

[Handwritten signature]

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: WAC 02 198 53757 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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.

[Handwritten signature]

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the director misinterpreted the petitioner's financial information and that the petitioner's evidence established its ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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) provides 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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is October 5, 1999. The beneficiary's salary as stated on the labor certification is \$11.62 per hour or \$24,169.60 per year, based on a 40-hour week. The visa petition indicates that the petitioner was established in 1996 and has three employees.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. In response to two requests for additional evidence, issued by the director in September and December 2002, it was established that the petitioner is organized as a sole proprietorship. Sole proprietors report income and expenses from their businesses on Form 1040, U.S. Individual Income Tax Return. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return.

In this case, the sole proprietors operate two other restaurants at different locations. In addition to the copies of the individual sole proprietors' income tax returns for 1999, 2000 and 2001, the petitioner submitted, through counsel, copies of the other restaurants' tax returns. The record indicates that their combined income is reported

on Form 1065, U.S. Return of Partnership Income. It is also observed that this partnership income is also reflected on the sole proprietors' individual tax returns as "rental real estate, royalties, partnerships, S corporations, trusts, etc." on line 17 of the first page of the return and is included in the sole proprietors' adjusted gross income. For 1999, 2000, and 2001, the sole proprietors' filed jointly and claimed no dependents. These individual returns also contain the following information:

Year	Business Income (Schedule C)	Adjusted Gross Income
1999	\$ - 175	\$ 25,994
2000	3,806	31,010
2001	3,123	35,510

In denying the petition, the director concluded that the sole proprietors' adjusted gross income, in each of the relevant years, could not reasonably be expected to provide sufficient funds to cover the proffered wage of \$24,169.60, as well as pay for reasonable living expenses of the petitioner's owners.

On appeal, counsel asserts that the adjusted gross income of the three restaurants was sufficient to cover the proffered wage. The AAO cannot agree. It is not reasonable to consider gross income without also considering the necessary expenses incurred to generate that revenue.¹ Moreover, a sole proprietorship is not legally separate from its owner. Therefore, the sole proprietor's personal expenses and liabilities are relevant to the petitioner's ability to pay the proffered wage. A sole proprietor must show that he or she can cover their existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents.

While the AAO concurs with the director's decision, it is noted that more cash would have been available to the sole proprietors as living expenses in 1999, if the proffered salary was calculated as a prorated expense beginning at the priority date of October 5, 1999. Even without calculating living expenses, however, the beneficiary's annual wage offer of \$24,169.60 represents 78% of the sole proprietors' adjusted gross income in 2000 and 68% of the adjusted gross income in 2001. Although the sole proprietors claimed no dependents during those years, it is implausible to conclude that they could support themselves and cover the beneficiary's proffered wage. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioner 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 about 30% of the petitioner's gross income. Further, as noted by the director in this case, the net current assets set forth on Schedule L of the partnership tax return contained in the record were also

¹ The AAO will 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 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. 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 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

insufficient to meet the proffered wage of \$24,169.60. In 2000, current liabilities exceeded current assets, and in 2001, current assets were only about \$5,600 more than current liabilities.

In view of the foregoing and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage as of the priority date of the visa petition pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

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.