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FILE: WAC-03-192-50876 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2005

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:

SELF-REPRESENTED

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican specialty 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, the petitioner submits a brief statement 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$11.75 per hour (\$24,440.00 per year). The Form ETA 750 states that the position requires 2 years experience. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1989.

On the petition, the petitioner claimed to have been established in April 1990 and to currently employ 11 workers. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. In support of the petition, the petitioner submitted Form 1040 U.S. Individual Income Tax Return for 2001 and 2002.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 27, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested evidence of the petitioner's ability to pay the beneficiary's wage for 2003, Form DE-6, Quarterly Wage Report, the beneficiary's W-2 form for years 1999 to 2003.

In response, the petitioner submitted Form 1040 for the years from 2001 through 2003, Form DE-6 from the second quarter of 2003 to the first quarter of 2004, and the beneficiary's W-2 form from the petitioner for 1999 to 2003.

On June 28, 2003, the director determined that the petitioner had not demonstrated through his net income, or the wage paid in the past that he has the ability to pay the proffered wage since the priority date until the present and accordingly denied the petition.

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 submitted the beneficiary's W-2 from the petitioner for the years 1999 through 2003<sup>1</sup>. The director doubted they are for the instant beneficiary because the name on the W-2 form is different from the one on the I-140. The petitioner verifies that the name on the W-2 form as [REDACTED] is the same person as [REDACTED] and submitted the beneficiary's birth certificate as evidence.<sup>2</sup> The beneficiary's Form W-2 shows compensation received from the petitioner as follows:

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$12,880	\$24,440	\$11,560
2002	\$14,840	\$24,440	\$9,600
2003	\$14,840	\$24,440	\$9,600

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage for each year respectively.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2001 through 2003. The record before the director closed on May 13, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner's owner for 2004 was not yet due. Therefore the owner's tax return for 2003 is the most recent return available.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, 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. Sole proprietors must show that they can cover their

<sup>1</sup> Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

<sup>2</sup> Per the birth certificate in the record of proceeding the beneficiary's full name is [REDACTED], his father's name is [REDACTED] and his mother's name is [REDACTED].

existing business expenses as well as pay the proffered wage. In addition, they 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 (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 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 (approximately thirty percent of the petitioner's gross income).

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,440 per year from the priority date.

In 2001, the Form 1040 stated adjustable gross income<sup>3</sup> of \$32,863.

In 2002, the Form 1040 stated adjustable gross income<sup>4</sup> of \$20,748.

In 2003, the Form 1040 stated adjustable gross income<sup>5</sup> of \$21,813.

In the year 2001, the petitioner's adjusted gross income was \$32,863. That amount is \$21,303 greater than the difference between the wage paid and the proffered wage. However, without his and his dependent's personal expenses<sup>6</sup> submitted, the petitioner did not establish that they would sustain themselves and their dependents with that amount.

In the year 2002, the petitioner's adjusted gross income was \$20,748. That amount is \$11,148 greater than the difference between the wage paid and the proffered wage. It is not likely that the petitioner could meet his and his dependent's personal expenses with that amount. Without his and his dependent's personal expenses submitted, the petitioner did not establish that they would sustain him and his dependent.

In the year 2003, the petitioner's adjusted gross income was \$21,813. That amount is \$12,213 greater than the difference between the wage paid and the proffered wage. It is not likely that the petitioner could meet his and his dependent's personal expenses with that amount. Without his and his dependent's personal expenses submitted, the petitioner did not establish that they would sustain him and his dependent.

Therefore, for the years 2001 through 2003, the petitioner did not establish that he had sufficient income to pay both the proffered wage and petitioner's living expenses since the record does not contain any evidence of the petitioner's household expenses.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the petitioner's assets and other methods to establish the ability to pay. The petitioner should address this issue in any subsequent proceedings.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001, 2002 or 2003. The net income in each year reported in tax returns demonstrated the ability to pay the difference

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<sup>3</sup> IRS Form 1040 for 2001, Line 33.

<sup>4</sup> IRS Form 1040 for 2002, Line 35.

<sup>5</sup> IRS Form 1040 for 2003, Line 34.

<sup>6</sup> Such expenses generally include mortgage, utilities, food, clothes, etc.

between the wage paid and the proffered wage, however, failed to establish that the surplus would cover the petitioner's living expenses in each of the years 2001 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of 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 appeal is dismissed.