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U.S. Citizenship  
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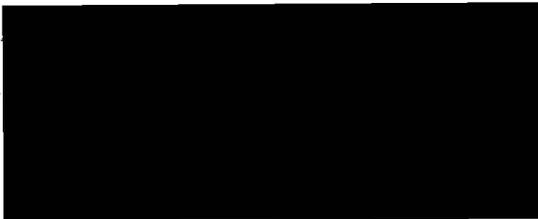
Office: VERMONT SERVICE CENTER

Date: APR 09 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a Korean & Japanese deli and restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty 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 additional evidence and asserts that the director erred in his analysis of the evidence submitted and maintains that the petitioner has the financial ability 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 March 13, 2003. The proffered wage as stated on the Form ETA 750 is \$11.84 per, which amounts to \$21,548.80 based on a 35-hour workweek as stated on the ETA 750. On Part B of the ETA 750, signed by the beneficiary on April 20, 2001, the beneficiary claims that he has worked for the petitioner since August 1994.

On Part 5 of the preference petition, filed January 20, 2004, the petitioner claims that it was established in April 1984, reported a gross annual income of \$284,098 in 2001, net annual income of \$24,389 in 2001, and currently employs four workers.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001 and 2002. These returns reflect that the sole proprietor files jointly with his spouse and declares no dependents. They contain the following information:

	2001	2002
Petitioner's gross receipts (Schedule C)	\$ 284,098	\$293,270
Petitioner's wages paid (Schedule C)	\$ 43,176	\$ 66,030
Petitioner's total expenses (Schedule C)	\$ 103,518	\$123,406
Petitioner's net profit (Sched. C)	\$ 24,389	\$ 5,458
Total business net income (Form 1040)	\$ 24,389	\$ 5,458
Sole Proprietor's adjusted gross income (Form 1040)	\$ 59,968	\$ 84,856

The petitioner also provided copies of the beneficiary's individual income tax returns for 2001 and 2002. The original 2001 return was supported by a Wage and Tax Statement (W-2), which shows withholding for social security and medicare tax, but no withholding for federal income taxes, and reflects that the petitioner paid the beneficiary \$10,920 in wages. A draft of a Form 1040X, Amended U.S. Individual Income Tax Return reflects that the beneficiary reported an increase in income due to "error Sch C income not reported on original return." No schedule C is included with this document, but the amended amount of income is shown to be \$21,329.

The beneficiary's 2002 individual income tax return, accompanied by a W-2 issued by reflects payment of wages of \$23,420.

On August 3, 2004, the director issued a request for evidence, instructing the petitioner to submit a list of his monthly expenses, including rent or mortgage, food, utilities, etc. The director also requested copies of the beneficiary's W-2s for 2001, if the beneficiary employed him.

In response, the petitioner, through counsel, supplied a copy of monthly expenses amounting to \$3,451 per month in 2001. Counsel also resubmitted a copy of the beneficiary's 2001 W-2 showing wages of \$10,920, as well as a copy of the beneficiary's original Form 1040 for 2001 and the draft of the 2001 amended tax return that were initially provided. Additionally, the petitioner provided a copy of a Form 1099-Misc that appears to represent non-employee compensation of \$10,409 paid to the beneficiary in 2001 by the petitioner, although the year of the form appears to be altered.

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 March 28, 2005, denied the petition. The director noted that the petitioner's adjusted gross income of \$59,968 less the yearly household expenses of \$41,412 for 2001 would have left \$18,556 available to be applied toward the proffered wage. He further noted that the wages of \$10,920 reflected on the beneficiary's 2001 W-2 were not sufficient to cover the proffered wage. The director, however, identified the proffered wage as \$24,627.20, rather than \$21,548.80.

On appeal, counsel asserts that the director failed to consider the appropriate proffered wage and also failed to consider the Form 1099 issued to the beneficiary in 2001. Counsel resubmits the beneficiary's 2001 and 2002 tax returns along with copies of the 1099/W-2(s) issued and additionally submits copies of the beneficiary's individual tax returns and corresponding W-2s for 2003 and 2004. In both 2003 and 2004, the beneficiary's W-2(s) reflect that the petitioner paid him \$23,920. The beneficiary's 2003 tax return was amended to reflect additional deductions and a change in filing status.

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. Lesser amounts will also be considered, and if either the petitioner's net income or net current assets can cover any difference between the actual wages paid the beneficiary and the proffered wage during a given period, then the petitioner is deemed to have established its ability to pay the certified salary for that period. In the instant case, as noted above, the W-2s and (Form 1099) submitted with the petitioner's evidence reflect the beneficiary's compensation as follows:

2001	(W-2)	\$10,920	(1099)	\$10,409
2002	(W-2)	\$23,420		
2003	(W-2)	\$23,920		
2004	(W-2)	\$23,920		

In determining the petitioner's ability to pay the proffered wage, CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

As discussed above, the petitioner is a sole proprietorship; a business in which an individual 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. As noted above, 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). Because the overall circumstances of a sole proprietor are part of the review of the ability to pay a certified wage, sole proprietors often provide summaries of their monthly household expenses.

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, starting with 2001, the difference between the wages reflected on the beneficiary's W-2 and the proffered wage of \$21,548.80 is \$10,628.80. After deducting household annual expenses of \$41,412 from the sole proprietor's adjusted gross income of \$59,968, the remaining sum of \$18,556 appears to be sufficient to

cover the \$10,628.80 deficit. The remainder of the wages shown to be paid to the beneficiary in 2002, 2003, and 2004 exceed the proffered wage of \$21,548.80 and would appear to establish the petitioner's ability to pay the certified salary. This case will be remanded, however, in order to secure specific corroboration from the petitioner that the wages and compensation that have been shown to be paid to the beneficiary are corroborated by the petitioner's actual records such as the wages and salaries reflected on Schedule C of the sole proprietor's tax returns, including 2003 and 2004, as well as state wage or unemployment reports identifying the employees and their wages. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is also recommended that the petitioner be requested to explain the 2001 Form 1099 alteration of the year and why the position is described as a new position on part 6 of the I-140, if, as claimed by the beneficiary, it has employed him since 1994. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In view of the foregoing the director's decision is withdrawn. The case is remanded to the director to request additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). 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.

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