



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 23 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]

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.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, who affirmed his decision on a subsequent motion to reopen, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 a brief and additional evidence.

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.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$600.00 per week, which amounts to \$31,200 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual income tax return for 2001 and what appears to be excerpts from quarterly wage reports.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 7, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested completed and signed federal income tax returns for the years 2000 and 2001.

In response, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual income tax returns for 2001 and 2000.¹ The sole proprietor's tax return for 2001 reflects the following information:

Proprietor's adjusted gross income (Form 1040)	\$51,405
Petitioner's gross receipts or sales (Schedule C)	\$279,247
Petitioner's wages (Schedule C)	\$42,579
Petitioner's net profit (Schedule C)	\$29,749

In addition, counsel submitted copies of the petitioner's quarterly wage reports. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. In counsel's accompanying letter, he states that the beneficiary lacks a social security number and thus is not reflected on the payroll "although the petitioner employs her."² A number of cancelled checks accompany the petitioner's response to the director's request for evidence. These cancelled checks are made payable to the beneficiary and are signed by the owner of the petitioner's business [REDACTED]. On the bank of these checks, which is difficult to discern since the fronts of the checks are copied on one page and then the supposedly corresponding backs of the checks are copied on a different page, the endorsement is signed by the beneficiary and [REDACTED] with the following text: "I agree to deposit this check to [REDACTED] by the beneficiary. So even though checks are made out to the beneficiary in the amount of \$2,400, it appears that she returned those funds back to the sole proprietor.

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, and, on October 30, 2002, denied the petition. The director determined that the adjusted gross income was too low, considering the five-member household of the sole proprietor, to support the sole proprietor's household and pay the proffered wage.

The director rejected the initial appeal as untimely filed, and reopened the matter on the petitioner's motion. In its initial appellate pleading, the petitioner's counsel stated that he instructed the petitioner to start issuing the beneficiary paychecks since prior to their decision to sponsor her for an immigrant visa, they had only paid her cash and kept her off of all payroll records because she did not have a social security number.³ Counsel asserts that the cancelled checks provided in response to the director's request for evidence shows that the petitioner had been actually paying the beneficiary the proffered wage. Additionally, counsel submits evidence of the sole proprietor's "liquid assets" – savings account statements from East West Bank from March 16, 2001 to September 15, 2002. The savings account statements reflect ending balances of approximately \$50,000 or greater for each month in 2001 and half of 2002, and \$29,698.81 and \$36,527.77 for the months of July and August, 2002, respectively.

¹ Counsel correctly pointed out in a footnote that since the priority date is in 2001, the 2000 tax return is irrelevant.

² It is noted that the wages paid as reflected on the quarterly wage reports add up to the total amount indicated as wages paid on Schedule C of the petitioner's profit and loss statement to the sole proprietor's individual income tax return.

³ Presumably the petitioner was concerned about the beneficiary lacking employment authorization documentation from CIS as well.

The director determined that the evidence submitted on motion to reopen did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 28, 2003, affirmed his prior decision to deny the petition. The director stated the following in his decision:

The petitioner also submitted the checks that the petitioner had paid the beneficiary since the beneficiary did not have [a] social security number yet. The nineteen (19) cancelled checks were signed from the date of April 2001 to October 2002. The total amount for each check was two thousand four hundred dollars. However, not all of these checks were being cashed. The total of thirteen (13) checks did not have the bank's transaction codes, which [are] imprinted by the bank on the bottom of the right hand of the checks when the checks were being cashed. This series [of] numbers contain ten (10) digits which [are] printed the dollars amount that being written on the check and cashed out.

The checks that do not have the bank's transaction codes will not be considered as the [sic] credible evidence.

The director stated that the evidence of the sole proprietor's savings accounts was not dispositive of the petitioner's ability to pay the proffered wage because it was supplemental evidence that would not compensate for failure to show its ability to pay through federal tax returns or audited financial statements.

On appeal, counsel asserts that the petitioner's actual payment of wages to the beneficiary and net income evidences its ability to pay the proffered wage. The petitioner submits copies of tax returns previously submitted and new evidence of the petitioner's assets.

Some evidence submitted on appeal addresses the director's concerns about transaction codes and actually negotiated checks. In his brief, counsel, effectively testifying as a witness, states the following concerning the cancelled check issue raised by the director:

There is a simple explanation. My primary dealing is with the alien not the employer. When we were preparing the submission of the I-140, my secretary requested evidence in the form of cancelled checks. The alien gave us what he [sic] had and missing checks were requested from the employer.

The seven (7) checks with the 10 digit proof of clearance were those the alien did not have copies of and we got those from the [petitioner]. That is why some had the transaction code and some did not.

To address this I requested the employer to provide all of the checks which are attached hereto and incorporated here by this reference. I have retained the originals. Your copies are certified and available for inspection.

The checks were all negotiated. . . .

Finally please find attached letter from the issuing bank that confirms all the checks we provided have in fact been negotiated.

Additionally, in a footnote, counsel addressed his lack of knowledge concerning cancelled checks and the reason for not providing copies of the back of the checks this time by stating the following:

I am not [sic] forensic accountant nor do I claim to be expert in the field. To be honest, I had no idea cancelled checks were imprinted on the front. I presumed the bank stamp on the back was the best evidence. Now I understand stamps on the back of the checks are irrelevant. Excuse my lack of knowledge.

A letter from East West Bank accompanies the evidence itemizing the check numbers on checks representing wage payments made to the beneficiary from the petitioner, and is signed by a branch service manager of the bank on May 21, 2003. The bank statements provided on appeal also show checks cashed against the account's funds. The statements are summaries and only provide an itemization of checks cashed but no other detail of account activity. One of the items highlighted is a check with the check number 3890 cashed on March 3, 2003 in the amount of \$2,400.00. That check is dated June 30, 2002. Another highlighted check number, 3900, was cashed on March 19, 2003, in the amount of \$2,400.00. That check is dated August 30, 2002. Another highlighted check number, 3851, was cashed on January 31, 2003, in the amount of \$2,400.00. That check is dated August 31, 2001 (originally 2002, but the "2" was changed to "1").

On appeal, counsel also provides updated savings account information for the sole proprietor from the East West Bank. Additionally, counsel provides copies of the sole proprietor's other savings accounts at Interbusiness Bank N.A. and State Bank of India. The account from Interbusiness Bank N.A. shows balances in a savings account for the sole proprietor with ending balances of \$35,704.63 in June 25, 2001 to \$43,039.95 in December 2002. The account from State Bank of India shows balances in an account held by the sole proprietor with average balances of \$2,000.33 in October 2001 to \$22,950.25 in December 2002.

Finally, on appeal, the petitioner presents the sole proprietor's 2002 U.S. individual income tax return, which reflects the following figures:

Proprietor's adjusted gross income (Form 1040)	\$61,683
Petitioner's gross receipts or sales (Schedule C)	\$296,358
Petitioner's wages (Schedule C)	\$90,890
Petitioner's net profit (Schedule C)	\$35,034

At the outset, there are a number of problems with the cancelled paychecks. As noted above, it appears that these checks were negotiated back to the sole proprietor by the endorsement on the back of the checks. Since the bank statements submitted on appeal are only excerpts of itemized checks presented for negotiation against the petitioner's bank account, there is no way to independently verify whether or not these funds were cashed back to the petitioner or not. The petitioner could have presented the beneficiary's bank account statements to show that the amounts were actually deposited to her instead of the summary of the sole proprietor's bank account showing checks cashed against his account (but no further detail that might show the funds deposited back in). Suspicion

is increased by the fact that the beneficiary cashed her paychecks so long after they were made out to her. Counsel's explanation on appeal lacks clarification on the issue of why the checks presented previously were not negotiated. If the petitioner provided the checks, after it had given them to the beneficiary for negotiation, then logic and reasoning dictates that the bank only returned the checks to the petitioner after negotiation was final. Therefore, the "simple" explanation that the petitioner gave counsel regarding the checks that apparently were not negotiated does not explain why they were not negotiated. In any event, the myriad doubts concerning this issue are too problematic to accept the evidence as credible and probative of actual wages paid to the beneficiary. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the proffered wage in 2001 or 2002.

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).

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 for businesses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she 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).⁴

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.

⁴ Counsel seems unaware of this case in his brief and surprised that CIS considers the sole proprietor's dependents and expenses.

In the instant case, the sole proprietor supports a family of five. In 2001, the sole proprietorship's adjusted gross income of \$51,405 covers the proffered wage of \$31,200 with \$20,205 for five individuals to live on for the year. In 2002, the sole proprietorship's adjusted gross income of \$61,683 covers the proffered wage of \$31,200 with \$30,483 for five individuals to live on for the year. Since the director erred by not seeking evidence of the sole proprietor's living expenses, CIS must consider the likelihood of the sole proprietor making ends meet within the context of *Ubeda*, 539 F. Supp. at 650. The record does not establish that the petitioner can support a family of five with an income of \$30,483 or less.

The petitioner has not established that it actually paid the proffered wage or that it could pay the proffered wage from its net income. While the record of proceeding contains evidence of significant cash assets from which the sole proprietor could pay the proffered wage⁵, the problem in this case is the evidence pertaining to the paychecks made out to the beneficiary from the sole proprietor. The "negotiated" paychecks raise doubts concerning the credibility of the evidence submitted to prove the fact that the beneficiary was actually paid the proffered wage. Because of the exceptional doubt surrounding this evidentiary piece, the remainder of the petitioner's evidence is also clouded with skepticism and a favorable determination cannot be made. *See Ho*, 19 I&N Dec. at 591.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has failed to establish that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is dismissed.

⁵ The bank statements from the East West savings account covering the period March 2001 through January 2003 reflects an average monthly balance of \$55,497.36⁵. The average balance could be substantial enough to cover the proffered wage for a year. Additionally, the petitioner presents evidence of two additional bank balances reflecting significant amounts, which might adequately supplement the East West savings account after depletion for paying the proffered wage.