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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 176 54284 Office: CALIFORNIA SERVICE CENTER Date: DEC 14 2005

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:
[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 service center director denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a martial arts training facility. It seeks to employ the beneficiary permanently in the United States as a martial arts instructor. 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, new counsel states that the petitioner has sufficient assets in Korea 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 July 2, 2001. The proffered wage as stated on the Form ETA 750 is \$11.89 an hour, or an annual salary of \$24,741.20. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1991, to have one employee, and to have a gross annual income of \$148,615. In support of the petition, the petitioner submitted two Schedules C, from its Forms 1040, Individual Income Tax Return, for tax year 2001 and 2002. These documents indicated a net profit of \$26,575 in 2001, and -\$1,754 in 2002. The petitioner also submitted state of California forms DE-542, Report of Independent Contractor that indicated the petitioner was paid \$9,500 in 2000, and the same form for tax year 2002 that indicated the sole proprietor/petitioner was compensated \$30,000 in 2002. The petitioner also submitted Forms 1099-MISC for tax years 2000 and 2002 that corroborated the sole proprietor's compensation in both years.

The petitioner also submitted bank statements from the petitioner's California Bank business banking account for the months January to December 2002, and a copy of the petitioner's business license for the city of Temecula, California. In addition, the petitioner submitted a document with regard to the real estate value of an apartment owned by the petitioner in Seoul, Korea. The petitioner also submitted evidence with regard to the beneficiary's qualifications for the job as well as a letter of employment verification from the Korea Taekwondo Federation, Natoyan Academy.

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 April 2, 2004, the director requested additional evidence pertinent to that ability. The director stated that the petitioner could submit copies of annual reports, federal tax returns with appropriate signatures and dates, or audited financial statements for the years 2001 to 2003. The director stated that if federal tax returns were submitted, that they must be signed, dated and include all pages and schedules and attachments. The director also requested that the petitioner submit copies of the petitioner's state of California Form DE-6 Quarterly Wage Reports for all employees for the last four quarters, and that the forms should include the names, social security numbers and number of weeks worked for all employees, as well as their titles and job duties. With regard to the beneficiary's qualifications, the director requested evidence to establish that the beneficiary possessed the foreign experience listed on the Form ETA 750. The director stated that the petitioner could provide letters on the previous and/or current employer's letterhead showing the name, title, and phone number of the person verifying the information, and that the verification should state the beneficiary's title, duties, dates of employment and number of hours worked per week. The director also requested the petitioner's date of birth and immigration status in the United States.

In response, former counsel submitted the petitioner's Forms 1040 for 2001, 2002, and 2003, with accompanying Schedules C; business bank statements from January to December 2001, 2002, and 2003, along with the months of January to March 2004; the petitioner's personal checking account statements for March and April 2004; and the petitioner's certificate of Naturalization and a copy of his U.S. passport. Counsel also submitted a new letter of employment verification from the Natowan Academy in Seoul, Korea, that provided the specific information requested by the director, as well as a copy of the beneficiary's Korean income tax documentation for the years 1993 to 2002. Counsel also resubmitted the Korean real estate documents submitted with the initial petition. In a cover letter, former counsel stated that the petitioner was a sole proprietor and the sole employee and instructor of the petitioner's martial arts company. Counsel described the petitioner's foreign real estate property as readily disposable for further investment in the sole proprietorship.

On July 8, 2004, the director denied the petition. In his denial, the director stated that the petitioner had adjusted gross income for tax years 2001 of \$24,697, of \$1,040 in 2002, and of \$22,987 in 2003. The director determined that all these amounts were less than the proffered wage of \$24,741.20. In addition, the director noted that the petitioner claimed five dependents plus his spouse on his Form 1040, and that the adjusted gross income for the petitioner was below the poverty line for a household of seven.

With regard to the petitioner's bank statements, the director stated that these documents were insufficient to establish the petitioner's ability to pay the proffered wage, as they did not show a continuous ability to pay the

proffered wage, but rather only showed that the petitioner had a certain amount of money during a certain time. The director stated that only in one period of time from June 30, 2002 to August 31, 2002, did the petitioner's bank account show more funds than the proffered wage. With regard to the petitioner's personal banking account, the director stated that these documents indicated that he had more than the proffered wage in his personal bank account only in March 2004.

With regard to the foreign real estate assets owned by the petitioner, the director stated that it was not known how easily the petitioner could turn the real estate property into capital to pay the beneficiary, or if the value has or will not fluctuate. In conclusion, the director stated that the petitioner had not presented sufficient evidence to demonstrate that the petitioner had the ability to pay the proffered wage.

On appeal, new counsel for the petitioner states that the petitioner has submitted documentation regarding an apartment he owns in Korea, which is valued at \$250,000. Counsel states that the petitioner also has funds in his bank account in Korea from which the petitioner transferred \$167,000 in July 2004. Counsel then asserts that although the petitioner has not shown that the apartment could be easily sold, it is common knowledge to those who know about property in Seoul, Korea, that property can be sold at any time. Counsel states that Seoul is much smaller than Los Angeles with a population of over 15 million people and there is no unused land in Seoul. Counsel then asserts that any property in Seoul can be sold at any time and the price of property does not go down. Counsel also states that the neighborhood in which the apartment is located is a very populated area of Seoul, and that the petitioner can sell the property for \$250,000 or more any time he wishes; however, the petitioner feels that there is no need to do so since he can transfer money from his Korean bank account to pay for the expansion of his business. Counsel states that the petitioner wishes to employ the beneficiary with the knowledge that the beneficiary's mastery of Tae Kwon Do and experience in teaching will expand the customer base for the petitioner's business. Counsel submits a copy of the petitioner's personal bank account with California Bank for July 2004. This statement indicates the receipt of seven domestic wire transfers of \$9,982, along with a domestic wire receipt on July 6, 2004 of \$97,983. Five of the wires for \$9,982 are annotated with the designation "org" following by different names. The wire transfer on July 6, 2004 for \$97,983 is annotated [REDACTED] which apparently refers to the sole proprietor/petitioner.

Counsel's reliance on the balances in the petitioner's bank account 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, as alluded to by the director, 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 somehow reflect additional available funds that were not reflected in the petitioner's net profits as shown on Schedule C.

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. As established by the ETA Form 750, the petitioner did not employ or pay the beneficiary prior to or following the 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). 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 sole proprietor supports himself, his wife, three children, and two parents. The petitioner's adjusted gross income in the years 2001, 2002, and 2003 is the following: \$24,697, \$1,040, and \$22,987. In petitions involving sole proprietorships, the director usually requests an itemized list of monthly household expenses that include housing, school, clothes, food, insurance, utilities, and similar items. In the instant petition, the director did not request an itemized list of monthly expenses from the petitioner. Nevertheless, the record reflects sufficient documentation to examine the sole proprietor's ability to cover his monthly expenses and pay the proffered wage.

As stated previously, the sole proprietor's adjusted gross income for 2001 to 2003 is \$24,697, \$1,040, and \$22,987. In addition, based on the two Forms 1099-MISC submitted to the record, the petitioner, as sole employee, received compensation of \$9,500 in 2000 and of \$30,000 in 2002. However, the priority year for the instant petition is 2001. Therefore the petitioner's compensation in tax year 2000 would not be probative with regard to whether the petitioner could pay his monthly expenses and the proffered wage as of the priority date.

With regard to tax year 2001, Schedule C of Form 1040 for tax year 2001 does not reflect any wages paid to the petitioner's sole employee in 2001. Therefore given the petitioner's adjusted gross income of \$24,697 in

2001, it does not appear reasonable that the petitioner could pay the monthly expenses for himself and his six dependents, much less the proffered wage. With regard to tax year 2002, even considering the sole proprietor/petitioner's compensation of \$30,000, and adjusted gross income of \$1,040, it does not appear reasonable that the petitioner can cover the monthly expenses of six dependents and himself with his 2002 compensation, and also pay the proffered wage. With regard to the tax year 2003, Schedule C for this year indicates that the petitioner paid himself, as sole employee, \$4,441. Although the petitioner had an adjusted gross income of \$22,987, and the petitioner also received \$4,441 in compensation, such figures do not appear to support the petitioner's ability to cover his monthly expenses, and pay the proffered wage. Thus, the petitioner's adjusted gross income is not determinative of his ability to pay the proffered wage as of the priority date and onward.

As previously stated, the AAO does not view the monthly balances in the petitioner's business banking account as a source of additional funds to pay the proffered wage. In addition, although the petitioner has provided evidence of the receipt of numerous money wires to his personal bank account in 2004, the priority date of the instant petition is 2001. The two bank statements submitted on appeal are not viewed as probative that the petitioner had sufficient funds to cover his monthly expenses, support himself and six dependents, and pay the proffered wage as of the 2001 priority date. Furthermore, the petitioner's bank statement for July 2004 does not conclusively establish the origin of several of the wire transfers or that the funds necessarily came from the petitioner's Korean bank account. As such, the petitioner has not provided enough evidence of the petitioner's additional financial assets. With regard to the petitioner's real estate property in Korea, this property is not viewed as liquidable enough to be utilized to pay the proffered wage. In other words, in order to use the equity in his Korean apartment to pay the proffered wage, the petitioner would have to sell the property. Although counsel asserts that the petitioner's apartment in Korea can be easily sold, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without more evidence with regard to the petitioner's personal assets, the petitioner has not established that it has the ability to pay the proffered wage as of 2001 and onward.

Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing through 2003.

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 with regard to the petitioner's ability to pay the proffered wage.

ORDER: The appeal is dismissed.

[REDACTED] I didn't understand your edit on 2002 compensation. But then I probably didn't state it very clearly. I was saying that even with the sole proprietor's compensation of \$30,000, it didn't appear reasonable that he could pay the expenses for six people, and also pay the proffered wage. I tried to clarify what I meant, but if I'm out of the ballpark (a Baltimore term of reference) can you just axe that sentence?

Thanks [REDACTED]