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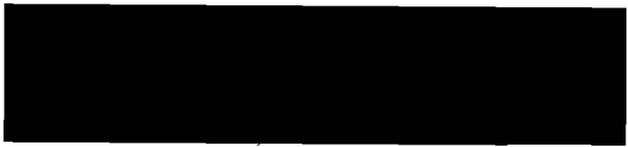
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529



U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 12 2009
SRC 07 185 51444

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

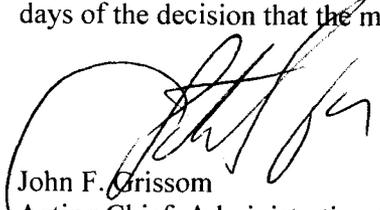
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting 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 Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 9089, Application for Permanent 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 denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 1, 2008 denial, the single issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

Counsel stated that a brief and/or additional evidence would be submitted to the AAO within 30 days. The petitioner filed the appeal on April 2, 2008. As of this date, more than 14 months later, the AAO has received nothing further.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) states in pertinent part:

Additional time to submit a brief. The affected party may make a written request to the AAO for additional time to submit a brief. The AAO may, for good cause shown, allow the affected party additional time to submit one.

The regulation at 8 C.F.R. § 103.3(a)(2)(viii) states in pertinent part:

Where to submit supporting brief if additional time is granted. If the AAO grants additional time, the affected party shall submit the brief directly to the AAO.

Counsel, here, did not request any additional time beyond the 30 days listed on Form I-290B. Therefore, a decision will be determined based on the record, as it is currently constituted.

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, 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 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 [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is September 22, 2006. The proffered wage as stated on the Form ETA 9089 is \$16,782 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

Relevant evidence submitted on appeal includes counsel's statement. Other relevant evidence includes a copy of the sole proprietor's 2005 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business, copies of the petitioner's bank account statements for the period May 1, 2007 through November 30, 2007, a list of the sole proprietor's personal recurring monthly expenses, a copy of the sole proprietor's monthly mortgage statement, and a copy of the sole proprietor's home comparison to other homes in the vicinity. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The sole proprietor's 2005 Form 1040 federal tax return reflects an adjusted gross income of \$0.

The sole proprietor's personal monthly recurring expenses are listed as \$3,769.57 per month or \$45,234.84 annually.

The sole proprietor's bank statements for the period May 1, 2007 through November 30, 2007 reflect checking account balances ranging from a low of \$1,973.67 to a high of \$11,292.44.

2 The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The sole proprietor's monthly mortgage statement reflects a principal balance of \$284,144.16 with a monthly payment of \$2,569.57 as of December 14, 2007.

The sole proprietor's home's comparison shows that homes in the sole proprietor's vicinity ranged between \$211,204 and \$320,342 in the 18 months prior to the comparison. The home was assessed at \$273,263 in 2007.

On appeal, counsel states:

USCIS should have allowed petitioner more time to submit tax returns. USCIS erred in its statement that Petitioner provided "no explanation" as to why 2006 tax returns were not provided. In fact, Petitioner, through his attorney, stated that "[the sole proprietor] is in the process of filing tax returns for 2006 and 2007 and is meeting with a new CPA to reconcile past taxes." Petitioner requested additional time to provide the Service with this information if necessary.

USCIS could have determined financial ability by a review of the monthly expenses and bank statements provided to them. USCIS erred by not allowing consideration of the documents tendered to them in assessing financial ability. Petitioner provided all the bank statements whoing [sic] the folow [sic] of income vs. expenses. Petitioner is a sole proprietor and also gave information regarding personal finances which can be used in a determination of financial ability.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS 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 9089, signed by the beneficiary, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary that would show that the petitioner employed the beneficiary in any of the pertinent year (2006). Therefore, the petitioner has not established that it

employed the beneficiary from the priority date of September 22, 2006, and, thus, must establish that it had sufficient funds to pay the entire proffered wage of \$16,782 from the priority date and continuing until the beneficiary obtains lawful permanent residence.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as 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 federal case law. *See 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 USCIS 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 USCIS 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of five in 2005. The sole proprietor's adjusted gross income in 2005 was \$0. The sole proprietor listed his monthly personal recurring expenses as \$3,769.57 per month or \$45,234.84 annually. Therefore, the sole proprietor could not have paid the proffered wage of \$16,782 and supported a family of five with monthly personal recurring expenses of \$45,234.84 annually from his adjusted gross income in 2005.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$16,782 based on its bank statements and the sole proprietor's personal finances.

Counsel is mistaken. First, it should be noted that the sole proprietor's 2005 income tax return is for the year prior to the priority date of September 22, 2006, and has limited probative value when determining the petitioner's ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Therefore, the AAO will not consider the sole proprietor's 2005 tax return except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

Second, the bank statements provided by the sole proprietor are for the petitioning entity and not the sole proprietor, the information from which is most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Business checking account statements may only be utilized as part of a "totality of circumstances" analysis. In addition, the sole proprietor only provided bank statements for a partial year (2007). The petitioner is obligated to establish its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence (from September 22, 2006). *See* 8 C.F.R. § 204.5(g)(2).

Third, the sole proprietor only submitted a copy of his monthly mortgage statement and a value comparison of homes sold in the area eighteen months prior to January 24, 2008 (when the comparison was done). It is noted that the sole proprietor submitted a document showing the assessed value of his home as \$273,263 in 2007. In addition, the sole proprietor's home is considered to be a long-term asset (having a life longer than one year), and its value is not considered to be readily available to pay the proffered wage to the beneficiary as the property is not easily converted into cash. Therefore, the AAO will not consider the real estate property of the sole proprietor when determining the petitioner's ability to pay the proffered wage of \$16,782.

The AAO notes that counsel claims on appeal that the petitioner should have been allowed more time to submit its tax returns. Counsel is mistaken. The director is bound by the regulations as cited in 8 C.F.R. § 103.2(b)(8), which states in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence, including blood tests. In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. **Additional time may not be granted. . . .**

If the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has provided its tax returns for 2005, which was for the year prior to the priority date of September 22, 2006 and which does not establish the petitioner's ability to pay the proffered wage of \$16,782 and support a family of five in 2005. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.