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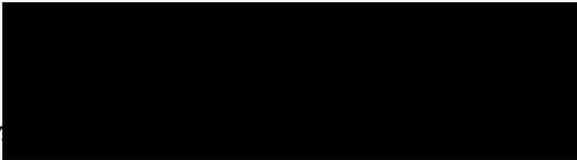


FILE: WAC 03 046 54477 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
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:



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 The director's decision will be withdrawn, and the matter will be remanded for further consideration of the petitioner's ability to pay the proffered wage, and its business operations.

The petitioner states that it is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty Korean 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 states that the petitioner has sufficient funds to pay the proffered wage and resubmits the petitioner's federal income tax returns, as well as new documentation.

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 August 13, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which amounts to \$26,000 annually.

The petitioner is structured as a sole proprietorship. The petitioner stated that it was established in 1995, and that it has five employees. With the petition, the petitioner submitted a letter of support from the petitioner as to the beneficiary's position, a certificate of employment from the beneficiary's previous employer, the petitioner's income tax return for 2001, and copies of the petitioner's bank statements from January 2002 to September 2002.

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 April 26, 2003, 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 the petitioner's federal income tax returns for 2002 to the present, as well as copies of the petitioner's current valid business licenses.

In response, counsel submitted the petitioner's income tax return for 2002, and a document entitled "Business License" issued on June 23, 1998 that indicated that the petitioner had a liquor license to sell "beer, wine, cooler on sale."

The director determined that the evidence submitted did not establish that, as a sole proprietor, the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and also to support himself and two dependents. On June 13, 2003, the director denied the petition.

On appeal, counsel states that the petitioner does have sufficient funds to pay the offered wage from the priority date onward, and points out that the petitioner 2001 tax return indicates \$20,784 in depreciation, which is considered to be a cash outlay, and thus can be added back to the adjusted gross income amount and considered as available funds. Counsel states that the petitioner, based on this analysis, had available funds of at least \$59,849 toward payment of the proffered wage. With regard to the petitioner's 2002 tax return, counsel states that the petitioner had \$58,944 (the adjusted gross income of \$39,904 plus \$19,040 of depreciation) available to pay the proffered wage. Counsel maintains that such sums would be adequate to both pay the beneficiary and meet daily living expenses. Counsel submits additional bank statements from November 2002 to June 30, 2003 and states that the average ending balance for this period is \$17,201.35 per month, which is more than enough to support the beneficiary's salary. Finally counsel states that the petitioner desperately needs a talented Korean specialty cook in order to be a 24-hour service establishment. Counsel also states that the petitioner's restaurant building and his home are owned by his adult son which minimizes the living expenses for himself and his two minor children. Counsel states that the petitioner is willing to pay the beneficiary's salary from his personal funds, if necessary.

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

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 39,065	\$ 39,904
Petitioner's gross receipts or sales (Schedule C)	\$ 482,881	\$ 406,516
Petitioner's wages paid (Schedule C)	\$ 75,207	\$ 66,627
Petitioner's net profit from business (Schedule C)	\$ 42,881	\$ 42,938

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.

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 (7<sup>th</sup> 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 himself and two minor dependents. In 2001, the sole proprietorship's adjusted gross income of \$39,065, minus the proffered wage of \$26,000, would leave \$13,000 to support a household of three family members. In 2002, the sole proprietorship's adjusted gross income of \$39,904, minus the proffered wage of \$26,000, would leave \$13,904 to cover the personal expenses of the sole proprietor and his two dependents. 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. Although counsel on appeal asserted that the petitioner's house and building in which his restaurant is located are owned by his adult son, and therefore the living expenses of the petitioner and his two dependents are minimized, counsel's assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). The petitioner would have to submit evidentiary documentation to support this assertion, as well as a list of household expenses for himself and his dependents, and any other funds available to pay the proffered wage.

Finally, the petitioner submitted monthly bank statements for the period from January 2002 to September 2002 with the initial petition. On appeal, counsel submits bank statements for the period from November 2002 to June of 2003. The lowest end of month balance is \$8,520 in July 2002, while the highest end of month balance is \$30,084 for January 2003. The petitioner submitted no bank statements for the period of time of the priority date, namely, August 13, 2001 and onward to January 2002.

On appeal, counsel states that these bank statements are evidence that the petitioner has established that it is able to pay the proffered wage. While the monthly balances in the petitioner's banking account do reflect substantial funds, 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. As stated previously, the petitioner also did not submit the banking statements most relevant to the petition, namely the statement for August 2001. Although counsel on appeal states that the petitioner is willing to pay the beneficiary's salary out of his own personal funds, the record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 and in subsequent years.

As stated previously, the record is insufficient due to the lack of information on the petitioner's household expenses. The record contains no request by the director for a list of household expenses and documentation

of these expenses at any point during his deliberations. For this reason, the director's decision is withdrawn, and the matter is remanded to the director for further consideration of the sole proprietor's household expenses, and whether sufficient funds are available to both pay the proffered wage and to financially sustain a family of three members.

Beyond the decision of the director, the director requested the petitioner to submit a copy of all business licenses. In response to the director's request, the petitioner submitted a liquor license, with no further explanation. Without more persuasive evidence as to a food establishment license, the petitioner has not established that it is a Korean restaurant and that it needs the services of a specialty Korean cook. Without such documentation, the petitioner has not established that a bona fide position exists for the beneficiary. The petitioner should provide additional licenses that are lacking from the record or an explanation as to why such documentation does not exist.

In view of the foregoing issues, the previous decision of the director will be withdrawn. The petition is remanded to the director for further consideration of the petitioner's household expenses, and the petitioner's business licenses. 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.