in 1993, has a gross annual income of \$167,849 and currently employs four workers.

The record contains a copy of a 2002 state registration of the petitioner's status as a limited liability company.¹ Public

¹ If the only member of the LLC is an individual, the LLC income and expenses are reported on Form 1040, Schedule C, E, or F. See IRS Publication 3402 (Rev. 7-2000) Catalog Number 249400 "Tax Issues for Limited Liability Companies."

records from the Oklahoma Secretary of State, however, reflect that this status is inactive.² While the AAO's instant decision does not rest on this finding, this raises a question as to whether the petitioner is authorized to do business in Oklahoma and whether it may be regarded as a viable petitioner to sponsor an alien worker. This should be resolved in future proceedings, if any, however for the purpose of this review, the petitioner will be treated as if it is structured as a sole proprietorship, that is a business in which it is operated in a single individual(s) personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In this matter, in support of the petitioner's ability to pay the proffered salary of \$19,884.80 per year, the petitioner initially provided copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2002, 2003, and 2004. The returns reflect that she filed as a single person, declaring daughters, "[REDACTED]" and "[REDACTED]" as dependents in 2002 and 2003 and "[REDACTED]" as the only dependent in 2004. The returns contain the following information:

	2002	2003	2004
Gross Receipts or Sales (Schedule C, Profit Or Loss from Business)	\$201,592	\$175,517	\$167,849
Gross Income (Schedule C)	\$122,491	\$102,598	\$100,376
Total Expenses (Schedule C)	\$ 69,204	\$ 70,137	\$ 75,176
Business Net Profit (Schedule C)	\$ 53,287	\$ 32,461	\$ 25,200
Wages (Form 1040)	\$ n/a	\$ n/a	\$ n/a
Taxable interest	\$ 11	\$ n/a	\$ 6
Business Income (Form 1040)	\$ 53,287	\$ 32,461	\$ 25,200
Gambling Winnings	\$ 9,900	\$ 11,443	\$ 11,250
Adjusted Gross Income	\$ 59,433	\$ 41,610	\$ 34,675

On August 27, 2005, the director issued a request for additional evidence including copies of the petitioner's last six bank statements and an itemization of personal monthly household expenses. In response, the petitioner provided copies of one of her dependent daughter's bank statements covering the period from February 10th to November 10, 2005; copies of the petitioner's bank statements from April 2005 to October 2005; and copies of bank statements reflecting an account held in the name of "[REDACTED]". These statements cover the period from April to October 2005. The statements indicate the same address for "[REDACTED]" as for the petitioner. "[REDACTED]" is not identified. The petitioner also submits copies of English translations of Thai documents related to land ownership, but they are not accompanied by any foreign documents and are not accompanied by any explanation as their significance.

The petitioner's itemization of monthly personal expenses including housing costs, food, automobile insurance, credit cards and utilities, reflects a total of \$2,290 per month, annualized to \$27,480.

The director denied the petition on December 1, 2005. After deducting the certified wage of \$19,884.80 from the adjusted gross income reported on the sole proprietor's tax returns, the director concluded that while the sole proprietor had sufficient funds to cover personal expenses in 2002, in 2003 and 2004 the resulting shortfall was

² See www.sos.state.ok.us/

insufficient to meet personal living expenses in 2003 and 2004. The director concluded that the petitioner had not demonstrated the continuing ability to pay the proffered salary of \$19,884.80 as of the priority date.

On appeal, counsel submits copies of the 2003 and 2004 individual tax returns filed by the sole proprietor's daughter, [REDACTED]. Schedule C of these tax returns indicate that this daughter owns and operates [REDACTED] and [REDACTED] as sole proprietorships. Counsel asserts on appeal that this additional source of income should be considered. He claims that adding back the depreciation deductions to these two businesses in 2003 would have made an additional \$5,856 available to the petitioner's ability to pay the proffered wage. Although noting that this [REDACTED] was not listed as a dependent on the petitioner's tax return in 2004, counsel contends that her income tax return indicates sufficient additional funds to cover the proffered wage in this year. He also states that she lived in the home in 2004 and contributed to expenses. Counsel also relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a petition may be approved based on a petitioner's reasonable expectations of increasing profit. He maintains that the petitioner has been in business for 12 years and that this ongoing business, combined with the sole proprietor's intent to sponsor a Thai chef establishes the ability to pay the proffered wage.

Counsel also claims that the sole proprietor has access to additional funds through the sale of real estate owned in Thailand, referring to the documents submitted in response to the director's request of evidence.

Counsel's assertions are not persuasive. The record suggests that the sole proprietor, [REDACTED] owns and operates the petitioning business, [REDACTED]. Her daughter, [REDACTED] owns and operates the other two restaurants as sole proprietorships. Beyond suggesting that because of their family relationship and the listing of [REDACTED] as a dependent on the 2003 tax return filed by the sole proprietor, counsel cites no legal authority obliging CIS to consider the resources of persons not legally obligated to pay the proffered wage. See *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), where the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Although this case was based upon whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage, the principle also applies to the facts in this case.

Similarly, the bank statements reflecting monies held individually by [REDACTED] will not be considered in the petitioner's ability to pay the proffered wage. It is further noted that in this case, the bank statements submitted to the record relate to 2005 balances rather than the resources available in 2003 or 2004 and are not helpful in establishing the petitioner's ability to pay in those years. Additionally, as noted above, the individual identified as "[REDACTED]" on the bank statements related to [REDACTED], is not identified.

With regard to real property held in Thailand, as noted above, the documents submitted are not accompanied by the foreign documents that they are supposed to represent. It is further noted that real estate is not regarded as a cash or cash equivalent current asset that is available to pay the proffered wage.

³ Adjusted gross income is shown as -\$7,248 on the 2003 tax return and \$1,674 on the 2004 tax return (\$8,922 inclusive of net operating loss deduction)

In determining a petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that wages less than the full proffered salary has been paid, those amounts will also be considered. As there is no evidence of such employment in this case, further review is not necessary.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will also examine the net taxable 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). Showing that the petitioner's business operation achieved a certain gross income is insufficient because it does not include consideration of the expenses incurred in order to generate such revenue. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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, personal cash or cash equivalent 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 as noted above, 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 proffered wage represented 48% of the sole proprietor's reported adjusted gross income in 2003 and 57% of the adjusted gross income in 2004. After covering household expenses, the remaining \$14,130 was not sufficient to pay the proffered wage in 2003. In 2004, after covering the living expenses, the remaining \$7,195 was also not enough to pay the certified wage of \$19,884.80. Counsel's assertions as to the nature and kind of [REDACTED] contributions to the living expenses of the sole proprietor is not documented by the record. 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). Based on the financial data that was provided to

the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

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.