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

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 01 283 58607 Office: CALIFORNIA SERVICE CENTER Date: OCT 0 7 2004

IN RE: Petitioner: [redacted]
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:

[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

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 an individual householder. He seeks to employ the beneficiary permanently in the United States as a kosher domestic cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that he 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.

On appeal, counsel submits additional evidence and asserts that the petitioner has available resources 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 the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 19, 1997. The proffered wage as stated on the Form ETA 750 is $13.47 per hour, which amounts to $28,017.60 annually.

With the petition, as evidence of his ability to pay the petitioner submitted copies of statements showing that he has accounts with [redacted] Services. A statement dated July 12, 2001, issued by [redacted] shows that the petitioner had approximately $100,000 in a mutual fund. A Washington Mutual Bank statement, dated August 2, 2001, shows that the petitioner had $79,835.29 in that bank account.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 27, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested copies of the petitioner's federal income taxes for the years 1997 through 2000.

In response, the petitioner submitted copies of his individual Form 1040, U. S. Individual Income Tax Return for 1997, 1998, 1999 and 2000. They show that the petitioner files jointly with his spouse and declares no dependents.

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

	1997	1998	1999	2000
Proprietor's adjusted gross income:	$5,154	$3,503	$8,177	$7,071
Social Security Benefits:	10,547	10,844	$11,564	$12,948

The petitioner also submitted a letter, dated February 20, 2002, asserting that he and his wife are both disabled and dependent on the beneficiary for their care.

The director subsequently requested additional evidence from the petitioner relevant to his continuing ability to pay the proffered wage. The director instructed the petitioner to submit a summary of the petitioner's monthly household living expenses, advising the petitioner that he must demonstrate the ability to pay the proffered wage beginning at the priority date and continuing until the beneficiary obtains lawful permanent residence.

In response, the petitioner submitted a summary of his monthly household living expenses, as well as various documents representing verification of some of these expenses. According these documents, the petitioner and his spouse incur monthly expenses of approximately $470 per month, or $5,640 per year. The petitioner also enclosed a 1999 Wage and Tax Statement (W-2), showing that he paid $15,831 in wages to her. The petitioner did not submit any other W-2 copies. He provided copies of various payroll tax deposit records, but none show that they are associated with the beneficiary. Similarly, he submitted copies of the beneficiary's 2000 and 2001 tax returns in which she describes her occupation as a caregiver, but as there are no W-2s accompanying them, they do not independently corroborate that the petitioner provided her income. The only other document that directly reveals the petitioner's payment of wages to the beneficiary, as mentioned by the director in his denial, is a state quarterly wage report for the quarter ending September 30, 2000. It shows that the petitioner paid the beneficiary $4,550 in wages during that quarter.

The director denied the petition on January 11, 2002. The director reviewed the petitioner's adjusted gross income and evidence of other assets as shown on the petitioner's tax returns and by other evidence and concluded that the petitioner had failed to demonstrate his ability to pay the proffered wage.

On appeal, counsel attaches copies of social security benefit statements and asserts that the elderly petitioner and his wife may also use their social security payments to pay the proffered wage as well as their living expenses. Counsel also asserts that the petitioner and his wife no longer have a mortgage to pay and despite having had a caregiver in the home for the past twenty years, still have approximately $100,000 from which they can pay for essential services. Counsel resubmits copies of the petitioner's 1998 through 2000 income tax returns, however, the '97 and '98 return do not have the social security benefit amounts filled in.

As noted by the director, an individual petitioner, like a sole proprietorship, does not maintain a separate legal entity. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore individual petitioners must show that they can cover their existing household expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals or sole proprietors must show that they can 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 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. In the instant case, the petitioner established that it employed the beneficiary during 1999 and paid her $15,831, which is $12,186.60 less than the proffered wage. The petitioner also provided evidence that he paid her $4,550 in wages during the third quarter of 2000, which is $23,467.60 less than the proffered wage.

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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, although the AAO agrees that it is appropriate to consider the petitioner's social security income, as well as his adjusted gross income to consider the petitioner's continuing ability to pay the proffered wage, the evidence submitted here does not show the petitioner's ability to pay the proffered wage as well as cover his expenses except in 1999. In that year, the petitioner needed to cover the $12,186.60 difference between the proffered wage and the actual wages paid, as well as pay the $5,640 needed for household expenses. His reported adjusted gross income plus social security income totaled $19,741, which was sufficient cover the shortfall of $17,826.60. By the same method, the difference between the proffered wage of $28,017.60 and the evidence of $4,550 in actual wages paid in 2000 is $23,467.60. The petitioner's adjusted gross income and social security income in 2000 totaled $20,019, which was insufficient to cover the proffered wage.

The AAO does not ignore the evidence suggested by the petitioner's mutual fund and bank statements as resources out of which the proffered wage may be paid. The statements provided, however, represent only a few dates in 2001 and 2002. Evidence of a few select balances showing a snapshot of the petitioner's cash assets on particular dates in two different years does not illustrate a sustainable source out of which the proffered wage may be paid. The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay a beneficiary's proposed salary beginning on the priority date. Here, that was February 19, 1997. In this case, for example, other than the petitioner's tax returns for 1997 and 1998, no persuasive evidence has been presented to establish the petitioner's ability to pay the proffered wage during that period.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 2000 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, it is noted that the evidence in the record raises the issue whether the job opportunity certified in the labor certification actually represents a bona fide job offer for a permanent full-time kosher domestic cook, when the evidence suggests that alien worker will predominately perform caregiver and health care duties. It is also noted that there is little evidence provided documenting the beneficiary's required two years of experience in the job offered of kosher domestic cook pursuant to 8 C.F.R. § 204.5(g)(1), which requires the evidence be submitted from the employer that can provide specific confirmation of job duties, training, and working hours.

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.