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U.S. Citizenship
and Immigration
Services



BG

FILE: WAC-02-208-53344 Office: CALIFORNIA SERVICE CENTER Date: **JAN 07 2005**

IN RE: Petitioner:
Beneficiary:



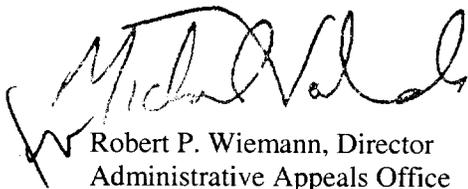
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 taekwondo studio. It seeks to employ the beneficiary permanently in the United States as a taekwondo 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 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.

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 June 24, 1999. The proffered wage as stated on the Form ETA 750 is \$2,080 per month, 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 Schedule C, Profit or Loss from Business, for the years 1999, 2000, and 2001.

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

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$36,160	\$31,041	\$39,806
Petitioner's gross receipts or sales (Schedule C)	\$166,864	\$153,983	\$163,287
Petitioner's wages paid (Schedule C)	\$0	\$0	\$4,000
Petitioner's net profit from business (Schedule C)	\$39,132	\$33,401	\$42,815

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 October 11, 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 all schedules to the sole proprietor's tax returns.

In response, the petitioner re-submitted its sole proprietor's complete tax returns for 1999, 2000, and 2001, and the information will not be recited here as it has already been summarized above.

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 February 12, 2003, the director again requested additional evidence pertinent to that ability. The director specifically requested evidence of the sole proprietor's monthly expenses.

In response, the petitioner submitted a monthly household expense statement and the sole proprietor's 2002 individual income tax return with the petitioner's profit and loss statement on Schedule C. The sole proprietor's monthly expenses are stated as \$2,940, which amounts to \$35,280 per year. The list includes such items as mortgage or rent, food, utilities, debt installments, gardener, clothing, insurance, and vehicle. The sole proprietor also submitted a copy of a debt owed to Wells Fargo for \$35,503.63 with a highlighted credit line of \$6,996. The sole proprietor's 2002 tax return reflects the following information:

Proprietor's adjusted gross income (Form 1040)	\$46,102
Petitioner's gross receipts or sales (Schedule C)	\$203,951
Petitioner's wages paid (Schedule C)	\$24,000
Petitioner's net profit from business (Schedule C)	\$53,196

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 May 29, 2003, denied the petition. The director noted that after reducing the sole proprietor's adjusted gross income by the sole proprietor's expenses and the proffered wage, there was no income left for the sole proprietor to subsist upon.

On appeal, counsel states that the director's decision was "rigid" and "inflexible," erroneously ignoring the sole proprietor's credit line, depreciation, and gross income. The petitioner submits two bank statements showing account balances of \$18,478.92 and \$6,972.91 in June 2003.

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.

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 contrary to counsel's appellate assertions. 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 a family of four. In 1999, the sole proprietorship's adjusted gross income of \$36,160 barely covers the proffered wage of \$24,960. It is improbable that the sole proprietor could support himself and his family on \$11,200 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, especially since the sole proprietor declared annual expenses of \$35,280. Reducing \$11,200 by \$35,280 results in a negative figure.

In 2000, the sole proprietorship's adjusted gross income of \$31,041 barely covers the proffered wage of \$24,960. It is improbable that the sole proprietor could support himself and his family on \$6,081 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, especially since the sole proprietor declared annual expenses of \$35,280. Reducing \$6,081 by \$35,280 results in a negative figure.

In 2001, the sole proprietorship's adjusted gross income of \$39,806 barely covers the proffered wage of \$24,960. It is improbable that the sole proprietor could support himself and his family on \$14,846 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, especially since the sole proprietor declared annual expenses of \$35,280. Reducing \$14,846 by \$35,280 results in a negative figure.

In 2002, the sole proprietorship's adjusted gross income of \$46,102 barely covers the proffered wage of \$24,960. It is improbable that the sole proprietor could support himself and his family on \$21,142 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, especially since the sole proprietor declared annual expenses of \$35,280. Reducing \$21,142 by \$35,280 results in a negative figure.

Finally, the petitioner maintains balances of \$18,478.92 and \$6,972.91 in two bank accounts. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The record contains bank statements covering one month – June 2003. The balances are not substantial enough to cover the proffered wage and merely show the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage. Likewise, the petitioner’s “credit line” of \$6,996 is also not substantial enough to cover the proffered wage, and in any event, 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. 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. 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). CIS will give less weight to loans and debt as a means of paying salary since the debts will increase a petitioning entity’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 demonstrated that it has already utilized \$35,503.63 of its credit line, a significant debt compared to the \$6,996 remaining credit it is permitted. The totality of circumstances does not favor the petitioner’s continuing ability to pay the proffered wage beginning on the priority date.

The record of proceeding does not contain any other evidence or source of the petitioner’s ability to pay the proffered wage in 1999, 2000, 2001, or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, 2001, and 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 appeal is dismissed.