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U.S. Citizenship  
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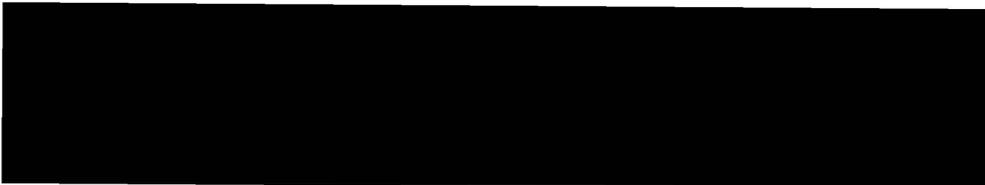
Office: NEBRASKA SERVICE CENTER

Date: MAR 04 2006

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 employment based 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 dismissed.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean food cook. As required by statute, a Form 9089, Application for Permanent 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 contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form 9089 was accepted for processing on September 7, 2006. The proffered wage as stated on

the Form 9089 is \$16.74 per hour, which amounts to \$34,819.20 per year.<sup>1</sup> On the Form 9089, signed by the beneficiary on March 10, 2007, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the I-140, filed on May 9, 2007, the petitioner states that it was established on June 1, 2000, currently employs nine workers, reports an annual gross income in 2006 of \$687,580, and a net annual income in 2006 of \$77,742.

The petitioner is structured as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$34,819.20 per year as of the September 7, 2006, priority date, the petitioner provided a copy of its sole proprietor's U.S. Individual Income Tax Return for 2005 and 2006. The returns reflect that the sole proprietor filed jointly with his spouse and claimed no dependents. The return also contains the following information:

	2005	2006
Wages	n/a	n/a
Taxable interest	n/a	\$ 10
Business Income	\$76,341	\$77,272
Adjusted Gross Income <sup>2</sup>	\$72,762	\$72,282

It is noted that the sole proprietor's 2006 federal income tax return is more relevant to the determination of the petitioner's ability to pay the proffered wage as it covers the priority date of September 7, 2006. With the petition and in response to the director's requests for additional evidence supporting its continuing ability to pay the proffered wage of \$34,819.20, the petitioner also supplied copies of its business checking account statements for the period covering all January 2006 through 2007, copies of W-2s of issued to its employees during 2004, 2005, and 2006, three employer quarterly federal tax returns (Form 941) for the last two quarters of 2006 and the first quarter of 2007, as well as copies of its state quarterly wage reports for the last two quarters of 2006 and the first two quarters of 2007. The beneficiary's name is not included with the other employees' names listed on the state quarterly wage reports.

In response to the director's query, the petitioner stated that it had filed for two chefs including the current beneficiary. The other beneficiary was identified as [REDACTED] whose priority date was November 15, 2007 and whose proposed wage offer was \$16.38 per hour.

The petitioner also provided a summary of sole proprietor's monthly household living expenses that totaled approximately \$4,150.31 per month, annualized to \$49,800 per year.<sup>3</sup>

<sup>1</sup> The director calculated the proffered wage at \$30,467, but this error does not affect the outcome of the appeal.

<sup>2</sup> Adjusted gross income is shown on line 37 of the Form 1040 in 2005 and 2006.

<sup>3</sup> This calculation includes only the submitted expenses billed to the sole proprietor not the petitioning business. Although the director noted that his review of the petitioner's ability to pay the proffered wage was based on the petitioner's ability to demonstrate an income at or above the U.S. Federal Poverty Guidelines for

The director denied the petition on August 22, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage of \$34,819.20. He noted that the petitioner has filed six other petitions and had failed to demonstrate the continuing ability to pay their collective proposed wage offers with respect to each beneficiary as of each priority date.

On appeal, the petitioner, through counsel, contends that the sole proprietor's individual assets should be considered and that his personal net worth of over \$2.5 million dollars demonstrated the petitioner's ability to pay the proffered wage. Counsel provides a copy of a personal financial statement prepared by the sole proprietor's accountant. It is noted that the accountant's name is not revealed and his signature is illegible. The sole proprietor's listed assets include cash and real estate held as of August 31, 2007. Counsel submits a copy of the sole proprietor's deed to real property located at [REDACTED] in Los Angeles which was acquired in 2003 and appears to be the personal residence held by the petitioner and his spouse based on the copies of utility bills previously submitted to the record as part of the itemization of household expenses.

Counsel's assertions are not persuasive. In determining a petitioner's ability to pay a certified wage, if there is no evidence that a petitioner may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will 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.

When a petitioner is a sole proprietorship, additional factors will be considered. 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, as suggested by counsel on appeal, 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 (line 12). 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). Such petitions often include a summary of

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a family unit of two, in addition to the amount necessary to pay the proffered wage, we believe that a such a determination should be based on the facts as developed in each case and that each petitioner's determination should include a consideration of the actual expenses provided by the petitioner.

household expenses. In this case, the petitioner indicated that the sole proprietor's expenses were approximately \$49,800 per year.

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's family is smaller but this beneficiary's proposed wage offer represents 48% of the sole proprietor's adjusted gross income in 2006, the year which covers the priority date.

Regarding the personal financial statement submitted on appeal, it is noted that such a financial statement is not persuasive evidence of the sole proprietor's ability to pay the certified wage in either 2006 or August 2007 when it was prepared. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. As the document relating to the August 31, 2007 individual financial condition of the sole proprietor is not audited as required by the regulation at 8 C.F.R. § 204.5(g)(2), it is not sufficiently probative of the ability to pay the proffered wage during the period at issue, which began as of the priority date of September 7, 2006. It is further noted that, other than the real estate deed, there was little supporting documentation of the figures presented in the sole proprietor's financial statement. 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)).

Although CIS will consider a sole proprietor's overall personal assets and liabilities, they must represent cash or cash equivalent assets that would be a readily available resource out of which the proffered wage could be paid. Real estate is considered a long-term asset and is not readily convertible to be available to pay the proffered wage.

If the bank accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money could be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses if supported by the appropriate documentation. In this case, the business banking accounts represent what appears to be the petitioner's cash flow that would already be represented on Schedule C of the sole proprietor's tax returns as gross receipts and expenses that have been brought forward to page 1 of the tax return as part of the sole proprietor's declaration of personal income.

It is noted that the director prorated the proffered wage in the year 2006 that occurred after the priority date. In general, CIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or, for example payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that is not the case here. In this matter, however, whether calculating a proportionate year of the proffered wage against a calculation of proportionate income and proportionate expenses, the comparison reflects the same result. Here, even without considering any pending petitions for other beneficiaries, after paying household expenses of \$49,800 out of the sole proprietor's 2006 adjusted gross income of \$72,282, the remaining

\$22,482 is insufficient to cover this beneficiary's proposed wage offer of \$34,819.20. The petitioner did not establish its continuing ability to pay the proffered wage as of the priority date.

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date.

Beyond the decision of the director, we would note that the verification of employment that was submitted in order to establish that the beneficiary had obtained the requisite 24 months of experience as a Korean food cook, appears to be signed by her spouse, [REDACTED]. When or if future proceedings should ensue involving this beneficiary, it is suggested that further corroboration of her qualifications should be pursued.

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.