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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 01 283 50835 Office: CALIFORNIA SERVICE CENTER Date: DEC 19 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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 came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed by the AAO in a decision dated March 4, 2004. The petitioner filed a motion to reconsider on April 2, 2004 and is now before the AAO on that motion. The motion will be granted. The prior decisions of the director to deny the petition and of the AAO to dismiss the appeal are affirmed.

The petitioner is a gas station and convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. 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 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 either 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 demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 23, 1997. The proffered wage as stated on the Form ETA 750 is $21.51 per hour, which amounts to $44,740.80 annually. On the Form ETA 750B, signed by the beneficiary on January 8, 1997, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on August 21, 2001. On the petition, the petitioner claimed to have been established in February 1982, to currently have six employees, to have a gross annual income of $3,512,542 and to have a net annual income of $91,166.

In support of the petition, the petitioner submitted an approved original ETA 750, and letters concerning the beneficiary's job experience.

In a request for evidence (RFE) dated January 26, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date along with the last four quarters of the federal Employer's Quarterly Wage Report. In accordance with 8 C.F.R. § 204.5(g)(2), 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.

In response to the RFE, the petitioner submitted:

- The petitioner's federal Employer Quarterly Wager Reports for the last four quarters; and,

- The petitioner sole proprietor's Form 1040 for years 1997–2000.

In a second request for evidence (RFE) dated March 6, 2002, the director requested additional evidence relevant to the petitioner's monthly household expenses. In response, the petitioner submitted the petitioner's owner's Form 1040 for 2001 and an undated estimate of the owner's monthly household expenses.

In a decision dated June 28, 2002, the director determined that the evidence did not establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submitted brief and additional evidence. Counsel stated on appeal that the petitioner has been a successful business since 1979, first as a gas station and car repair shop, and since 1997, as a gas station retail convenience store after building over the repair bays. Citing *North American Industries, Inc. v. Feldman*, 722 F. 2d 893, 898 (1st Cir. 1983), *O'Conner v. U.S*, 1987 WL 18243 (D. Mass., 1987), and *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), counsel faulted the director for misapplying the law to the facts of the case and for failing to look at the "entire financial picture" that includes the petitioner's past and his likely future growth. Further, because of his large capital investment in redirecting his business, the petitioner could take larger than normal depreciation deductions in the two years the director most closely analyzed in denying the petition.[1]

As part of the appeal counsel submitted:

- Documents showing the petitioner had bank lines of credit in the following amounts, $12,000, $10,000, $21,500, $8,200, and $2,500; and,
- A July 24, 2002 letter from a CPA stating that the 1997 and 1998 tax returns understated the petitioner's net yearly profits, as set forth on Schedule C of his returns, because of depreciation deductions available for remodeling construction and equipment purchase totaling $529,000.

In a decision dated March 4, 2004, the AAO dismissed the appeal, distinguishing *Sonegawa* for lack of evidence of the petitioner's profit history that would permit finding that current operations were "uncharacteristically unprofitable." The AAO, citing *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993) further found *O'Conner* was not binding on the AAO because "the published decision of district courts are not binding on CIS outside of that particular proceeding." Moreover, the AAO distinguished *O'Conner* as based upon the availability of the "personal assets of the owners of the petitioning entity" while by contrast here there was no evidence the petitioner could pay the proffered wage out of his personal assets. The AAO also found that after taking into account the owner's average monthly household expenses of $3,344, or $40,128 a year, the petitioner would only be able to pay the proffered wage in 2001 based on what would remain of his adjusted gross income remaining for the years 1997–2001. The AAO noted that, based upon the owner's claim of eight dependent exemptions in 2001, the actual expenditures for monthly household expenses might not leave enough to pay the proffered even in 2001.

On April 2, 2004, counsel has filed a motion for AAO to reconsider its dismissal of the appeal and submits a brief and additional evidence. Counsel submits as evidence:

- The petitioner's Form 1040 return for 2002;
- The August 22, 1997 security agreement with Texaco Refining for the $654,878 line of credit;

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[1] The petitioner's owner's income tax returns showed he deducted $3,541 for depreciation from his 1997 income, $34,752 for depreciation from his 1998 income, $57,233 for depreciation from his 1999 income, $50,333 for depreciation from his 2000 income, and $40,625 for depreciation from his 2001 income.

- A mortgage or "trust deed" deed on the petitioner's home;
- A $12,000 line of credit;
- A letter from Texaco acknowledging that the petitioner's business site was "completely closed for construction from November 1997 through March 1998;"
- A document showing a "2nd request for advance" on the Texaco security agreement for $425,67;
- A site lease with Citicorp as agent for Texaco dated September 3, 1997;
- A letter from Shell Oil stating the business site was closed for construction from November 8, 2002 to December 22, 2002; and,
- A CPA's letter of March 25, 2004, stating that for Mr. Otaky's Form 1040 return for 2001,the exemptions for his dependents were "relatives that were temporarily living with the taxpayers."

In his motion counsel asserts as error the AAO basing its decision upon the owner's "net gross income" in 1997 of $45,482, because the petitioner had other sources of income as of the priority date, including funds available because of an August 22, 1997 secured loan agreement granting the petitioner a $654,878 line of credit, a May 14, 1986 $65,200 trust deed securing a real estate purchase loan for real property in San Bernardino County, California. Counsel asserts that hiring the beneficiary would free up the owner to operate a separate furniture business. Similar to *Sonegawa*, the petitioner had "exceptional expenses" a business move and expansion that lasted from November 1997 through March 1998. Counsel asserts that the business has prospered such that, "in 1994 the petitioner had...accumulated in addition to other assets a principal balance of $317,417 in citicapital (Exhibit K)."[2] Further, seven of the dependents exemptions were temporary lodgers. Finally, counsel asserts that if CIS wants to account for the owner's personal monthly expenses in determining his ability to pay, the AAO cannot ignore the owner's sources of income other than the adjusted gross income figures of his Form 1040 returns.

At the outset, it is noted that the record of proceedings lacks financial documents from which to judge, based upon *Sonegawa,* whether the petitioner's owner's Form 1040 returns for 1997 and 1998 are characteristic for the petitioner's gas station-convenience store business over the long term. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established.

By contrast, here the documents establishing a financial history consist of five years of tax returns for a business that is no longer a gas station car repair shop but a gas station convenience store, a transformation in which the end result is no longer the same business as the that started in 1979.

In *O'Conner*, the court held the legacy INS had abused its discretion by refusing to consider the private assets of storeowners in deciding if the sole proprietorship retail outlet had the ability to pay the proffered wage to a store manager. Here, counsel has submitted documents showing lines of credit.

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 corporation's 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

[2] The petitioner is paying off a business loan that has a principal balance of $317,417, with a monthly installment of $7,200.73 due on March 27, 2004.

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 corporation's 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 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner, nor was there any submission of any of the petitioner's W-2 Forms issued to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were

paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than $20,000.00 where the beneficiary's proposed salary was $6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income:

The petitioner's tax returns show the amounts for adjusted gross income as shown in the table below.

Tax Year	Net Income	Wage Increase Needed * To Pay Proffered Wage	Income Available ** To Pay Proffered Wage
1997	$45,482	$44,740.80	$5,354
1998	($28,298)	$44,740.80	($68,426)
1999	$47,671	$44,740.80	$7,543
2000	$78,387	$44,740.80	$38,259
2001	$93,733	$44,740.80	$53,605
2002	$78,732	$44,740.80	$38,604

* The full proffered wage, since no wage payments were made to the beneficiary in 1997–2002.

** Available Income does not take into account the additional $40,128 the petitioner will spend each year in household expenses.

Since all of the figures for income available are less than the sole proprietor's personal expenses except for those in 2001, the petitioner's adjusted gross income fails to establish the petitioner's ability to pay the proffered wage.

The record also contains copies of unaudited financial statements. Unaudited financial statements 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 of its 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.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered

wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that her reputation would increase the number of customers.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 reconsider is granted. The decision of the AAO to dismiss the appeal is affirmed.