

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Handwritten signature]

[Redacted]

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 Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO granted a subsequent motion to reopen and affirmed its prior decision. The matter is again before the AAO on a motion to reopen. The motion will be granted. The petition will be dismissed.

The petitioner is a restaurant and deli. 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. The AAO affirmed this determination on appeal and subsequently on motion.

On motion, 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 December 16, 1996. The proffered wage as stated on the Form ETA 750 is \$2,525.47 per month, which amounts to \$30,305.64 annually.

The AAO affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its continuing ability to pay the proffered wage as of the filing date of the petition. Specifically, the director noted that the petitioner's tax returns, reflected on its sole proprietor's individual income tax returns, showed only \$7,864 in wages paid to employees and \$8,227 in profit. Additionally, the director noted that the petitioner responded to a request for evidence by stating it did not need to prove its ability to pay the proffered wage because the beneficiary is a relative of the sole proprietor. The AAO director affirmed the director's decision as the petitioner did not provide any additional evidence or argument on appeal.

On prior motion to reopen, the petitioner's counsel submitted evidence that it had provided additional evidence on appeal. Counsel stated that the director misinterpreted the petitioner's response to a request for evidence as the petitioner "never wavered [sic] from his commitment to employ his sister-in-law according to the terms in the labor certification." The AAO reviewed the evidence in the record of proceeding and determined that the petitioner failed to evidence that it had sufficient funds to pay the proffered wage in 1999. The AAO determined that the petitioner did have the ability to pay the wage offered in 1996, 1997, 1998, and 2000.

On the instant motion to reopen, the petitioner's counsel submits additional evidence and asserts that the evidence shows assets that enable the petitioner to pay the proffered wage. Additionally, the petitioner's counsel states the following:

The petitioner herein presents evidence to show his wife was pregnant and delivered a baby in 1999. This is the principle [sic] reason for the lower income during 1999. Despite the lower income for 1999, the additional evidence of [the] petitioner's savings during 1999 should satisfy the financial requirements for approval of the petition.

The motion meets the requirements of a motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The pieces of evidence submitted with the instant motion that qualify the motion as a motion to reopen are the following: a [redacted] certificate of deposit worth \$1,000, and previously submitted financial documentation of a 401(k) retirement account, [redacted] account, and savings and checking accounts at a credit union updated to reflect the account statuses in 1999, and documents evidencing the sole proprietor's spouse's pregnancy in 1999. The petitioner submits copies of an Aetna life insurance policy worth approximately \$27,000 that is undated and was previously submitted. Because this is not new evidence, it fails to meet the requirements of a motion to reopen and will not be considered. Additionally, the petitioner submits documents apparently in the Thai language. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

A review of the evidence in the record of proceeding does not find in favor of the petitioner in this matter.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's 1998 Form 1040, U.S. individual income tax return. Additionally, the petitioner submitted evidence of property ownership, its Aetna life insurance policy, 401(k) savings account, and accounts at Wells Fargo bank and the AEA credit union.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 21, 2000, 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. Specifically, the director requested evidence from December 16, 1996 to the present date, as well as an explanation as to how the petitioner could pay



a salary of \$30,305.64 when its 1998 tax return shows that the petitioner only paid \$7,861 in wages and showed a profit of only \$8,227.

In response, the petitioner submitted the sole proprietor's Form 1040 individual income tax returns for the sole proprietor, failing to submit the petitioner's reported income and expenses on Schedule C, for the years 1996, 1997, 1998, and 1999. The tax returns reflect the following information:

	<u>1996</u>	<u>1997</u>
Proprietor's adjusted gross income (Form 1040)	\$52,493	\$54,076
Petitioner's gross receipts or sales (Schedule C)	\$n/a	\$n/a
Petitioner's wages paid (Schedule C)	\$n/a	\$n/a
Petitioner's net profit from business (Schedule C)	\$n/a	\$n/a
	<u>1998</u>	<u>1999</u>
Proprietor's adjusted gross income (Form 1040)	\$43,699	\$15,572
Petitioner's gross receipts or sales (Schedule C)	\$94,792	\$n/a
Petitioner's wages paid (Schedule C)	\$7,861	\$n/a
Petitioner's net profit from business (Schedule C)	\$8,227	\$n/a

In addition, counsel re-submitted evidence of the sole proprietor's assets to corroborate the following statement:

Please note that the [b]eneficiary is the sister-in-law of the owner of [the petitioner], [REDACTED]. A copy of [REDACTED] marriage certificate (indicating his marriage to the [b]eneficiary's sister) is enclosed for your reference.

Because the [b]eneficiary is related to [REDACTED] it is not required that the [b]eneficiary's entire salary be paid through [the petitioner]. Upon the [b]eneficiary's entry to the U.S., an Affidavit of Support (Form I-864) from Alan Tang will be provided.

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 December 20, 2000, denied the petition. The director stated the following:

The petitioner's tax return shows that the petitioner has been paying only \$7864 in wages and had a profit of \$8227. This indicated that they do not have sufficient income to pay the beneficiary's wages. On July 21, 2000 [CIS] requested further evidence to explain how the petitioner will pay the beneficiary's wage.

On October 13, 2000 the petitioner responded to the request for evidence. They stated that the beneficiary is the sister in law of the petitioner. Therefore, the company did not have to

pay her entire salary. The purpose of this immigrant classification is to allow employer's [sic] to fill a position for which they cannot find an [sic] U.S. worker. It is not intended as a way to sponsor relatives. The petitioner must have been able to pay a U.S. worker the same salary they say they will pay the beneficiary. The petitioner submitted a letter from the American Electronics Association Credit Union stating that he has \$35,042 in his saving [sic] account. He also has a vested amount of \$12,822.71 in his 401(K). The petitioner's savings would only pay one year of wages and it is doubtful that it is the petitioner's intention to use his 401(K) to pay an employee. The petitioner does not have sufficient income to pay the beneficiary's salary. It appears that their intention is to sponsor a relative rather than fill a specific vacancy.

The director was correct in her findings. Additionally, the AAO notes that the Bureau of Alien Labor Certification Application precedent has determined that employment sponsorship of relatives for lawful permanent residence lessens the credibility of the job offer. *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

On appeal, counsel asserted the following:

The [b]eneficiary is the sister-in-law of the owner of the [petitioner], [REDACTED]. Because the [b]eneficiary is related to [REDACTED] it is not required that the [b]eneficiary's entire salary be paid through [the petitioner]. Upon entry to the United States, an Affidavit of Support (Form I-864) from Alan Tang will be provided.

Counsel indicated that a brief and additional evidence would be submitted within thirty (30) days of the date of filing the appeal. Counsel filed the appeal on February 9, 2001. When the AAO rendered its first decision, on August 21, 2001, the record of proceeding did not contain any additional evidence or argument from the petitioner or its counsel. Thus, the AAO affirmed the director's decision noting the incomplete tax returns for 1996, 1997, and 1999.

On the petitioner's first motion to reopen, it provided evidence that it submitted additional evidence and argument on February 15, 2001 with its initial appeal. Thus, the AAO reopened the proceeding. On appeal and with its motion to reopen, the petitioner submitted complete tax returns for the petitioner's sole proprietor for the years 1998, 1999, and 2000. Counsel also re-submitted previously submitted evidence of the sole proprietor's assets as well as a recent pay stub issued to the sole proprietor. In an accompanying brief, counsel for the petitioner states that regardless of the relationship of the beneficiary to the sole proprietor, the petitioner will pay the wage offered in the labor certification regardless of his restaurant's profitability. He states that the sole proprietor has remarkable assets from which to pay the proffered wage. Counsel also asserts that the sole proprietor personally guarantees against the possibility of the beneficiary becoming a public charge and that under Section 213A of the INA, "an employer/relative meets all the wage requirements when a valid Affidavit of Support has been presented to the American Consulate in the country when the beneficiary applies for her immigrant visa."

The tax returns submitted on appeal/motion to reopen reflect the following:

	<u>1998</u>	<u>1999</u>
Proprietor's adjusted gross income (Form 1040)	\$43,699	\$15,572
Petitioner's gross receipts or sales (Schedule C)	\$94,792	\$94,016
Petitioner's wages paid (Schedule C)	\$7,861	\$4,485
Petitioner's net profit from business (Schedule C)	\$8,227	\$15,116
	<u>2000</u>	
Proprietor's adjusted gross income (Form 1040)	\$48,636	
Petitioner's gross receipts or sales (Schedule C)	\$98,839	
Petitioner's wages paid (Schedule C)	\$0	
Petitioner's net profit from business (Schedule C)	\$22,095	

During a status inquiry subsequent to filing its motion to reopen, the petitioner presented its sole proprietor's individual income tax return for 2001. The AAO properly did not consider this piece of evidence as it was presented outside of the time limitations for the petitioner's motion to reopen filing.

The AAO affirmed its prior decision, noting that the petitioner illustrated an ability to pay the proffered wage from the sole proprietor's adjusted gross income in 1996, 1997, 1998, and 2000, but failed to demonstrate its ability to pay the proffered wage in 1999. The AAO was correct in its evaluation of the evidence.

On instant motion to reopen, counsel states the following: "The petitioner now presents additional evidence showing a total of \$126,712.11 savings. This represents more than four times the beneficiary's offered annual salary." Counsel submits evidence previously submitted concerning the sole proprietor's assets, however, they are dated 1999. Previously, the evidence was dated 2000 or 2001. Even though the dates are different, the evidence changes nothing in the analysis since the figures are less than what was presented earlier. Only the Bank of America CD for \$1,000 and evidence of the sole proprietor's spouse's pregnancy was never submitted before. The \$1,000 CD is too insignificant to alter the outcome of this proceeding. Additionally, the evidence of the sole proprietor's spouse's pregnancy is not dispositive. There is no evidence of the expenses and absences that caused the sole proprietor to have decreased profits in 1999. Nothing in the applicable law and regulations provides an exemption from illustrating an ability to pay a proffered wage based upon a business owner's spouse's pregnancy.

Additionally, the petitioner's complete tax returns should not have been accepted by the AAO since they had been requested by the director previously. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA

1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and should not have considered the sufficiency of the evidence submitted on appeal.

Counsel also misconstrues the use of the Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the INA as a public charge. Section 212(a)(4) of the INA also includes a section on family-based sponsored immigrants as the typical context in which an Affidavit of Support arises. There is no similar provision for employment-based sponsored immigrants. In this case, a family-based immigrant visa is not approved, and the beneficiary has not advanced to a consular processing or adjustment of status phase of the proceeding. At the I-140 immigrant visa filing state of proceeding, evidence is required of a sponsoring employer's ability to pay a proffered wage, not its guarantee to pay a wage regardless of its financial ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee or Affidavit of Support to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, the Affidavit of Support is a future pledge of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible 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).

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 full proffered wage in any year.

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 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.

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 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 sole proprietor supports a family of four. In 1999, the sole proprietorship's adjusted gross income of \$15,572 fails to cover the proffered wage of \$30,305.64 per year. It would have been impossible for the sole proprietor to support himself and his family and pay the proffered wage in 1999. The evidence of the sole proprietor's assets in the record of proceeding are insufficient for the reasons provided by the director and the AAO, and the evidence submitted with the instant motion does not overcome those findings. It is also noted that the petitioner paid modest wages and realized modest profits from its business activities.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999. Therefore, the petitioner has not established that it had 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 not met that burden.

ORDER: The motion to reopen is granted. The appeal is dismissed.