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

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted] prevention of personal privacy

B6 FEB 28 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 02 280 50088

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, California 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 Chinese dim sum chef. 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, the petitioner, through counsel, submits additional evidence and asserts that the director misinterpreted the evidence and should have approved the petition.

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:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 25, 2001. The proffered wage as stated on the Form ETA 750 is $10.09 per hour, which amounts to $20,987.20 per year. The ETA 750B, signed by the beneficiary on April 20, 2001, does not reflect that the petitioner employed the beneficiary at that time.

Part 5 of the petition, filed September 12, 2002, reflects that the petitioner was originally established in 1992, claims a gross annual income of $138,735 and currently employs six workers. A subsequent letter, dated September 5, 2002, indicates that the petitioner is attempting to expand its services in the Santa Monica area.

The petitioner claims to be structured as a sole proprietorship. As evidence of its ability to pay the proffered salary of $20,987.20 per year, the petitioner initially submitted a partial copy of the sole proprietor's Form

1040, U.S. Individual Income Tax Return for 2001, consisting only of Schedule C, Profit or Loss from Business. It is noted that this Schedule C lists a different employer identification number as that given for the petitioner on page 1 of the Immigrant Petition for Alien Worker (I-140).

On October 31, 2002, the director requested additional evidence in support of the petitioner's continuing ability to pay the proffered salary. He requested audited financial statements, federal tax returns or annual reports covering the period of the priority date to the present.

In response the petitioner submitted a more complete copy of the sole proprietor's individual income tax return for 2001. It shows that the sole proprietor filed individually and declared two dependents. He reported an adjusted gross income of $19,921 in 2001. This amount includes taxable interest of $50, a net business income of $21,494 as reflected on Schedule C, Profit or Loss from Business, and on line 12 of page 1 of the tax return. The adjusted gross income also includes -$106 reported on line 17 of page 1 and on Schedule E as a loss from a partnership or S Corporation. It is noted that the employer identification number listed for the sole proprietorship business is again different from that of the petitioner on the I-140. Rather, the petitioner and its employer identification number is listed on Schedule E as an S Corporation for which the sole proprietor declared a loss of $81 in 2001. The remaining $25 loss for 2001 was reported on Schedule E as his income from a partnership called "Homat Technologies."

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on February 6, 2003, denied the petition. The director noted that the sole proprietor's adjusted gross income reported in 2001 as $19,921 was $1066.20 less than the proposed wage offer of $20,987.20 and failed to demonstrate the petitioner's continuing ability to pay the proffered wage.

On appeal, citing a 1999 AAO case, counsel asserts that the petitioner's 2001 profit of $21,494 and depreciation of $1,878 establish the petitioner's continuing ability to pay the proffered wage

At the outset, two observations are made. Although counsel cites a 1999 AAO decision in support of her initial assertion, it is noted that this decision does not constitute a binding precedent within the terms of 8 C.F.R. § 103.3(c). That regulation provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In determining eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. §103.2(b)(16)(ii).

Secondly, the record fails to credibly establish the exact identity of the petitioner. It is unclear whether the petitioner is "Ocean City Restaurant," a Subchapter S corporation whose employer identification number is listed on page one of the I-140 and on Schedule E of the 2001 individual tax return, or is "Ocean City Restaurant," a sole proprietorship whose business income is reported on Schedule C of the sole proprietor's 2001 income tax return. Both list their business address as the same location, which is also the address given as the location where the alien will work. It is incumbent upon the petitioner to resolve inconsistencies by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In this proceeding, no clarification or explanation has been offered. If represented as a corporation, the petitioner has failed to submit evidence in support of its ability to pay the proffered wage in the form of federal tax returns, annual reports or audited financial statements as required by 8 C.F.R. § 204.5(g)(2). For the reasons discussed below,

the AAO also concurs with the director's denial in his review of the petitioner's ability to pay as a sole proprietorship, so a remand is unnecessary.

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 may have 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. To the extent that a petitioner may have paid wages less than the proffered salary to the alien will, these amounts will also be considered. In the instant case, the record does not suggest that the petitioner has employed the alien beneficiary.

If the petitioner does not establish that it may have 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 *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

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, counsel asserts that the petitioner has had additional financial sources and other assets to support family expenses. As evidence of this ability, counsel attaches, on appeal, a copy of a California statement by domestic stock corporation, "Lin Point Dume International Inc.," reflecting that the sole proprietor is the only director and officer listed on the document. Also attached are copies of this corporation's September, October, and December 2001 bank statements showing balances of $832.67, $7,021.05, and $4,132.37, respectively.

These amounts held by a different corporate entity may not be considered in support of the petitioner's ability to pay the proffered wage. First, as stated by counsel and as shown on the individual tax return of the sole proprietor, no individual distribution of income was reported by the sole proprietor from this corporation in 2001, therefore it cannot properly be attributable as an additional personal asset readily available to the petitioner. Second, these monies are not considered in an evaluation of an individual sole proprietor's ability to pay the proffered wage because they are held as assets of the corporation, which is a separate legal entity from the individual sole proprietor. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel also asserts that the restaurant sustained a decline in income due to the terrorist attack of September 11, 2001 and should merit discretionary consideration. She offers copies of bank statements that represent a corporate checking account for April, June, July, September, October and November 2001. She states that the restaurant's business deposits enjoyed an increase from $11,000 to the $15,000 range before September 11th and afterward sharply declined to $8,000. Two of the bank statements from October and December 2001 are those of Lin Point Dume International Inc. The remaining statements are those for "Ocean City Chinese Restaurant." They are labeled as corporate checking accounts. Counsel refers to all statements as corporate accounts.

As stated above, the assets of a corporation and sole proprietorship are not considered interchangeably. By submitting corporate bank statements instead of ones that clearly reflect the sole proprietorship as the business that is petitioning the alien, it again raises the issue as to which entity is supposed to be the prospective U.S employer making a bona fide job offer for a full-time position.

Second, although discretion may sometimes be exercised where unusual or unique business circumstances may affect the petitioner's ability to pay, even if these bank deposits would be considered to represent the petitioner's, it cannot be concluded that the evidence sufficiently supports its continuing ability to pay the proffered wage. In *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established.

He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, the sole proprietor's adjusted gross income was $20,241 during 2001 including a net business income of $$21,494. Even viewing the corporate bank statements as relevant to the sole proprietorship's business deposits, while they were about $10,000 in April 2001, and reached $15,000 in June 2001, in July, they declined again to $10,000. The August statements were omitted. In September, the business deposits were about $8,400, but had climbed to approximately $11,500 by November 2001. While the events of September 11th were certainly a unique occurrence, the evidence submitted by this petitioner has shown evidence of a decline prior to September 11th. As such, there is not sufficient evidence in the record that the petitioner's restaurant operation experienced such an unusual decrease so as to merit exercising discretion on behalf of the petitioner.

The evidence indicates that the sole proprietor supports himself and two dependents. In 2001, as noted by the director, even without considering payment of any household living expenses, the sole proprietorship's adjusted gross income of $19,921 was $1,066.20 less than the certified wage of $20,987.2 per annum. Other than as discussed above, the record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001. Again, as noted above, the identity of the petitioner as either a sole proprietorship or a corporation has not been convincingly demonstrated, but based on the evidence contained in this record, neither has successfully demonstrated the continuing ability to pay the proposed wage beginning on the priority date of April 25, 2001. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner could not pay the wage as stated in the labor certification. *See Matter of Great Wall,* 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977).

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.