

BL



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: WAC-03-029-51146 Office: CALIFORNIA SERVICE CENTER Date: SEP 01 2004

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

PETITION: 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent disclosure of information
regarding the identity of the agency

PUBLIC COPY

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 Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Thai food specialty. 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.

The director determined that the evidence failed 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. On appeal counsel states that the director erred by relying exclusively on the information on the tax returns of the petitioner's owner.

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.

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 either 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].

Eligibility in this matter turns, in part, 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is September 10, 2001. The beneficiary's salary as stated on the labor certification is \$12.76 per hour or \$26,540.80 per year.

The evidence submitted initially and in response to a request for evidence issued by the director consisted of: copies of Form 1040 U.S. individual income tax joint returns for the petitioner's owner and her husband for 2000 and 2001; copies of statements for bank accounts and investment accounts of the petitioner's owner and her husband for certain months from April 2002 to May 2003; copies of unaudited financial statements of the petitioner in bar graph form for 2000, 2001 and the first five months of 2002; copies of unaudited financial statements of the petitioner for January through May 2002 and for September 2002; and copies of real estate closing documents showing a sale of a property by the petitioner's owner on May 19, 2003.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and evidence consisting of additional copies of some of the bank account and investment accounts statements submitted previously plus a copy of a statement for April 2002 for an investment account of the petitioner's owner at a securities company for April 2002

Counsel states on appeal that the adjusted gross income figures relied on by the director present an incomplete picture of the petitioner's financial situation during the relevant period. Counsel states that an examination of the petitioner's entire tax returns and of the additional evidence submitted for the record establishes the petitioner's ability to pay the proffered wage during the relevant period.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record indicates that the petitioner is a sole proprietorship. 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 returns 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 the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th 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 the owner, 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.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner. The joint tax returns of the petitioner's owner and her husband show the following amounts for adjusted gross income: \$16,007.00 for 2001; and \$43,821.00 for 2002. Since the adjusted gross income for 2001 is less than the proffered wage of \$26,540.80, it fails to establish the ability of the petitioner to pay the proffered wage that year, which is the year of the priority date. The adjusted gross income for 2002 is greater than the proffered wage, but after paying the proffered wage only \$17,280.20 would have remained for the household expenses of the petitioner's owner and her husband. No statement of monthly household expenses of the petitioner's owner was submitted for the record. Absent such information, the amount of \$17,280.20 is found to be insufficient to pay the reasonable household expenses of the petitioner's owner and her husband.

The petitioner also submitted copies of unaudited financial statements for the petitioner for certain periods in 2000 through 2002. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

The petitioner also submitted copies of statements for bank accounts and investment accounts of the petitioner's owner and her husband. The closing balances of those statements are as follows:

2001:	September – December	no statements
2002:	January-March	no statements
	April	\$6,714.12 (Amer. Express – petitioner's owner) \$29,060.45 (Amer. Express – owner's husband) \$100,025.49 (Wells Fargo – investment) \$85,426.74 (Wells Fargo – checking)
	May	\$71,636.62 (BOA – business)
	June-August	no statements
	September	\$35,006.32 (BOA business) \$32,668.63 (BOA personal)
	October-December	no statements
2003:	January	no statements
	February	\$20,044.86 (BOA business) \$20,286.54 (Wells Fargo – investment) \$5,969.73 (Wells Fargo – checking)
	March	\$27,664.81 (BOA business) \$5,125.67 (Wells Fargo – checking)
	April	\$5,216.54 (Wells Fargo – checking)
	May	\$4,917.28 (Wells Fargo – checking)
	June	no statements
	July	\$20,141.72 (Wells Fargo – investment)
	August	no statements
	September	\$20,189.77 (Wells Fargo – investment)

The foregoing bank and investment account balances show that in April 2002 the petitioner's owner and her husband had balances in their accounts totaling \$221,226.80. But no account statements were submitted for September 2001, the month of the priority date, nor for any other months prior to April 2002. Therefore the bank

and investment account statements fail to establish the ability of the petitioner to pay the proffered wage as of the priority date. Furthermore, no evidence was submitted to indicate the liabilities of the petitioner's owner and her husband as of the priority date or at any time thereafter. Therefore, despite the substantial account balances in April 2002, the bank account and investment account evidence fails 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

Finally, the petitioner submitted copies of real estate settlement documents showing a sale by the petitioner's owner of a property in Santa Maria, California on May 19, 2003 for the amount of \$317,000.00. Those documents appear to show that the owner realized no cash from that transaction. The line items include a bank loan payoff of \$195,702.55 and a settlement charge labeled "Exchange Resources" of \$112,507.45, plus other settlement charges and taxes. The line items are not explained. Also, the record contains no explanation of the significance of the real estate transaction for the petitioner's owner, and no audited financial statement on the personal financial situation of the owner and her husband.

For the foregoing reasons, the evidence other than tax returns of the petitioner's owner and her husband also fails 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.

In his decision, the director correctly stated the adjusted gross income figures from the joint tax returns of the petitioner's owner and her husband for 2000 and 2001. The director correctly concluded that those figures fail to show the ability of the petitioner to pay the proffered wage while also allowing the petitioner's owner to pay the reasonable expenses of her two-person household. The director stated that the account statements in the record were considered to be secondary evidence and that those account statements did not represent any additional financial resources that would not be reflected on the petitioner's tax return or on "credible financial statements." Although the director erred in failing to analyze the information shown on the account statements, that error did not affect the director's decision, since, as shown above, the account statements fail to show the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director's decision to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal counsel submits evidence consisting of a copy of a statement for April 2002 for an investment account of the petitioner's owner at a securities company plus additional copies of some of the bank account and investment accounts statements submitted previously. The statement newly submitted on appeal shows a balance of \$19,034.69 in a First Union investment account in April 2002. That amount raises the total of the balances in the accounts of the petitioner's owner and her husband that month to \$240,261.49. But the additional account statement submitted on appeal fails to cure the evidentiary deficiencies concerning the account statements, as discussed above.

For the foregoing reasons the petitioner's appeal fails to overcome the decision of the director.

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.