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

B-6

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

[redacted]

JUL 22 2004

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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
for Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont 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 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.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 from 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is $14 per hour or $29,120 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated April 7, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted, for 2000 and 2001, the petitioner's federal income tax return with schedules and attachments, annual report, or audited financial statement, as well as Wage and Tax Statements (Forms W-2) or other evidence of wage payments to the beneficiary.

In the response to the RFE, counsel submitted his own Summary, dated June 24, 2003 (2003 Summary), and the 2000, 2001, and 2002 Forms 1040, U.S. Individual Income Tax Returns, with Schedule C of Arthur Athanasi (AA), the sole proprietor of the petitioner, and his spouse. The federal tax returns reflected adjusted gross income (AGI) and other information referenced for AA:

| | 2000 | 2001 | 2002 |
|---|---|---|---|
| Proprietor's AGI (Form 1040) | $ 27,940 | $ 28,831 | $ 28,240 |
| Petitioner's gross annual receipts (Schedule C) | $130,000 | $165,000 | $195,750 |
| Petitioner's gross annual income (Schedule C) | $ 66,115 | $ 116,120 | $ 95,129 |
| Proprietor's business income (Form 1040) | $ 30,035 | $ 31,020[1] | $ 30,381 |

[1] While this number is reflected on the proprietor's Form 1040, line 12, we acknowledge that the business income on Schedule C is $62,020. The record contains no explanation as to the discrepancy.

Counsel's Summary posited, also, that the petitioner's business is absolutely debt free, that a cook has just left it, that several more vacancies occurred, and that the business desperately needs the beneficiary.

The director compared sums of AGI for 2000-2002 with the total of the proffered wage and amounts to support the sole proprietor's household, based on Forms 1040. The director concluded that the AGI did not establish the petitioner's ability to support the household and to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition in a decision issued August 15, 2003 (NOD).

On appeal, counsel submits a brief that repeats the Summary. It adds that a full-time cook will enable the sole proprietor to promote the restaurant and maintain the steady increase in sales. Since counsel stipulates that the petitioner did not pay wages to the beneficiary, it is necessary to examine net income, in this case, the sole proprietor's AGI.

Counsel offers no authority to use gross receipts or gross income, as charted above, without regard to expenses incurred to produce them. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will 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. 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, CIS will consider the sole proprietor's income and personal liabilities, as reported on Form 1040.[1] Sole proprietors must show that they can cover both their business expenses and the proffered wage, and, additionally, sustain themselves and their dependents. *See Ubeda v. Palmer, supra*.[2] The sole proprietor of the instant petitioner supports a family of four (4). Forms 1040 for 2000-2002 show amounts of AGI that are less than the proffered wage. In this instance, only a deficit remains for the family's expenses.

Counsel contends that the petitioner will pay the beneficiary as a replacement, variously, for one (1) employee, or for several employees, who have left the business. Counsel does not document the names, duties and capacity, salary, or date of termination of any of these.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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[1] The sole proprietor reports business related income and expenses on Schedule C and carries the difference forward to page 1 of Form 1040, whence it becomes part of AGI and, thus, the petitioner's ability to pay the proffered wage.

[2] In *Ubeda*, 539 F.Supp. at 560, the Court found 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 given the beneficiary's proposed salary of $6,000 or approximately thirty per cent (30%) of the petitioner's gross income.

Counsel concedes in the 2003 Summary that some departures are quite recent (now) and does not relate such evidence to the priority date. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

In respect to counsel's allegations that one (1) employee, or several employees, left, the AAO notes that the Immigrant Petition for Alien Worker (I-140), as of January 13, 2003, states that the petitioner had seven (7) employees. To the contrary, Schedule C of the 2002 Form 1040 reports only $5,200 paid in wages in 2002 and none in 2000 and 2001. The evidence contradicts the existence of seven (7) employees and, with it, the claim that any full-time employee might have departed.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

No credible evidence provides a basis for the claim that the beneficiary will replace an existing full-time employee. The proceedings suggest no source of funds for the petitioner's ability to pay the proffered wage in 2000, 2001, or 2002.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

After a review of the federal tax returns, 2003 Summary, and brief on appeal, 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.