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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC-01-254-58255 Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien 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.

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 Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges 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. The petition's priority date in this instance is May 21, 1996. The beneficiary's salary as stated on the labor certification is $17.83 per hour or $37,086.40 per year.

With the initial petition, counsel submitted the petitioner's 1997, 1998 and 1999 Form 1040 U.S. Individual Income Tax Return. The 1997 tax return reflected an adjusted gross income of -$12,357. Schedule C of the return reflected a net profit from business of $27,664. The 1998 tax return reflected an adjusted gross income of $593. Schedule C of the return reflected a net profit from business of $24,857. The tax return for 1999 reflected an adjusted gross income of $43,639. Schedule C of the return reflected a net profit from business of $14,248. In addition, counsel submitted the petitioner's April 2001 bank statement .

The director determined that counsel had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 27, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing.

In response to the RFE, counsel submitted the petitioner's 1996 and 2000 U.S. Individual Income Tax Return, with Schedule C, the petitioner's 1998 and 2000 monthly bank statements as well as 1997, 1998, and 1999 federal tax documentation, previously submitted. The federal tax return for 1996 reflected an adjusted gross income of income of $10,346. Schedule C of the 1996 return reflected a net profit from business of $9,284. The federal tax return for 2000 reflected an adjusted gross income of income of $ 97,210.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the decision of the director failed to consider the petitioner's liquid assets.

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 present matter, the petitioner did not establish that it had previously employed the beneficiary.

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO 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).

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 response to the RFE, counsel submitted a letter from Irma Perez, Assisting Financial Center Manager for Norwalk Financial Center, who indicated that the petitioner's owner's average bank balance for 1996, 1997, 1998, 1999, 2000, and 2001 was $45,296.83, $1,428.80, $1,485.92, $21,515.51, $21,515.51, and $28,279.28, respectively. [redacted] did not describe her relationship to the petitioner, how the balances were arrived at, nor did she submit any documentation to corroborate her assertions. Simply going on record without supporting documentary evidence is insufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California* 14 I&N Dec. 190 (Reg Comm. 1972). A review of the record shows that the petitioner has submitted copies of its 1998 and 2000 bank statements, but no such evidence has been submitted for 1996, 1997, 1999, or 2001. Therefore, the evidence proffered by Ms. Perez is of little probative value.

The adjusted gross incomes for 1997 through 2000 were -$12,357, $593, $43,639 and, $97,210, respectively.

The petitioner could have only paid the proffered wage for 2000 from these figures. Further, even if the average bank balances previously referred to were probative, the petitioner would not have been able to pay the proffered wage of $37,086.40 in any years other than 1999 and 2000 and still support himself and his family.

After a review of the evidence it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence in the United States.

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.