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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 23 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 it 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 a brief.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is $600 per week, which amounts to $31,200 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a letter of support, a statement from the sole proprietor's savings account, a statement from the sole proprietor's checking accounts, and the sole proprietor's Forms 1040, U.S. Individual Income Tax Return with accompanying Schedules C, Profit or Loss from Business, for the years 1999 through 2001[1].

The petitioner's letter of support stated, in pertinent part, the following:

> As you may notice from the attached tax return copies, in the year of 1999, 2000 and 2001, my gross profit is about $96,266, $107,188 & $107,363, while my net profit is $23,041, $21,508 & $26,259 [sic] respectively. As what I stated in the above paragraph, it is so difficult to find a qualified Chinese food cook for the past few years that I have to work in the

[1] The petitioner's financial situation for 1999 and 2000 is not necessarily dispositive for establishing a continuing ability to pay the proffered wage beginning on the priority date, which is 2001.

> restaurant myself with the help of my wife. Therefore, the business operation is not as successful as it should be. That is why we finally decide to spend tremendous time and resources to file the labor certification application and immigration petition for [the beneficiary]. We understand clearly the fundamental aspects of our business, as well as the potential for successful expansion of the restaurant with the help of [the beneficiary] as a qualified Chinese food cook. Our long term plan is to provide our customers with superior quality and various types of Chinese food products.
>
> I am going to pay salary [sic] $31,200 to [the beneficiary] based on the certified Labor Certificate [sic]. In order to demonstrate that we have the ability to pay the prevailing wage, I attached my bank statement with this application. I have more than $60,000 deposit in my saving account in the bank which I am going to use to invest to the restaurant business expansion if [the beneficiary] is hired. I believe that with [the beneficiary] as the cook in my restaurant, the business will be much more successful than ever and I am sure that our food will attracts [sic] a lot more customers.

The sole proprietor's savings account statement is from Cathay Bank and reflects a balance of $61,232.81 as of May 15, 2002. The sole proprietor's checking account statement is from American State and reflects an average balance of $3,841.73.

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

	2001	2000	1999
Proprietor's adjusted gross income (Form 1040)	$24,427	$19,988	$22,121
Petitioner's gross receipts or sales (Schedule C)	$185,328	$174,934	$151,936
Petitioner's wages paid (Schedule C)	$12,000	$12,000	$20,200
Petitioner's net profit from business (Schedule C)	$25,933	$21,508	$13,015

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 November 1, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a list of monthly recurring household expenses, and additional financial documentation such as personnel records, quarterly tax returns, or W-2 forms for all employees.

In response, the petitioner submitted copies of a what counsel claims to be bank records of the sole proprietor's mortgage payments, although the bank and the account owner's information are not included, which counsel claims are recurring monthly expenses of $3426.00; copies of the sole proprietor's certificates of vehicle titles which counsel claims were paid in full at time of purchase and do not present a recurring expense; copies of three months of credit card payments for an account without identifying information which counsel claims demonstrate the sole proprietor's monthly expenses and showing payments of $2,389.59, $1,057.28, and $39; copies of the sole proprietor's personal checking account statements; copies of the petitioner's checking account statements, from March 2001 through November 2002; copies of the petitioner's quarterly tax returns for the quarters ending September 30, 2002, June 30, 2002, March 31, 2002, December 31, 2001, September 30, 2001, June 30, 2001, and March 31, 2001; copies of unemployment

insurance reports; and copies of "[p]ersonnel records (Form W-2) for all employees, which includes Forms W-2, Wage and Tax Statements, issued from the petitioner to Tu Can Yang and Xiu X. Zhang in the amount of $12,000 for each of them in 2001. Counsel's accompanying cover letter states that profit and loss statements are enclosed with the response; however, the record of proceeding does not contain any profit and loss statements.

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 August 1, 2003, denied the petition.

On appeal, counsel asserts that the sole proprietor's home and vehicle values and cash assets should be considered in the petitioner's ability to pay the proffered wage.

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 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 sole proprietor supports a family of three. In 2001, the sole proprietorship's adjusted gross income of $24,427 does not cover the proffered wage of $31,200. The sole proprietor could not support himself and his family and pay the proffered wage, especially with monthly expenses that appear to be greater

than $3,500 per month. The AAO notes that the sole proprietor did not provide an adequate listing of monthly expenses, but did provide what the director specifically requested. Typically, monthly expenses include utilities for a home, food and clothing, and entertainment, items which are missing from the evidence provided in response to the director's request. The home mortgage is $3426 and credit card payments are between approximately $100 and $2500 per month. It could be fair to approximately $4500 as the sole proprietor's average monthly expense, absent better evidence and clarity from the petitioner's submission.

The petitioner could not pay the proffered wage out of its sole proprietor's adjusted gross income. Likewise, its net profits are modest. The AAO will consider the sole proprietor's cash assets; however, it will not consider items such as home and vehicle values. Both are assets not typically liquidated to pay salaries of employees. The home is also encumbered by a mortgage. The AAO will consider the cash assets in bank accounts.

The sole proprietor maintains an "average ledger" of $3,467.04 in a checking account at American State bank in North Dakota.[2] The sole proprietor also maintains an additional savings account balance of $61,232.81 at Cathay Bank as of May 2002.[3] Additionally, the petitioner maintains an "average ledger" of $5983.55 in a checking account at American State bank in North Dakota. These average balances are substantial enough to cover the proffered wage as the sole proprietor's savings account could pay the proffered wage for two years, and the two checking accounts could also pay the proffered wage quite easily. The petitioner's substantial cash assets as reflected in its checking accounts shift this decision in the petitioner's favor.

Therefore, the petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

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[2] The average was obtained by adding each balance together and dividing by total time periods. The "average ledger" figure was obtained from each individual statement from March 2001 through November 2002 and divided by the 21 time periods covered by the statements provided.
[3] See note 2 *supra*.