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

**U.S. Citizenship and Immigration Services**

B6

[redacted]

FILE: SRC-02-036-55228 Office: TEXAS SERVICE CENTER Date:
[redacted]

IN RE: Petitioner:
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:

[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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican specialty cook. 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.

The director denied the petition because the petitioner failed to establish its 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 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 2, 2001. The beneficiary's salary as stated on the labor certification is $8.89 per hour or $18,491 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 28, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's 2000 and 2001 federal income tax return, monthly bank statements from April 2001 to the present and Form W-2 Wage and Tax Statements for each person employed during 2000 and 2001.

In response to the RFE, counsel submitted the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return. The federal tax return for 2001 reflected an adjusted gross income of $21,745. Schedule C of the return reflected a net loss from business of -$1,466. In addition, counsel submitted the petitioner's employees Form W-2 Wage and Tax Statements for the year 2001. These did not include the beneficiary. Counsel also submitted bank statements for various periods between February 1, 2001 and December 31, 2001.

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 by hiring the beneficiary, the petitioner will not need part-time cooks which will result in significant savings, that as a sole proprietor, the petitioner's personal assets should be considered in determining his ability to pay the proffered wage and that he is submitting the petitioner's regular checking account statements for the period December 2000 through February 2002 as well as the company's payroll

checking account statements for the period March 2001 through April 2002. Counsel references several unpublished decisions as corroboration that a petitioner may establish its ability to pay the proffered wage through balances in its checking accounts.

The petitioner's ending monthly balance for its checking account with PNC Bank for the period January 2001 through February 2002 was $271.74, $336.29, $1,353.42, $4,236.39, $2,168.00, $622.86, $176.52, $2,053.31, $1,676.16, $1,985.39, -$266.97, $4,644.31, $2,707.66 and $2,754.77, respectively. This reflects an average monthly balance of $1,765.70.

Additionally, the petitioner's PNC Bank payroll account for the period March 2001 through April 2002 reflected month ending balances of $1,161.72, $776.66, $1,640.68, $1,342.97, $1,272.92, $1,621.34, $1,483.14, $1,640.24, $2,108.79, $1,372.96, $1,734.79 and, $2,092.79, respectively. These figures reflect an average monthly balance of $1,520.75

The federal tax return for 2001 reflected an adjusted gross income of $21,745. Schedule C of the return reflected a net loss from business of -$1,466. The proffered wage is $18,491. The average monthly balances of the petitioner's checking accounts as proffered by counsel is $2,486.04.

The petitioner has not demonstrated that the beneficiary will replace part-time employees, who have not been identified by name, nor have dates of purported terminations have not been stated. There is insufficient evidence of wages paid to other employees holding a similar position whom the beneficiary would replace.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, 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); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the CIS, then the Immigration and Naturalization Service, had properly relied upon 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 CIS should have considered income before expenses were paid rather than net income.

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. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents.

Even though the petitioner submitted its bank statements as evidence that it had sufficient cash flow to pay the wage for 2001,the amounts reflected in those accounts is insufficient to pay the proffered wage.

The proffered wage is $18,491 per year. The federal tax return for 2001 reflected an adjusted gross income of $21,745 Schedule C of the return reflected a net loss from business of -$1,466. The petitioner could not pay

the proffered wage for 2001 from these amounts and support himself and his spouse as reflected by the record.

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.

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.