

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

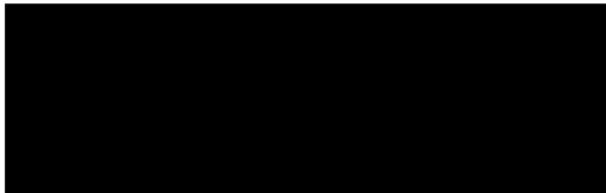
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:

LIN 03 025 53670

Office: NEBRASKA SERVICE CENTER

Date: **SEP 06 2006**

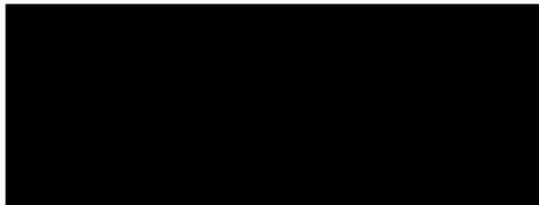
IN RE:

Petitioner:
Beneficiary:



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:



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. Wiseman, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a caretaker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 petitioner filed an untimely appeal, which the director treated as a motion to reopen pursuant to 8 C.F.R. § 103.5. The director subsequently determined that the grounds for his decision had not been overcome and reaffirmed that the denial of the petition.

On appeal, counsel asserts that the director erred in his analysis of the evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$2,500 per month, which amounts to \$30,000 per year. The ETA 750B, signed by the alien beneficiary on April 1, 2001, contains no reference to past employment with the petitioner.

On Part 5 of the visa petition, filed on November 1, 2002, it is claimed that the petitioner was established in 1996, claims a gross annual income of \$144,901, a net annual income of \$9,038, and currently employs three workers.

In support of its continuing ability to pay the proffered salary of \$30,000 per year, the petitioner submitted partial copies of the sole proprietor's individual Form 1040 tax return for 2000 and 2001, consisting of Schedule C, Profit or Loss From Business and two or three additional pages (omitting the first two pages of the Form 1040). Schedule C for the 2000 tax return shows that the petitioner, a sole proprietorship, reported \$70,161 in gross income, \$59,276 in total expenses, resulting in net business income of \$10,885. Schedule C for the 2001 tax

return shows that the petitioner reported gross income of \$80,152 and total expenses of \$71,114, reflecting a net profit of \$9,038. Because the petitioner did not submit any supporting documentation relating to the required training for the

On January 13, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proposed wage offer. If the petitioner was a sole proprietor, the director instructed the petitioner to provide its 2001 federal tax return, and a list of monthly household expenses, including, but not limited to mortgage or rent expenses, automobile payments, credit card payments, and other household expenses. The director also requested copies of checking and savings account balances.

The director also requested such items as audited financial statements, bank account records, and personnel records including Internal Revenue Service (IRS) Form 1099 or Wage and Tax Statements (W-2s) for all employees.

In response, the petitioner, through counsel, provided copies of the sole proprietor's 2001 and 2002 individual tax returns. They reflect that in 2001, the sole proprietor and his spouse filed jointly and declared one dependent. In 2002, they filed jointly and reported no dependents. The tax returns also contain the following:

	2001	2002
Petitioner's Gross Income (Sched. C)	\$80,152	\$103,496
Petitioner's Total Expenses (Sched. C)	\$71,114	\$ 80,990
Petitioner's net profit (Sched. C & Form 1040)	\$ 9,038	\$ 22,506
Wages (Form 1040)	\$ 3,000	\$ 6,000
Taxable interest income (Form 1040)	\$ 148	\$ 191
Sole Proprietor's Adjusted Gross Income (Form 1040)	\$ 8,547	\$ 24,107

The petitioner also submitted copies of its federal employer quarterly tax return for 2001 and 2002, accompanied by state wage reports for each year, and copies of W-2s for 2001 and 2002. These documents indicate that the petitioner employed from two to four workers during these years. The beneficiary's name does not appear among the listed employees.

The petitioner offered copies of the petitioner's business checking account statements for 2001 and 2002, as well as three bank letters, which are all dated February 10, 2003, and reflect the following information about bank accounts held jointly by the sole proprietors:

	Balance as of February 10, 2003
South Central Bank [REDACTED]	\$15,019.22 (account opened since 12/23/1993)
Charter One [REDACTED]	\$20,052.35
Pacific Global Bank [REDACTED]	\$15,063.04 (account opened on 4/17/1996)

The petitioner's response did not include a summary of the sole proprietor's household expenses as requested by the director.

The director denied the petition on August 5, 2003. He determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the April 25, 2001. The director noted that the petitioner's net profit was insufficient to cover the proffered wage and determined that the bank statements measured against the tax return numbers did not establish the ability to pay. The director also noted that for a household of three (as reflected on the sole proprietors' 2001 return) the federal poverty guidelines set an annual income of \$15,020 as the minimum amount necessary for living requirements.

As mentioned above, the petitioner, through counsel, filed an untimely appeal, which the director treated as a motion to reopen pursuant to 8 C.F.R. § 103.5. Counsel contends that the director erred in not giving sufficient weight to the petitioner's current sales, bank statements, and wage and tax statements, and failed to consider that the petitioner's federal income tax return includes depreciation and other expenses. Counsel asserts that the petitioner has clearly stated that he is willing to commit personal funds to increase business and guarantee the beneficiary's wages and that he has savings of more than \$60,000 which is more than double the beneficiary's salary. Finally, counsel cites hardship to the beneficiary's child if the father were forced to leave the United States.

Counsel made no specific arguments on motion, but submitted additional evidence in support of the petitioner's ability to pay the proffered wage, including a copy of a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"). In addition to the 2001 and 2002 sole proprietor's individual tax return, counsel provided a copy of the sole proprietor's 2003 individual tax return. It shows that the sole proprietor filed jointly with his spouse and claimed no dependents. It also contains the following information:

	2003
Petitioner's Gross Income (Sched. C)	\$107,864
Petitioner's Total Expenses (Sched. C)	\$ 90,147
Petitioner's net profit (Sched. C & Form 1040)	\$ 17,717
Wages (Form 1040)	\$ 6,000
Taxable interest income (Form 1040)	\$ 229
Sole Proprietor's Adjusted Gross Income (Form 1040)	\$ 19,694

Counsel additionally provides a copy of an income statement and balance sheet presenting the petitioner's financial information for the first five months of 2004, accompanied by an accountant's compilation report. Counsel further provides a letter, dated June 8, 2004, from the sole proprietor, in which he states that his personal household expenses are approximately \$500 per month, noting that he does not have car payments, credit card or installment loan debt. He further states that, in addition to other resources, he has maintained a savings account exceeding \$50,000 and a business checking account averaging a \$20,000 balance.

In addition to wage reports previously submitted to the record, counsel provided copies of the Wage and Transmittal Statements (W-3s) that petitioner filed for 2001, showing total wages of \$24,900 paid; \$32,652 paid in 2002; and \$36,256 in total wages paid in 2003.

Relevant to bank accounts, counsel provides a letter, dated June 15, 2004, from Associated Bank, accompanied by copies of business checking account statements from December 2002, and February – April 2003. The letter states that the checking account was opened December 16, 2002 and closed on May 28, 2003. Additional documentation was also submitted related to the bank accounts held jointly by the sole proprietors:

Balance as of June 14, 2004

South Central Bank (savings)	\$17,087.45
Charter One Bank [REDACTED]	\$24,428.78
Pacific Global Bank [REDACTED]	\$20,176.20

The director reviewed the evidence submitted in support of the motion to reopen and concluded that it did not support a finding that the petitioner had demonstrated its ability to pay the proffered wage. The determined that the motion did not overcome the grounds for denial and reaffirmed his previous decision denying the petition.

On appeal from this decision, counsel indicates on the notice of appeal, that a brief and/or additional evidence will be forthcoming in thirty days. As this office has received no additional documentation,¹ a decision will be rendered on the record as it currently stands.

Counsel asserts on the notice of appeal, that the director failed to consider all the evidence submitted by the petitioner and failed to give sufficient weight to the evidence in the record, including the bank statements, commitment by the sole proprietor to personally support payment of the proffered wage, consideration of depreciation and other expenses taken on the federal tax return, and the increase in business income due to the hiring of the beneficiary as a specialty cook.

Counsel's assertions are not persuasive. Relevant to counsel's submission of the 2004 Yates Memorandum, it is noted that this document is not intended to create any right or benefit or constitute a legally binding precedent, but merely offered as guidance. It is not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions. That said, the review process employed in this case is consistent with the guidance offered in the Yates Memorandum.

The 2004 compiled financial statement is not determinative of the petitioner's ability to pay the proffered wage for given period. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. *See Barron's Accounting Handbook*, 37071 (3rd ed. 2000). This disclaimer, as is present in this case, is usually found at the beginning of a compilation where the accountant explains that no form of assurance or opinion can be expressed based on the figures presented.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it may have 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

¹ A recent facsimile inquiry elicited no response.

proffered wage. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. As noted above, the record in this matter does not indicate that the petitioner employs the beneficiary.

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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

In this case, the petitioner is a private household. It does not exist as an entity apart from the individual owner(s). See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the individual's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. It is noted that a sole proprietor's commitment to personally support the payment of the proffered wage is not pertinent as the sole proprietor is already individually obligated to pay the proffered wage. Private individuals report income and expenses from their businesses as sole proprietorships 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. Existing business expenses as well as the ability to pay the proffered wage must be shown to be covered by their adjusted gross income or other available funds. In addition, sole proprietors must show that they can personally sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In order to review whether sole proprietors or a private householder can personally support the household and dependents, as well as pay the proffered wage, CIS frequently requests a summary of household living expenses from petitioners.

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.

In this case, the petitioner appears to have a household of two persons. The household expenses are claimed to be \$500 per month or \$6,000 per year. In 2001, even without considering household expenses, the proffered salary exceeds the sole proprietor's adjusted gross income by \$21,453; in 2002, the proffered wage exceeds the sole proprietor's adjusted gross income by \$5,893; and in 2003 the adjusted gross income is \$10,306 less than the proposed wage offer.

With respect to balances shown in the business checking account, it is noted that no evidence or argument has been provided to explain why, at least with reference to the checking account, such funds would not already be included as part of the day-to-day cash flow operations encompassed within the figures of receipts and expenses already presented on Schedule C of the corresponding tax return. As such, CIS declines to consider such an account as representing separable available liquid assets available to pay the proffered wage.

It is noted that the regulation at 8 C.F.R. 204.5(g)(2) requires that a petitioner's evidence demonstrating its financial ability to pay a certified wage must be demonstrated by either federal tax returns, audited financial statements or annual reports. In appropriate cases, such as those petitions involving sole proprietors, additional evidence is often considered. In this case, the sole proprietor's individually held bank accounts represented by the balances in the South Central, Charter One, and Pacific Global Bank(s) must be considered as they represent cash assets available to pay the proposed wage offer and which are not readily discernible (except as source of interest income) on a sole proprietor's individual tax return.

The evidence submitted to the record shows balances in these accounts as of February 10, 2003, cumulatively represented \$50,134.61. No earlier bank statements representing these balances were submitted. For 2003, the petitioner's ability to pay the proposed wage offer has been established because the sole proprietor's additional requirement of \$16,306 to pay the full certified wage and the household expenses could easily be covered by using the cumulative balance available in the sole proprietor's individual accounts. As noted above, the level(s) of these accounts in earlier years has not been submitted to the record, so it may not be concluded that petitioner's ability to pay the proffered wage has been established for 2001 and 2002. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As to the ability of the beneficiary to generate income for the petitioner, the record contains no specific detail supporting this projection. It is therefore unclear to hypothesize exactly what kind of effect the beneficiary's employment would have. There is no guarantee, as in most businesses, that a positive cash flow will automatically develop. As stated in *Matter of Great Wall*, 16 I&N Dec. 143, 144-145:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

It is further noted that there are no statutory or regulatory provisions that allow consideration of a beneficiary's hardship in determining the eligibility of an employment-based visa petition filed under section 203(b)(3) of the Act.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary beginning at the priority date. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concurs with the director's finding that the petitioner has failed to demonstrate his continuing ability to pay the proffered wage beginning at the visa priority date of April 27, 2001.

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.