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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC 03 015 51030 Office: CALIFORNIA SERVICE CENTER Date DEC 29 2004

IN RE: Petitioner: [redacted]
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:

[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 Japanese cuisine restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese cuisine cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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. The director also found that the petitioner had failed to establish that the beneficiary had the requisite two years experience required by the offered position.

On appeal, counsel submits additional evidence and contends that the petitioner has established its financial ability to pay the proffered wage and has demonstrated that the beneficiary qualifies for the certified position.

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 regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled worker.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . .

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. The petitioner must also establish that alien beneficiary has the required education, training, and experience specified on the ETA 750 as of the priority date. *See* 8 CFR § 204.5(d); *Matter of*

Wing's Tea House, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on September 17, 1998. The proffered wage as stated on the Form ETA 750 is $2,300 per month, which amounts to $27,600. Part B of the ETA 750, signed by the beneficiary, does not indicate that the petitioner has employed the beneficiary.

Part A, item 14 of the ETA-750, indicates that the beneficiary must have two years of experience in the job offered of Japanese cuisine cook.

On Part 5 of the visa petition, filed October 21, 2002, the petitioner claims to have been established in 1987, have a gross annual income of more than $947,937, a net annual income of more than $498,177, and to currently employ twenty-eight workers.

The petitioner is structured as a sole proprietorship. With the petition, as evidence of its ability to pay the proffered wage, the petitioner submitted incomplete copies of the sole proprietor's individual tax returns for 1999, 2000, and 2001 consisting only of Schedule C, Profit or Loss From Business, and various attachments. The petitioner failed to submit any evidence documenting that the beneficiary had two years of prior employment experience as a Japanese cuisine cook. The petitioner did, however, provide a letter, dated December 17, 1999, with an original signature, addressed to the DOL, which protested the requirement that the certified position must require two years of experience.

On March 3, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage and the beneficiary's qualifying work experience because the initial documentation submitted with the petition was inadequate. The director 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 of September 17, 1998. The director also advised the petitioner that because the petitioning business is a sole proprietorship, it must be able to establish that the sole proprietors have sufficient income to support their living expenses as well as pay the proffered salary. The director specifically requested that the petitioner submit a summary of the sole proprietors' monthly living expenses including such items as housing costs, car payments, insurance, utilities, and other reoccurring household expenses. The director also instructed the petitioner provide copies of its last four state quarterly wage reports and all schedules and tables that accompany submitted tax returns.

The director further requested that the petitioner submit evidence demonstrating that the beneficiary possesses two years of work experience as a Japanese cuisine cook as set forth in the ETA 750. The director informed the petitioner that verification of such experience should be submitted on the previous employer's letterhead showing the name and title of the person providing the verification and with the beneficiary's job title, duties and dates of employment The director also advised that if the work experience is from outside the United States, the petitioner should "provide verifiable evidence that would establish that the applicant has met the labor certification requirements. Examples include work I.D., pay stubs, or tax returns."

In response, the petitioner provided two salary statements from Japanese companies, along with certified English translations. The statements described the beneficiary's wages, but failed to identify the job held or duties performed.

Regarding the petitioner's ability to pay the proffered wage, the petitioner submitted a partial copy of the sole proprietors' 2001 individual tax return consisting only of Schedule C, Profit or Loss From Business, a copy of

an unaudited monthly income statement for 2002, and a copy of the petitioner's last state quarterly wage report for the quarter ending March 31, 2003. The petitioner also provided a draft of a 2003 Orange County "Business Property Statement," in which the petitioner's declaration of the value of its supplies and equipment had been listed for tax assessment purposes.

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 June 16, 2003, denied the petition. The director noted that the petitioner had supplied incomplete tax returns, had not provided a summary of the sole proprietor's household expenses, and had not established that the beneficiary possesses the requisite two years of qualifying work experience as a Japanese cuisine cook.

On appeal, the petitioner, through counsel, provides a copy of a letter from the Ishifunato restaurant in Nagano, Japan verifying that the beneficiary had worked for it as a Japanese cuisine cook for approximately three years. Counsel also offers copies of the petitioner's last five quarters of state quarterly wage reports for the quarters ending June 30, 2002 through June 30, 2003. They show that the petitioner employed an average of seventeen workers each quarter. Counsel further submits copies of the sole proprietors' Form 1040, U.S. Individual Income Tax Returns for 1999 through 2002. They reflect that the sole proprietors filed jointly as married persons and declared one dependent. The tax returns contain the following information:

	1999	2000	2001	2002
Proprietor's adjusted gross income (Form 1040)	$ 67,933	$ 72,176	$ 62,934	$ 42,392
Petitioner's gross receipts or sales (Schedule C)	$848,472	$941,033	$947,937	$826,045
Petitioner's wages paid (Schedule C)	$158,688	$167,299	$199,497	$199,771
Petitioner's net profit from business (Schedule C)	$ 72,755	$ 80,061	$ 77,200	$ 66,712

Counsel asserts that the director misinterpreted the sole proprietors' tax returns and should not have considered anything other than the information offered on Schedule C, Profit or Loss from Business.

At the outset, it is noted that the employment letter provided on appeal appears to comply with the terms of the regulation at 8 C.F.R. § 204.5(l)(3), *supra,* in verifying that the beneficiary has the requisite prior work experience of at least two years as a Japanese cuisine cook

Relevant to counsel's claims that the director erred in reviewing the petitioner's ability to pay the proffered salary of $27,600, it is noted that 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 a given 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. In the instant case, neither the ETA 750B, nor the quarterly wage reports provided by the petitioner reflect that the petitioner employed the beneficiary.

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).

With regard to the unaudited financial statement that the petitioner submitted in response to the director's request for evidence, it is noted that 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. Unaudited statements are the unsupported representations of management, and as such, are not probative of the petitioner's ability to pay the proffered salary.

The AAO finds that the director properly sought to consider complete, not partial copies of the petitioner's tax returns, as well as requesting the petitioner to provide a summary of the sole proprietors' monthly household expenses. In this case, the petitioner is operated as a sole proprietorship, generally defined as a business which is operated in the owner's individual capacity. *See* 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. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). This is the reason that a review of the ability to pay the proffered wage includes consideration of the sole proprietors' household expenses, as well as the adjusted gross income set forth on page one of the tax return.

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, although the sole proprietors support a smaller family than that illustrated in *Ubeda,* it is noted that in 1999, the proffered salary of $27,600 represents 41% of the sole proprietors' adjusted gross income; in 2000, it represents 38%; in 2001, it is 44% of the proposed salary; and in 2002, the proposed wage offer represents 64% of the sole proprietors' adjusted gross income. Without consideration of the sole proprietor's specific household expenses pertinent to the given period, it cannot be calculated that what remain, after reducing the adjusted gross income by the amount required to pay the proffered wage, was sufficient to support the sole proprietors and their family, however, as the record currently stands, particularly with reference to 2002, the AAO cannot conclude that it is probable that the sole proprietors' could have supported a family of three after such a deduction.[1] The regulation at 8 C.F.R. § 204.5(j)(3)(ii), states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide such a summary of the sole proprietors' household expenses.

[1] In 1999, after deducting the proffered wage from the sole proprietors' adjusted gross income, $40,333 remains. In 2000, $44,576 remains after the deduction; in 2001, $35,334 remains after the deduction, and in 2002, $14,792 remains after deducting the proffered wage.

The only document supplied was an unrelated monthly income statement from the sole proprietors' restaurant. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to provide requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

It is finally noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the proffered wage. In this case, the petitioner provided federal tax returns to support its ability to pay the proffered wage during the relevant years, however it failed to provide a tax return or other probative documentation covering the priority date of September 17, 1998. For this additional reason, the petition may not be approved. The petitioner must demonstrate that the petition is approvable as of the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on a review of the evidence and argument offered in the underlying record and on appeal, the AAO cannot conclude that the petitioner has submitted sufficient persuasive evidence to show that it has had the continuing financial ability to pay the proffered wage beginning on the priority date.

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.