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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 21 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $12.00 per hour or $24,960 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage.

In a request for evidence (RFE) dated September 18, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE also stated that "[t]he Service needs the W-2's for the beneficiary from the year 2000 to the present."

Counsel submitted evidence in response to the RFE with a cover letter dated October 9, 2002.

In a second request for evidence (RFE) dated January 16, 2003, the director requested evidence to establish the experience of the beneficiary as listed on Form ETA 750. The second RFE also requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The second RFE also stated, "Please provide the Service of your Monthly Expenses; i.e. water, gas, electricity and garbage bills."

Counsel submitted evidence in response to the second RFE with a cover letter dated March 25, 2003.

On April 10, 2003 the director issued a third RFE. This RFE noted that the petitioner is a sole proprietorship and it requested a Statement of Monthly Expenses for the petitioner's family.

Counsel submitted evidence in response to the third RFE with a cover letter dated June 19, 2003.

In a decision dated July 10, 2003 the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits additional evidence and a brief. Counsel offers four arguments on appeal.

Counsel's first argument is that the federal tax returns of the petitioner for the years 2000, 2001 and 2002 show a net income sufficient to pay the beneficiary's proffered wage. For each of these years, counsel refers to tax returns submitted by Mr [redacted] and argues that in each year the returns show "net income" sufficient to pay the proffered wages. Counsel does not specify which line on the tax returns should be deemed to show "net income." Counsel appears to use "net income" and "taxable income" as interchangeable terms. Nonetheless, although the term "taxable income" is found on two lines of the Form 1120 corporate tax return, no line on the Form 1040 individual tax return is labeled as either "taxable income" or "net income."

The proper income analysis in the case of a sole proprietor is to use the sole proprietor's adjusted gross income from the Form 1040 as the starting point, and then to subtract from that figure the personal expenses of the sole proprietor and his family.

In the decision in this case, the director found that for the year 2000 the petitioner's income was $37,884; for the year 2001, $39,603; and for the year 2002, $36,612. The director erred slightly in using the figures for total income for 2000 and 2001, rather than the figures for adjusted gross income, which were $35,207 and $36,841 respectively. But these errors were not significant to the director's conclusion. The director noted that the petitioner's annualized household expenses of $51,240 were significantly higher than the petitioner's income in each of the years in question. The director found that the petitioner's evidence had failed to establish that the petitioner's income

during the relevant time period was sufficient to pay the proffered wages. This finding was a correct analysis of the evidence in the record.

Counsel's second argument is that the petitioner had enough cash available to pay the beneficiary's proffered wage from 2000 to the present time. On appeal counsel submits unaudited financial statements for th[redacted] restaurant. These consist of an income and expense statement for the six-month period ending June 30, 2003 and a compilation of a balance sheet for the Yei San Jib restaurant as of June 30, 2003.

A cover sheet on the letterhead of Richard Kim & Associates, Inc. describes the balance sheet as "Accountant's Compilation Report." A separate cover letter on the same letterhead also accompanies the financial statements. However, the signature at the bottom of the letter is illegible, and no printed name or title appears below the signature. Therefore it is not possible to confirm whether the financial statements were prepared by an accountant.

Nonetheless, even assuming that the financial statements were prepared by an accountant, they are of limited evidentiary value. The cover letter accompanying the financial statements states that they are based solely on management's representations. The cover letter states that management "has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles." Therefore the financial statements fail to contain information which is relevant to the issue of the petitioner's ability to pay the proffered wage. Moreover, the financial statements are not audited financial statements. See 8 C.F.R. § 204.5(g)(2). For these reasons the financial statements do not show the ability of the petitioner to pay the proffered wages during the relevant time periods.

Counsel also submits bank statements from the checking account used for the [redacted] restaurant as further evidence that the petitioner had enough cash available to pay the proffered wage from 2000 to the present time. The bank statements cover the period from February 2000 until June 2003. The bank statements show monthly closing balances ranging from $2,420 to $11,636. Counsel's reliance on the bank statements from the [redacted]estaurant, however, fails to note that [redacted]s not a corporation, but is a sole proprietorship. Other materials in counsel's submissions indicate that the proprietor, Mr[redacted] has at least one other bank account in the United States and also has at least one bank account in Korea. Therefore, the bank balances in the account which the proprietor uses for the restaurant do not indicate the overall financial condition of the proprietor. Because of these omissions, the bank statements which were submitted for the record do not show the ability of the petitioner to pay the proffered wages during the relevant time periods.

In an unincorporated association or sole proprietorship, the assets and income of the owner can be considered in determining the petitioning business' ability to pay the wages offered. In this case,

the petitioner would be required to produce evidence which shows monies available to pay the owner's monthly expenses of $4,270 plus the salary of the beneficiary of $2,080 per month.

Counsel also submits copies of two decisions of the Associate Commissioner for Examinations in which appeals were sustained on the issue of the petitioner's ability to pay the proffered wages. The critical evidence in each decision was monthly bank statements of the petitioner in which the closing monthly balances showed sufficient cash available to pay the proffered wages. Each of those two decisions, however, involved a corporate petitioner. In the instant case, as noted above, the petitioner is a sole proprietor. Therefore the funds in any bank account controlled by the proprietor are not restricted to business expenses, but may be transferred at any time to other accounts controlled by the proprietor or may be expended directly by the proprietor in meeting the personal expenses of the proprietor and his family. Therefore the reasoning in the two appeals decisions submitted by counsel is not applicable to the instant case.

Counsel's third argument is that the [redacted] restaurant had sufficient assets to pay the proffered wage. Counsel's brief contains a description of the [redacted] restaurant's operations and contains estimates of the value of the assets of the business and of the market value of the business. These factual matters, however, are not supported by affidavits or other documentary evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel cites the "other tangible and movable assets of Mr. [redacted] as further resources from which the proffered wages could be paid. Counsel submits a copy of a document titled "Personal Financial Statement" listing financial assets and liabilities of Mr. [redacted] and his wife. That statement is dated August 1, 2003 and shows a net worth of Mr [redacted] and his wife in the amount of $942,748, including $380,000 in equity in a house in California and $190,000 as the value of an unencumbered apartment in Korea. Although this financial statement contains significant financial information pertaining to Mr [redacted] and his wife, the statement is unsigned and there is no evidence in the record which corroborates this statement. Therefore the statement cannot be taken as evidence that the figures therein reflect the financial condition of Mr. [redacted] and his wife.

Counsel's fourth argument is that the petitioner has a history of meeting payroll for other workers. Counsel's brief offers factual assertions on this point which are unsupported by documentary evidence. These factual assertions, like those noted above concerning the assets of the Yei San Jib restaurant, do not constitute evidence. *Matter of Obaigbena*, *supra*; *Matter of Ramirez-Sanchez*, *supra*.

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.