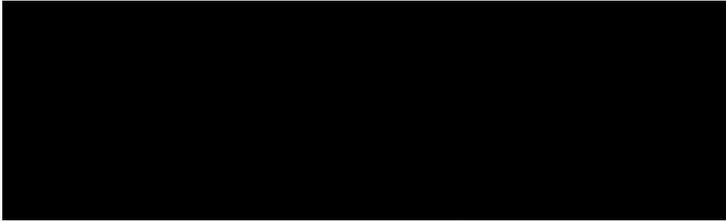


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FILE: WAC-03-148-54013 Office: CALIFORNIA SERVICE CENTER Date: JUN 03 2005

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:



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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**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 Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a sushi chef. 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.

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 (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 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 priority date in the instant petition is November 16, 2000. The proffered wage as stated on the Form ETA 750 is \$2,002.00 per month, which amounts to \$24,024.00 annually. On the Form ETA 750B, signed by the beneficiary on October 16, 2000, the beneficiary claimed to have worked for the petitioner beginning in September 1999 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on April 14, 2003. On the petition, the petitioner claimed to have been established on June 30, 1995, to currently have four employees, to have a gross annual income of \$182,000.00, and to have a net annual income of \$120,000.00. With the petition the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated July 17, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and relevant to the beneficiary's experience.

In response to the RFE, the petitioner submitted additional evidence.

In a second RFE, dated November 1, 2003, the director requested more additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and relevant to the beneficiary's experience.

In response to the second RFE, the petitioner submitted additional evidence. The petitioner's response to the second RFE was received by CIS on January 20, 2004

In a decision dated February 10, 2004, 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 additional evidence.

Counsel states on appeal that although the wages received by the beneficiary from the petitioner were approximately \$6,000.00 less than the proffered wage during the three-year period of 2000, 2001 and 2002, bank statements in the record show that the petitioner had sufficient funds to pay the additional amounts which would have been necessary to raise the beneficiary's wage to the proffered wage during those years.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the documents submitted for the first time on appeal consist of the following: a statement of the monthly household expenses of the petitioner's owner, providing further details on matters covered by an earlier statement of monthly household expenses which was submitted prior to the director's decision; and copies of monthly bank statements for three accounts of the petitioner dated from October 2000 through March 2004. The bank statements dated in 2002 are duplicate copies of statements which had been submitted for the record prior to the decision of the director. None of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage 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 instant case, the record contains copies of Form W-2 Wage and Tax Statements of the beneficiary showing that

the petitioner paid the beneficiary \$4,713.00 in 1999; \$23,140.00 in 2000; \$21,582.00 in 2001; and \$21,333.00 in 2002. The payments in 1999 are not directly relevant to the instant petition, since the priority date is November 16, 2000. For each year from 2000 through 2002, the payments to the beneficiary were less than the \$24,024.00 proffered wage. The amounts which would be needed to raise the beneficiary's actual compensation to the proffered wage are the following: \$884.00 in 2000; \$2,442.00 in 2001; and \$2,691.00 in 2002. Since the petitioner's payments in each of the relevant years were less than the full proffered wage, the Form W-2's fail 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.

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 for a given year, 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 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 (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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was 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 owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income: \$43,028.00 for 2000; \$38,358.00 for 2001; and \$23,824.00 for 2002. The tax returns of the owner are joint returns of the owner and his wife. No dependents are listed on any of the tax returns of the owner in the record. The record before the director closed on January 20, 2004 with the petitioner's submissions in response to the second RFE. As of that date, the tax return of the petitioner's owner and his wife for 2003 was not yet due. Therefore the return for 2002 was the most recent return then available.

The petitioner also submitted a statement of monthly expenses of the owner dated October 8, 2003. That statement shows the following monthly expenses: \$1,500.00 for housing; \$550.00 for car payments; \$150.00 for insurance; \$150.00 for utilities; \$1,200.00 for credit cards; \$600.00 for food; and \$70.00 for clothing. The total of

the items listed on the statement is \$4,220.00 per month, which amounts to \$50,640.00 annually. The petitioner did not submit any statements of the owner's monthly expenses for the years 2000, 2001 and 2002. Therefore, the figures on the October 8, 2003 statement will be used for those earlier years.

The stated household expenses of the petitioner's owner are greater than the figures for the owner's adjusted gross income for each of the years at issue in the instant petition. The deficits are -\$7,612.00 for 2000; -\$12,282.00 for 2001; and -\$26,816.00 for 2002. These deficits indicate that during each of those years the petitioner's owner lacked the financial resources to have paid the beneficiary the remainder of the full proffered wage.

It should be noted the owner's monthly expenses from the statement dated October 8, 2003 may present an inaccurate picture of the owner's financial situation for earlier years, since the October 8, 2003 statement shows significant monthly credit card payments of \$1,200.00, which would amount to \$14,400.00 per year. The record does not indicate when that credit card debt was incurred. But the tax returns of the owner and his wife show a large reduction in their adjusted gross income from \$38,358.00 in 2001 to \$23,824.00 in 2002, a decline of \$14,534.00. That decline was mainly due to a decline in the business income of the petitioning business, which was \$16,062.00 in 2001, but which was a loss of -\$124.00 in 2002, as shown on the Schedule C's attached to the owner's tax returns for 2001 and 2002. One possible inference from the decline in the adjusted gross income of the owner and his wife in 2002 is that their household expenses in 2002 were paid in part through credit card debt.

If the petitioner's owner and his wife were not making large credit card payments in 2000 and 2001, the adjusted gross income of the petitioner's owner of \$43,028.00 for 2000 and \$38,358.00 for 2001 may have been sufficient to pay the reasonable household expenses of the petitioner's owner and his wife and also to raise the beneficiary's wages to the proffered wage in those years. If the owner and his wife were not making credit card payments those years (other than for their regular listed household expenses), the annual household expenses would have been only \$36,240.00, a level which would have allowed for more than enough remaining funds from their adjusted gross income to raise the beneficiary's wages by \$824.00 in 2000 and which would have left nearly enough remaining funds to raise the beneficiary's wages by \$2,442.00 in 2001. Nonetheless, since the petitioner failed to submit statements of the actual monthly expenses of the petitioner's owner and his wife for 2000, 2001 and 2002, the earliest evidence in the record of the couple's monthly expenses is the October 8, 2003 statement of monthly expenses.

The significant decline in the income of the petitioning business in 2002 lowered the adjusted gross income of the owner and his wife to a level which was \$12,416.00 less than their annual household expenses as itemized on the October 8, 2003 statement, even if the credit card payments are ignored. With a deficit of -\$12,416.00 in 2002 between adjusted gross income and household expenses, even before making any credit card payments, the evidence indicates that petitioner's owner lacked financial resources to pay the beneficiary the additional \$2,691.00 needed to raise the beneficiary's compensation to the proffered wage of \$24,024.00 in 2002.

The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to establish its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." The ability to pay the proffered wage is an essential element in showing that the petitioner's job offer to the beneficiary must have been a realistic one during the entire relevant period. See *Matter of Great Wall*, 16 I&N Dec. 142.

For the foregoing reasons, the beneficiary's Form W-2 Wage and Tax Statements, the Form 1040 tax returns of the petitioner's owner and his wife and the statement of monthly expenses of the petitioner's owner and his wife dated October 8, 2003 fail to establish the petitioner's ability to pay the proffered wage during the relevant period.

The record also contains a statement of monthly expenses of the petitioner's owner and his wife dated March 1, 2004, submitted for the first time on appeal. The total of the expenses on that statement is \$5,325.00 monthly, which amounts to \$63,900.00 annually. On that statement, \$1,000.00 per month is listed as for credit card payments, a total of \$12,000.00 per year. Since the household expenses of the petitioner's owner and his wife as shown on the March 1, 2004 statement are even higher than those shown on the October 8, 2003 statement discussed above, the more recent statement provides no additional support to establish the petitioner's ability to pay the proffered wage during the relevant period.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns. The statements in the record are for three separate accounts. Two of those accounts are the business accounts of the petitioner and therefore represent funds covered by Schedule C of the Form 1040 U.S. Individual Income Tax Return. The remaining personal account has very low balances.

Counsel asserts in his brief that all of the household expenses of the petitioner's owner were paid with checks drawn on the bank accounts for which statements were submitted for the record. Counsel's assertion is supported by a handwritten list of itemized checks covering the period from January 2001 through December 2002 showing the purpose of each payment. The list is attached to the March 1, 2004 statement of the monthly household expenses of the petitioner's owner. This evidence is apparently intended to show that the bank statements in the record reflect all of the payments on liabilities of the petitioner's owner and his wife during the relevant period. Counsel asserts that the bank statements in the record show that the petitioner always had bank balances greater than the total of about \$6,000.00 which would have been needed to raise the beneficiary's wage to the proffered wage during the period from November 16, 2000 through the end of 2002.

As noted above, the statements in the record are for three separate accounts. For the year 2000, the record contains statements for only one account. For 2001 and 2002, the record contains statements for the aforementioned account and for a second account. For 2003, the record contains statements only for the second account and for a third account. For 2004, the record contains statements only for the third account.

The totals of the ending balances on the statements submitted for the record are as follows:

2000:	Total ending balances	2001	Total ending balances
January	not submitted	January	\$3,261.92
February	not submitted	February	\$6,626.59
March	not submitted	March	\$4,653.20
April	not submitted	April	\$4,886.01
May	not submitted	May	\$29,785.32
June	not submitted	June	\$13,215.57
July	not submitted	July	\$9,586.95
August	not submitted	August	\$8,274.48
September	\$2,144.63	September	\$8,198.77
October	\$4,480.91	October	\$7,774.39
November	not submitted	November	\$13,630.67
December	not submitted	December	\$5,215.86
2002:	Total ending balances	2003	Total ending balances
January	\$4,879.36	January	\$4,074.20
February	\$3,717.72	February	\$4,581.82
March	\$4,136.32	March	\$2,730.82
April	\$3,364.14	April	\$2,640.85
May	\$5,602.57	May	\$1,386.14
June	\$5,537.73	June	\$795.43
July	\$3,625.99	July	\$2,487.84
August	\$1,917.23	August	\$9,187.78
September	\$3,230.51	September	\$2,043.08
October	\$1,031.27	October	\$819.41
November	\$1,391.36	November	\$827.83
December	\$5,310.85	December	\$454.90
2004:	Total ending balances		
January	\$0.96		
February	\$109.11		
March	\$279.54		

The bank statements in the record show consistently positive balances. But, as noted above, the statements are for three different bank accounts and for none of those accounts were statements submitted for the entire period relevant to the instant petition. It is possible that not all of the three accounts were open during that entire period, but the record does not indicate when any of the accounts were opened or whether any were closed. Moreover, it cannot be assumed that the statements omitted from the record would show additional funds available to the petitioner's owner, since some of those omitted statements may show overdrafts and negative ending balances.

For the foregoing reasons, the bank statements in the record do not provide reasons to believe that the tax return evidence analyzed above gives an inaccurate picture of the financial resources available to the petitioner's owner to pay the full proffered wage.

In his decision, the director correctly analyzed the beneficiary's Form W-2 Wage and Tax Statements and found that they failed to establish the petitioner's ability to pay the proffered wage. The director also correctly used as the measure of net income the figures for adjusted gross income on the Form 1040 U.S. Individual Income Tax

Returns of the petitioner's owner and his wife. The director found that those figures failed to establish the petitioner's ability to pay the household expenses of the petitioner's owner and his wife and also to raise the beneficiary's wage to the level of the proffered wage. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal fail 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.