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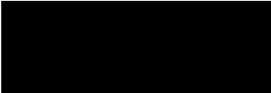
**U.S. Citizenship
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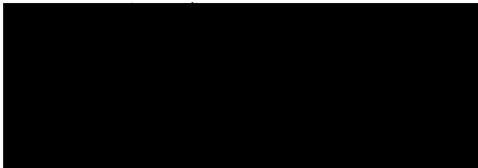
BK

FILE:  Office: CALIFORNIA SERVICE CENTER Date: **SEP 06 2005**
WAC 03 124 52202

IN RE: Petitioner: 
Beneficiary:

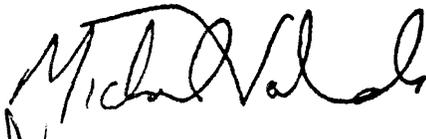
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter remanded to the director for further consideration, and a new decision.

The petitioner is an Indian restaurant serving dishes from Northern India. It seeks to employ the beneficiary permanently in the United States as an Indian cuisine 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. Accordingly, the director denied the petition.

On appeal, the petitioner submits a new statement.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour, which amounts to \$22,880 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from August 1999 to the date he signed the ETA 750, namely April 27, 2001.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$91,235, a net annual income of \$14,051, and to currently employ three workers. In support of the petition, counsel submitted a letter of support from the petitioner, and also a cover letter that explained the petitioner had previously filed a similar I-140 in March 2002 that had been denied. Counsel stated that the petitioner chose to refile a new I-140 rather than pursue the appeal process. Counsel submitted copies of the sole proprietor's Forms 1040 for 2000 and 2001, as well as Schedules C for the same years. Counsel also submitted bank statements from CalFed for the sole proprietor's business interest checking account (Account number [REDACTED] January 2000 to December 2002, as

well as a personal bank statement for a Liquid CD account (Account number [REDACTED] with Washington Mutual Bank. The statement is dated December 19, 2002, and had an ending balance of \$52,497. Counsel also submits a second savings statement for another Washington Mutual Bank account (Account [REDACTED] that is dated January 10, 2003, and has an ending balance of \$2,569. Counsel states that the average daily balances from the petitioner's bank statements from CalFed exceed \$3,000, and also that the beneficiary's monthly salary would be \$1,906.66. Based upon the ending balances in the petitioner's bank statements, and the beneficiary's monthly salary, counsel stated that the petitioner clearly had and continues to have cash on hand exceeding the required wage on a daily basis in its banking accounts. Counsel also noted that the owner's bank statement dated December 2002 showed that he had more than \$52,000 available in cash to provide to the business, if necessary.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 7, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns with all accompanying schedules and tables for the years 200 to 2002, with appropriate signatures, or audited financial statements. The director also requested that the petitioner submit a correct IRS number, as well as the beneficiary's check stubs for the last eight months of 2003.

In response, counsel states that the petitioner was unable to provide check stubs for the beneficiary for the last eight months. Counsel stated that although the beneficiary had previously worked for the petitioner, he had not worked for the petitioner during the last eight months of 2003, due to a health condition. Counsel resubmitted the sole proprietor's Forms 1040 for 2000 and 2001, and also submitted the sole proprietor's Form 1040 for 2002, with accompanying Schedules C. The tax returns indicated the following yearly adjusted gross income: 2000, \$11,789; 2001, \$14,355; and 2002, \$12,520. Counsel resubmitted the bank statements from CalFed for Account Number [REDACTED] initially submitted with the petition and submitted newer statements from December 2002 to September 2003. Counsel stated that typically the daily balance in these statements was in the \$2,500 to \$3,000 range. Counsel also submitted additional bank statements from the sole proprietor's accounts with Washington Mutual, under the following account numbers: [REDACTED] described as a free checking account; [REDACTED] described as a statement savings; [REDACTED] identified on the documents as a market rate account; and [REDACTED] identified as a Liquid CD account. Counsel also submitted a Internet document that he described as a Washington Mutual profile. This document appears to be dated December 12, 1999. This document identifies two accounts [REDACTED] with a balance of \$526.08, and Account [REDACTED] with a balance of \$52,769.54.¹ Counsel also submitted a Washington Mutual Bank account statement summary statement for Account Number [REDACTED] taken from the Internet. This document indicates that as of December 8, 2003, the sole proprietor had a current balance of \$21,469.97 in this statement savings account.

¹These two accounts appear to be the same accounts identified on the submitted documents as [REDACTED] and [REDACTED]

On March 23, 2004, the director denied the petition. In his denial, the director noted that the petitioner stated on the I-140 petition that he had three employees. The director further noted that the petitioner's tax return for 2001 indicated that the petitioner paid \$5,500 in wages and had a profit or total income of \$14,051. The director also stated that the petitioner's tax return for 2002 indicated that the petitioner had paid \$6,000 in wages and had a profit of \$12,191. The director then examined the petitioner's bank statements and stated that they showed an average balance of about \$2,500 to \$3,000, and the beneficiary's monthly income based on the proffered wage would be \$1,760.² The director then stated that after deducting the beneficiary's salary, the petitioner would be left with a balance of \$740 from its average monthly banking accounts.

Finally the director noted that the ETA 750, signed in 2001, indicated that the beneficiary had worked for the petitioner since August 1999, although the petitioner was not able to provide copies of the beneficiary's check stubs for the last eight months of 2003. The director then determined that the petitioner did not have the ability to pay the proffered wage to the beneficiary.

On appeal, counsel states that the director erred by focusing exclusively on the petitioner's tax returns and failing to consider the submitted bank statements that provided evidence of cash in hand. Counsel asserts that there is no legal distinction between the sole proprietor owner of the Bombay Café and the Café, and as a result both the tax returns and the bank statements of the sole proprietor and the sole proprietor's business must be considered by the director. Counsel cites to what he describes as AAO precedent decisions reported in the publication *Immigration Reporter* that utilized the examination of monthly bank account balances to determine petitioners' ability to pay proffered wages. Counsel again reviews the range of balances established in the documentation submitted on four of the sole proprietor's accounts with Washington Mutual Bank.

On appeal, counsel refers to decisions issued by the AAO concerning the use of monthly bank account balances to establish a petitioner's ability to pay the proffered wage, but does not provide any published citations. While 8 C.F.R. § 103.3(c) 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). It is also noted that several of the decisions cited also involve the examination of monthly bank balances that exceeded the proffered wage on a monthly basis.

Furthermore, the director's and counsel's reliance on the balances in the petitioner's business bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements for its CalFed business banking account (Account number [REDACTED] [REDACTED]) somehow reflect additional available funds that were not reflected on its tax returns. The use of the

² The correct monthly salary, as noted by counsel, would be \$1,906.

sole proprietor's additional assets documented by numerous Washington Mutual Bank accounts to pay the proffered wage will be discussed further in the proceedings.

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. Form ETA 750, signed by the beneficiary, indicated the petitioner had employed the beneficiary from August 1999 to the date the ETA 750 was signed. In addition, the petitioner stated that it had employed the beneficiary previously, but could not provide pay stubs for the last eight months in 2002, because the beneficiary was not employed then, due to a health condition. Without more persuasive evidence, the petitioner did not establish that it employed the beneficiary or paid him the proffered wage prior to or following the April 2001 priority date.

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

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 14,355	\$ 12,520
Petitioner's gross receipts or sales (Schedule C)	\$ 91,253	\$ 73,653
Petitioner's wages paid (Schedule C)	\$ 5,500	\$ 6,000
Petitioner's net profit from business (Schedule C)	\$ 14,051	\$ 12,191

As correctly noted by counsel, 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 petitioner is a sole proprietor and, as indicated on both income tax returns, supports himself. As previously stated and illustrated above, the petitioner's adjusted gross income in 2001 and 2002 respectively is \$14,355, and \$12,520.³ It is noted that in his request for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's personal expenses. Therefore, there is no list of household expenses or discussion of the sole proprietors' household expenses to allow further examination of this issue. Nevertheless, even without such information on the petitioner's personal and household expenses, based on the sole proprietor's adjusted gross income, the sole proprietor would lack \$8,525 in 2001 and \$10,360 in 2002 to pay the proffered wage. Thus, the petitioner has not established that it can pay the proffered wage, cover his existing business expenses, and sustain himself, based on his adjusted gross income.

With regard to the sole proprietor's additional financial assets, namely the sole proprietor's banking accounts with Washington Mutual bank, as stated previously, counsel is correct that these assets can be utilized to establish the petitioner's ability to pay the proffered wage. Upon review of these assets, the record is somewhat confused. In addition, the account documentation submitted to the record is poorly organized. Counsel on appeal suggests that the sole proprietor has three Washington Mutual Bank accounts with balances ranging from amounts such as \$562 and \$6,000 to over \$50,000. These accounts are identified as Account Numbers [REDACTED] and [REDACTED]. However, upon brief review of the documentation of some of the accounts, it appears that the sole proprietor has perhaps invested the same money in various certificates of deposit over the years. For example, bank statements for Account number [REDACTED] indicate that as of the priority date, April 27, 2001, the sole proprietor had \$50,290.14 in an account described as a market rate account, and that the proprietor withdrew \$50,893.18 from this account in September 2001, leaving a zero balance in this account. The sole proprietor then deposited \$51,052.67 into Account number [REDACTED] on September 19, 2001 as a liquid CD. The record also indicates a renewal of this CD as of July 2002, and additional bank statements establish that the sole proprietor had \$52,552 in this account as of January 19, 2003. However, as of May 19, 2003, this account has a balance of \$6,098.19. Nevertheless, the record indicates that the sole proprietor deposited significant monies into Washington Mutual Bank account number [REDACTED] the sole proprietor's statement savings account, in 2003 and that as of December 8, 2003, the sole proprietor had a current balance of \$21,469.97 in this statement savings account.

In sum, the sole proprietor had substantial amount of cash in either a Washington Mutual Bank money market account or a liquid CD from April 2001 to January 2003. Furthermore, the record reflects that the sole proprietor still had \$21,469.97 in liquidable assets as of December 8, 2003. It appears that any of these accounts, including certificates of deposit, were liquidable to be used to fund the beneficiary's proffered wage of \$22,880. However, it is not clear what the exact amount of liquidable funds were, and whether or not the petitioner could have paid the wages for 2001, 2002, and 2003 with this sum and still support himself.

³ Although the petitioner submitted its IRS Form 1040 for 2000, the priority date for the petition is April 27, 2001. Thus, the petitioner only has to establish its ability to pay the proffered wage as of the priority date. Thus, the 2000 income tax return is not dispositive, and will not be considered in these proceedings.

The issue of the sole proprietor's monthly expenses and his ability to pay business expenses, his household expenses and the proffered wage, as stated previously, remains unresolved. It is noted that if the sole proprietor had to use the Washington Mutual bank accounts to support his monthly expenses, these funds would not have been available to pay the beneficiary's proffered wage, or they would have been available in diminishing quantity, over the period of time from the priority date to the present. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Therefore, the director's decision is withdrawn, and the matter is remanded to the director for further consideration of the following issues, along with evidentiary documentation on these issues:

The sole proprietor's household expenses. The petitioner should provide an itemized list of expenses to include rent or mortgage, insurance, food, clothes, utilities, etc., on a monthly basis.

The sole proprietor's actual personal liquidable financial assets as of the priority date, April 27, 2001, and continuing to the present. As stated previously, the record is confused and poorly organized. The petitioner needs to provide a precise explanation of the sole proprietor's personal assets as of the priority date and continuing to the present time.

The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.