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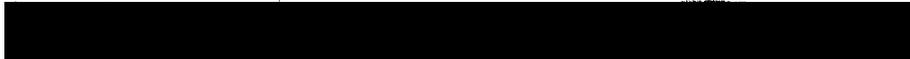
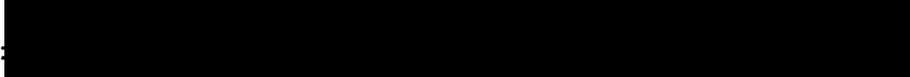


**U.S. Citizenship  
and Immigration  
Services**

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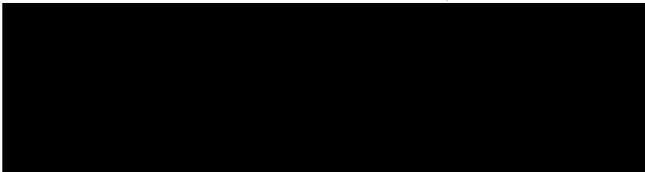


FILE: WAC 02 257 54439 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2004**

IN RE: Petitioner:   
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:



**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 project support services business. It seeks to employ the beneficiary permanently in the United States as a management analyst. 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 a brief and additional 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 May 27, 1997. The proffered wage as stated on the Form ETA 750 is \$52,028.08 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner from November 1995 until the present.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a copy of the owner's 2000 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The tax return reflected an adjusted gross income of \$2,884.38.

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 November 8, 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 for the years 1997, 1998, 1999, and 2001. The director also specifically requested a statement of monthly expenses for the petitioner's family, W-2 Forms, Wage and Tax Statements, for the beneficiary for the years 1997 through 2001, a copy of the beneficiary's last IRS Form 1040 and state tax returns to show wages from the petitioner, and copies of the petitioner's Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California.

In response, the petitioner submitted copies of the owner's 1997 through 2001 Forms 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business; copies of the petitioner's 2001 and 2002 Forms 1120S, U.S. Income Tax Return for an S Corporation; copies of the petitioning owner's monthly expenses for the years 2000 through 2003; copies of the beneficiary's Forms W-2, Wage and Tax Statement, for the years 1997 through 2002; copies of Forms DE-6 for the quarters ended March 30, 2002, June 30, 2002, and September 30, 2002; and copies of Forms 941, Employer's Quarterly Federal Tax Return, for the same quarters as above.

The 1040 tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>
Proprietor's adjusted gross income (Form 1040)	-\$ 26,801	\$ 22,271	-\$ 7,772
Petitioner's gross receipts or sales (Schedule C)	\$400,428	\$486,535	\$241,803
Petitioner's wages paid (Schedule C)	\$ 35,034	\$252,001	\$ 82,871
Petitioner's net profit from business (Schedule C)	-\$ 7,331	\$ 66,990	-\$ 5,790

The 1040 tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$ 2,884.38	\$ 31,222
Petitioner's gross receipts or sales (Schedule C)	\$148,108	\$ 29,485
Petitioner's wages paid (Schedule C)	\$ 22,123	\$ 0
Petitioner's net profit from business (Schedule C)	\$ 3,100.95	-\$ 9,703

The 1120S tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Ordinary income	\$40,914	\$42,095
Current Assets	\$53,830	\$43,837
Current Liabilities	\$ 0	\$ 0
Net current assets	\$53,830	\$43,837

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 February 24, 2003, denied the petition.

On appeal, the petitioner submits copies of several statements showing varying lines of credit; copies of letters from competitors expressing a desire to buy into the petitioner; copies of contracts and subcontracts; a letter from the petitioner explaining her monthly expenses and indicating that various lines of credit could help her meet her monthly expenses; a copy of the 2000 Health and Human Services Poverty Guidelines; and copies of financial statements for the two months ending February 28, 2003. Counsel states:

The Petitioner, through undersigned counsel, submits that the Service erred in its denial of the I-140 petition. The Petitioner contends that a review of the financial documents previously submitted to the Service, as well as a review of the Petitioner's additional financial documents being submitted with this brief demonstrate the Petitioner's ability to pay [REDACTED] the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2).

\* \* \*

However, the Petitioner respectfully submits that the Service erred in its determination because even though the Petitioner incurred losses in 1997, it had existing lines of business credit which amount to more than \$18,033.69.

\* \* \*

However, the Petitioner again respectfully submits that the Service erred in its determination because even though the Petitioner incurred losses in 1999, it had existing lines of business credit which amount to more than \$4,628.08.

\* \* \*

The Petitioner submits that it attracted offers from three (3) companies in 2000 to enter into a business arrangement with them. These companies were namely KDG, NCC and Krishnan/IFL. As the letter from [REDACTED] President of The G Crew states, the Petitioner was offered several business options ranging from "having [REDACTED] retain 51% ownership, outright assumption by the Offeror of The G Crew's payroll and liabilities; and an offer to provide Payroll Loan/Security Agreements, including a credit line of \$150,000."

\* \* \*

The Petitioner respectfully submits that the Service erred in its determination and is hereby submitting a letter explaining her 2000 Living Expenses. (See **Exhibit O**). As the letter states, Ms. [REDACTED] was reimbursed by the business on business-related expenses. Moreover, she had personal lines of credit with a total amount of \$29,700.00 which assisted her with meeting her monthly living expenses.

More importantly, according to the 2000 Poverty Guideline issued by the U.S. Department of Health and Human Services, a family of one can survive with \$8,350 a year. (See **Exhibit P**). As such, the fact that the Petitioner was able to live on \$25,008 shows that the

Petitioner was able to maintain her household and living expenses. Moreover, based on evidence stated above, The G Crew had business credit lines which attest to its ability to pay the proffered wage.

\* \* \*

In addition, the Petitioner may well have a larger profit from the valued employment of the Beneficiary. In fact, the Petitioner anticipates an increase in future projects and hopes for greater profits. As proof of its continued growth, the Petitioner is hereby submitting its Statement of Income for the current year and its balance sheet for the two months of 2003 ending on February 28, 2003. (See **Exhibit Q**). As such, The G Crew will need the Beneficiary's continued service as an Organization Communication Specialist since the business conducts numerous transactions for each of its projects. As such, the Beneficiary will greatly contribute to the smooth running of the Petitioner's business and ensure continued growth.

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 established that it employed and paid the beneficiary \$33,994.39 in 1997, \$41,923.75 in 1998, \$47,400.00 in 1999, \$14,400 in 2000, \$9,747.33 in 2001 and \$35,409.74 in 2002. Since the proffered wage is \$52,028.08, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$18,033.69 in 1997, \$10,104.33 in 1998, \$4,628.08 in 1999, \$37,628.08 in 2000, \$42,280.75 in 2001 and \$16,618.34 in 2002.

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 unaudited financial statements that counsel submitted with the appeal 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.

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 (7<sup>th</sup> 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 one. In 1997, 1999, and 2000, the sole proprietorship's adjusted gross income did not cover the remaining amounts needed to pay the proffered wage, and in 1998 the adjusted gross income covered the remaining amount needed to pay the proffered wage by only \$10,104.33. As the petitioner failed to provide a statement of monthly expenses for 1998, the AAO cannot determine if the petitioner was able to pay the proffered wage and support herself with the remaining \$10,104.33.

Counsel states that the 2000 Poverty Guideline indicates that a family of one could survive with \$8,350 per year. However, the AAO does not recognize the Poverty Guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses, and, therefore, will not be considered when determining the ability to pay the proffered wage. The poverty guidelines issued by the Department of Health and Human Services are used for administrative purposes — for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The only time CIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support.<sup>1</sup>

Counsel also states that the petitioner has several lines of credit available to pay both the proffered wage to the beneficiary and to pay her own monthly expenses. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the business' credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the business' net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed

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<sup>1</sup> The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the INA as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding.

business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel asserts that the petitioner had offers from three companies in 2000 to enter into a business arrangement with it to include business options ranging from having the owner retain 51% ownership, outright assumption of the petitioner's payroll and liabilities to providing payroll loan/security agreements that included a credit line of \$150,000 to the petitioner. The petitioner has indicated, however, that she did not enter into any of these arrangements, and, therefore, none of these offers were actually available to pay the proffered wage in 2000.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a management analyst will significantly increase profits for a project support services business. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage from 1997 through 2000. It is noted that as a result of the combination of its ordinary income and the wages actually paid to the beneficiary, the petitioner has established its ability to pay the proffered wage in 2001 and 2002. However, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage from 1997 through 2000. 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 appeal is dismissed.