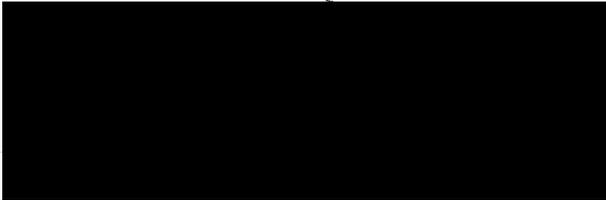


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U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. A3042,  
Washington, DC 20529



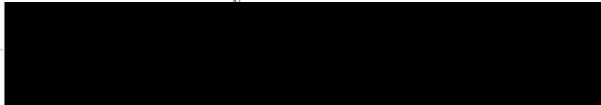
U.S. Citizenship  
and Immigration  
Services



FILE: WAC 02 220 53037 Office: CALIFORNIA SERVICE CENTER

Date:  
NOV 01 2004

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.

For Robert P. Wiemann, Director  
Administrative Appeals Office

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Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**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 catering services firm. It seeks to employ the beneficiary permanently in the United States as a food service manager. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the director erred in concluding that the petitioner has not had the 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:

*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. 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 [Citizenship and Immigration Services (CIS)].

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 September 9, 1996. The proffered wage as stated on the Form ETA 750 is \$12.49 per hour, which amounts to \$25,979.20 annually. On Form ETA 750B, signed by the beneficiary on August 12, 1996, the beneficiary did not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims that it was established in 1992, has a gross annual income of \$671,050, and currently employs thirty workers. In support of its continuing financial ability to pay the proffered wage of \$25,979.20 per annum, the petitioner submitted evidence showing that it re-structured itself as a limited liability company on May 17, 1999. The petitioner provided a copy of its federal quarterly employer's tax return for the quarter ending June 30, 2001, a copy of its Form 1065, U.S. Return of Partnership Income for 2000, and a copy of an unaudited income statement and balance sheet presenting the

petitioner's financial data for the first five months of 2001, ending May 31, 2001. The quarterly tax return reflects that the petitioner paid cumulative wages of \$33,322 during the second quarter of 2001 and employed sixteen workers. The federal tax return discloses that the petitioner files its taxes using a standard calendar year and reported gross receipts or sales of \$671,050, salaries and wages of \$189,399, and ordinary income of -\$3,290 in 2000. Schedule L reveals that it had \$8,231 in current assets and \$22 in current liabilities, resulting in \$8,209 in net current assets. Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> It represents a measure of a petitioner's liquidity and a possible resource out of which the proffered wage may be paid. A partnership's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a petitioning partnership's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

On October 24, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the beneficiary's proposed wage, as of the priority date of September 9, 1996. The director specifically requested that the petitioner provide copies of annual reports, signed federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage beginning on the priority date and continuing to the present.

In response, the petitioner submitted copies of Form 1040, U.S. Individual Income Tax Return for 1996, 1997, 1998, and 1999, filed by the petitioner's sole proprietor, reflecting that, during those particular years, the petitioner's income was reported as a sole proprietorship. It is unclear if, after being organized as a limited liability company in May 1999, the petitioner ever filed a 1999 partnership tax return. The petitioner also provided another copy of its 2000 partnership tax return, as well as a copy of its federal partnership tax return for 2001. The 2001 partnership return shows that the petitioner reported gross receipts or sales of \$738,922, salaries and wages of \$195,484, and -\$13,128 in ordinary income. Schedule L indicates that the petitioner had \$18,306 in current assets and \$2,210 in current liabilities, yielding \$16,096 in net current assets.

The tax returns reflecting the petitioner's operation as a sole proprietorship contain the following information for the following years:

	1996	1997	1998	1999
Proprietor's adjusted gross income (Form 1040)	\$ 41,607	\$ 40,197	\$ 40,462	\$ 73,772
Petitioner's gross receipts or sales (Schedule C)	\$255,385	\$223,089	\$222,510	\$256,818
Petitioner's wages paid (Schedule C)	\$ 66,779	\$ 64,425	\$ 75,250	\$ 73,030
Petitioner's net profit from business (Schedule C)	\$ 3,935	-\$ 11,402	-\$ 11,951	-\$ 11,749

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The sole proprietor's tax returns for 1996, 1997, and 1998 reflect that he filed as a single person, declaring no dependents. His 1999 tax return shows that he filed jointly with his spouse and declared one dependent.

On March 27, 2003, the director issued a notice of intent to deny the petition based solely on the petitioner's submission of unsigned federal tax returns. The petitioner was afforded thirty additional days to respond to the director's notice.

In response, the petitioner, through counsel, objected to the basis of the director's intent to deny the petition, but, in an attempt to comply with the director's request, provided original signatures on the copies of the sole proprietor's 1996 through 1999, and 2001, individual tax returns, as well as copies of the petitioner's partnership returns for 2000 and 2001.

On May 9, 2003, the director denied the petition. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date of September 9, 1996.

On appeal, counsel asserts that the petitioner's gross volume of business has tripled during the relevant period. Counsel claims that the director's analysis of the petitioner's ability to pay the proffered wage was incorrectly based on the sole proprietor's individual taxable income. He also maintains that the petitioner has other related business entities, such as "Cardinal [REDACTED] which has also shown continued growth. On appeal, counsel submits a letter, dated June 2, 2003, from [REDACTED] the petitioner's president. [REDACTED] states that the beneficiary is on the petitioner's payroll, providing a vital service. He further states that one of their primary business locations in [REDACTED] was closed last year for four weeks due to a forest fire, and that this as yet unreimbursed loss, affected their 2002 income. [REDACTED] expects 2003 to be an outstanding year due to a recent business expansion in Los Angeles. It is noted that no assessment of the petitioner's ability to pay the proffered wage in 2002 can be made, as the record contains no evidence in the form of federal tax returns, audited financial statements, or annual reports related to that year.

Along with [REDACTED] letter, counsel submits copies of two checks that were issued to the alien beneficiary on May 24, 2003 by [REDACTED], and on June 7, 2003 by "Cardinal [REDACTED] The Camps." As neither of these companies appear to be the same entity as the petitioner, these wages cannot be considered as part of the review of the petitioner's ability to pay.

At the outset, it is noted that the AAO agrees with counsel's objection to providing, as a general practice, signed tax returns in support of a visa petition. Although the CIS retains discretion in such matters and may request an original document in some cases, it is noted that the regulation at 8 C.F.R. § 103.2(b)(4) provides that unless otherwise specified, ordinary legible photocopies are generally acceptable. It is not clear how a copy of a signed tax return significantly increases the evidentiary weight of a petition, penalties for submitting false or forged documents to Citizenship and Immigration Services set forth in section 274C of the Act, 8 U.S.C. 1324C, and 18 U.S.C. § 1546(a) do not hinge upon whether the tax return is signed or not, but whether a document or statement is false. Unless the director has reasonable cause to require a signed tax return from a particular petitioner, it should refrain from requesting it as a general practice.

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 credible 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 during a given period. To the extent that a petitioner may be paying a beneficiary less than the proffered wage, consideration will be given to those wages. If the shortfall can be paid out of either a petitioner's net income or net current assets, a petitioner will be deemed to have established its ability to pay the proffered wage during a given period. In the instant case, as noted above, any compensation paid to the beneficiary by a different corporation, will not be considered as part of the petitioner's ability to pay the proffered wage. CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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.

In this case, the petitioner has submitted copies of the sole proprietor's individual tax returns for 1996 through 1999, in support of its ability to pay the proffered wage of \$25,979.20. A sole proprietorship is 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 (7<sup>th</sup> 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 director failed to request that the petitioner provide a summary of the sole proprietor's living expenses during the relevant period, so a more accurate assessment of the petitioner's ability to pay the proffered wage could be made. It is noted, however, that the alien's proposed wage offer of \$25,979.20

represented approximately 62% of the sole proprietor's adjusted gross income in 1996, 65% of the sole proprietor's adjusted gross income in 1997, 64% of his adjusted gross income in 1998, and approximately 35% of his income in 1999. Although the sole proprietor's household was comprised of fewer dependents than in *Ubeda*, the comparison of the beneficiary's proposed wage measured against the sole proprietor's adjusted gross income suggests that it was highly improbable that reasonable living expenses as well as the proffered wage could be covered out of the sole proprietor's adjusted gross income during this period.

As noted above, after the petitioner restructured as a limited liability company, it reported its income on a partnership tax return, rather than reporting its income and expenses as a sole proprietorship. Similar to a corporate petitioner's tax returns, in evaluating its continuing ability to pay the proffered salary, the limited liability petitioner's income and assets are not commingled with the individual's income and assets and are reported as a separate legal entity. In this case, even without considering the previous four years, as stated above, the petitioner's federal tax returns for 2000 and 2001 do not demonstrate the petitioner's continuing ability to pay the certified wage during either of those years. Neither the petitioner's 2000 net income of -\$3,290, nor its net current assets of \$8,209 could pay the beneficiary's proposed salary of \$25,979.20. Similarly, in 2001, neither the petitioner's reported net income of -\$13,218, nor its net current assets of \$16,096 was sufficient to cover the proffered wage.

Although counsel's assertion that the petitioner's gross receipts tripled during the relevant period is accurate, the tax returns also reflect an increase in expenses. As the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* financial ability to pay the proffered wage measured from the priority date, it cannot be concluded that the record contains sufficient evidence supporting the petitioner's ability to pay the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petition becomes approvable under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.