U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 1 6 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed on October 2, 2000, and approved by the Department of Labor (DOL), on March 23, 2001. 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.

On appeal, the petitioner submitted a letter in support of the appeal.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 eligibility 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. 8 C.F.R. § 204.5(g). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on October 2, 2000. The proffered wage as stated on the Form ETA 750 is $17.62 per hour, or approximately $36,650 per year.

With the petition, the petitioner submitted only the ETA 750 and the sole proprietor's 1999 Form 1040 U.S Individual Income Tax Return. On June 19, 2002, the director requested copies of the petitioner's wage reports for the last four quarters submitted to the State of California, and a description of the job title and duties of all employees identified in the Forms DE-6. In addition, the Service Center requested that the petitioner provide copies of its tax returns for 2000 and 20001, including all related schedules, attachments and tables.

In response, on or about August 7, 2002, the petitioner submitted copies of the 2000 and 20001 tax returns, and the Forms DE-6 annotated to note the job duties of each employee.

The director then sent a second RFE dated October 2, 2002, requesting evidence to establish the beneficiary's experience as listed on the ETA 750 and evidence of the petitioner's existence as a business. Specifically, the

petitioner was asked to submit a letter from the employer supplying information regarding the beneficiary's title, duties, dates of employment, and number of hours worked. The petitioner was also asked to submit copies of its current business licenses. The petitioner responded by submitting copies of its business licenses for 2000 through 2002, issued by the City of San Rafael, California. On the issue of the beneficiary's experience, the petitioner submitted a letter dated December 1, 2002, stating that it was not possible to submit a detailed letter from the beneficiary's former employer as the restaurant had closed in December 2000. Instead, the petitioner offered a copy of the recommendation letter from the petitioner's former employer, which had previously been submitted in support of the labor certification.

The tax returns reflect the following information for the following years:

	2000	2001
Petitioner's adjusted gross income (Form 1040)	$55,838	$59,629
Petitioner's gross receipts or sales (Schedule C)	$301,419	$324,353
Petitioner's wages paid (Schedule C)	$57,217	$43,466
Petitioner's net profit from business (Schedule C)	$41,175	$64,390

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 15, 2003, denied the petition finding that although the petitioner's adjusted gross income exceeded the amount of the proffered wage, the director was not convinced that the remaining amount was sufficient to pay the beneficiary and maintain the petitioner's family of four.

On appeal, the petitioner asserts that he believes that the beneficiary will add to the petitioner's revenue due to his skills as a cook. Additionally, the petitioner asserts that even were the restaurant's income to remain the same, the amount of his adjusted gross income above the proffered wage, allegedly 25% above the poverty level, is sufficient to support his household.[1]

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. The petitioner has not established that it has previously employed 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

[1] We note that while the evidence reflects that the petitioner's income showed a moderate increase between 2000 and 2001, it would be important to examine the trend in subsequent years as the petitioner is required to demonstrate that it continues to have the ability to pay the proffered wage from the priority date through the approval of the petition. We further note that assertions that the beneficiary will contribute to an increase in business are mere speculation unless supported by objective evidence.

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); *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. *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 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 the instant case, the petitioner supports a family of four. In 2000 and 2001, the adjusted gross income of $55,838, and $59,629 respectively, covers the proffered wage of $36,650. However, it is somewhat doubtful that the sole proprietor would elect to pay the beneficiary more than fifty percent (50%) of the adjusted gross income while retaining only $19,188 and $22,979, to support himself and his family for each of those years. In his decision, the director put the petitioner on notice that CIS "must consider the cost of maintaining" the sole proprietor's household. Yet the petitioner failed to submit any evidence of the sole proprietor's monthly expenses on appeal. Thus, regardless of the poverty level, the petitioner has not established that the sole proprietor can pay his family expenses from the remaining income.

ORDER: The appeal is dismissed.