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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 19 2005
WAC-02-199-53620

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 Director, California Service Center, denied the immigrant visa petition twice after a series of motions, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The prior decision of the AAO will be affirmed. The appeal will remain dismissed and the petition will remain denied.

The petitioner is a [REDACTED] restaurant. It seeks to employ the beneficiary permanently in the United States as a 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. The AAO affirmed the director's decision.

On motion, the petitioner submits an affidavit and new evidence.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements, for 2000 and 2001.

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 September 18, 2002, 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 copies of any W-2 forms issued from the petitioner to the beneficiary.

In response, the petitioner resubmitted previously submitted evidence and its business checking account statements reflecting average available balances ranging from approximately \$4,000 to \$9,000 for eight months in 2002. Counsel's accompanying letter states that "the beneficiary has never been employed in the United States since arrival in the United States. Therefore, we are unable to provide the requested W-2's copies for the beneficiary."

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 6, 2003, the director again 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 copies of the petitioner's quarterly wage reports and the sole proprietor's monthly expenses.

In response, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements, for 2000¹, 2001, and 2002.

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

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$36,841	\$36,612
Petitioner's gross receipts or sales (Schedule C)	\$172,688	\$198,000
Petitioner's wages paid (Schedule C)	\$22,380	\$41,920
Petitioner's net profit from business (Schedule C)	\$39,087	\$38,348

In addition, the petitioner submitted copies of its quarterly wage reports for all four quarters in 2002 that did not reflect the actual employment of and payments of wages to the beneficiary. The petitioner also submitted its business checking account statements reflecting average available balances ranging from approximately \$4,000 to \$9,000 for eight months in 2002. The petitioner also submitted its most recent gas and electricity bills.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 10, 2003, the director again requested additional evidence pertinent to that ability. The director specifically requested the sole proprietor's monthly expenses.

In response, the petitioner submitted a list of monthly expenses for the family of [REDACTED] (Mr. [REDACTED]) totaling \$4,270 per month, which annualized to \$51,240. Counsel's accompanying letter referenced income Mr. [REDACTED] received from Korea but no corroborating evidence was submitted.

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 July 10, 2003, denied the petition.

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserted that the director erred by failing to consider the petitioner's cash in bank accounts, the sole proprietor's assets, and its payroll history. The petitioner submitted unaudited financial statements, additional business checking account statements from the same account held by the petitioner still showing average available balances ranging from approximately \$4,000 to \$8,000 from 2001 through 2003, and an unsigned credit application (personal financial statement) from the sole proprietor detailing his personal assets.

The AAO dismissed the appeal on January 21, 2004 finding that the sole proprietor's adjusted gross income was insufficient to pay the proffered wage and his expenses, that there was defective evidence to corroborate his personal assets, and that the bank account balances could not be used towards determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On motion to reopen, counsel asserts that there is new evidence and the matter should be reopened. The petitioner submits an affidavit from Mr. [REDACTED] who states, in pertinent part, that he capitalized the petitioning restaurant with \$100,000 and is the sole owner; that he is both an owner and a cook and his wife is an assistant responsible for administrative, accounting, and purchasing duties; that the petitioner's "reasonable value," including furniture, equipment, automobile, leasehold improvements, good will, and an alcoholic beverage license, is "about \$367,077"; that he has cash in a private bank account of \$2,892 as of January 2004; that his wife has cash in a Korean bank account in the amount of 120,000,000 Korean won which is equivalent to \$100,000 U.S. dollars; that he owns personal property in the value of \$100,000 and he and his wife own life insurance policies for a combined total of \$1,000,000; that he owns real estate property valued at \$600,000 with mortgages amounting to \$320,000 and his wife owns real estate property in Korea valued at 159,800,000 Korean won which is equivalent to \$120,000 U.S. dollars; and that his net worth combined with his wife is approximately \$1 million.

On motion to reopen, the petitioner submits previously submitted evidence as well as new evidence, namely, the sole proprietor's personal bank account statement for 2004 showing an ending balance of approximately \$3,000; a bank account statement in Korean with a certified English translation reflecting that Mr. [REDACTED] wife holds a savings account in Hanvit Bank in Korea with a balance of 120,000,000 Korean won in August 2002; a seller's permit for the petitioning restaurant and Mr. [REDACTED] car registration; Mr. [REDACTED] closing paperwork on his real estate and taxes; a purchase agreement in Korean with a certified English translation reflecting that Mr. [REDACTED] wife purchased real estate in the amount of 159,800,000 Korean won and registered it in May 2002; and a signed credit application (personal financial statement) detailing Mr. [REDACTED] and his wife's personal assets.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Thus, since the petitioner submits new evidence and counsel states new facts to be proved, namely, the petitioner's continuing ability to pay the proffered wage as reflected on its tax returns, the motion qualifies as a motion to reopen.

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.

In the instant case, the petitioner has not established that it has previously employed the beneficiary. Although the beneficiary represented that she worked for the petitioner since July 2001 on a Form G-325,

Biographic Information sheet accompanying an application to adjust status to lawful permanent resident, signed in January 2003, counsel represented in his correspondence responding to the director's request for evidence, dated October 9, 2002, that she has never worked for the petitioner. This inconsistent representation casts doubt upon the petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "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."

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).

As noted by the prior AAO adjudicator, the unaudited financial statements that are in the record of proceeding are not persuasive evidence. 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. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage and will not be considered by the AAO.

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 a family of three in 2001 and 2002. In 2001, the sole proprietorship's adjusted gross income of \$36,841 covers the proffered wage of \$24,960. It is impossible that the sole proprietor could support himself and his family on \$11,881 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, since the sole

proprietor would also have to pay expenses in the amount of \$51,240, which would result in a deficit for the year.

Likewise, in 2002, the sole proprietorship's adjusted gross income of \$36,612 also covers the proffered wage of \$24,960. It is impossible that the sole proprietor could support himself and his family on \$11,652 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, since the sole proprietor would also have to pay expenses in the amount of \$51,240, which would result in a deficit for the year.

Finally, the petitioner and sole proprietor maintain balances of \$3,000 and between \$4,000 to \$9,000 in two accounts. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The average balances are not substantial enough to cover the proffered wage and cannot be considered in the aggregate as any funds used to pay the proffered wage in one month would not be available to pay the wage in subsequent months.

There is insufficient evidence in the record of proceeding that the petitioner's "reasonable value," including furniture, equipment, automobile, leasehold improvements, good will, and an alcoholic beverage license, is "about \$367,077." No audit of inventory or of the petitioner's business value was submitted into the record of proceeding. Likewise, there is insufficient evidence that the sole proprietor owns personal property in the value of \$100,000 and he and his wife own life insurance policies for a combined total of \$1,000,000 as no independent corroborating evidence was submitted to substantiate that claim². 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)).

The real estate owned by the sole proprietor and his wife is also not probative evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date since real estate is not the type of easily liquefiable and unencumbered asset typically utilized by employers to pay wages. Finally, the savings account in Hanvit Bank held by the sole proprietor's wife in Korea with a balance of 120,000,000 Korean won in August 2002 is also not probative evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date since the account was opened in 2002, which is after the priority date in 2001, and there is no evidence of the account's ongoing or current status. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO also notes that the petitioner only paid total wages in the amount of \$22,380 and \$41,920 in each year as well. These modest figures do not lend credence to a finding in the petitioner's favor.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002.

² The signed credit application is insufficient since there is no evidence it was analyzed by a credit evaluation service.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing 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 motion to reopen is granted. The AAO's decision, dated January 21, 2004, is affirmed. The appeal remains dismissed and the petition remains denied.