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**U.S. Citizenship
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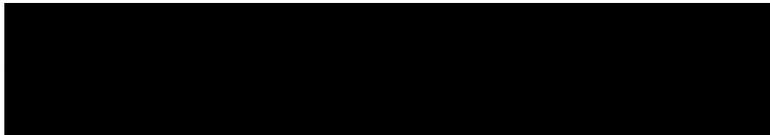
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FILE: WAC 03 057 55328 Office: CALIFORNIA SERVICE CENTER Date: **JAN 25 2005**

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: SELF-REPRESENTED

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 remanded for further consideration.

The petitioner is involved in the rebuilding, refurbishing and maintenance of residential buildings. It seeks to employ the beneficiary permanently in the United States as a maintenance repair worker, general. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$8.50 per hour or \$17,680 per year.

With the petition, the petitioner submitted a copy of its 2001 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 \$25,238, gross receipts of \$54,906, net profit of \$27,008, wages of \$0, and cost of labor of \$13,000. The director considered this documentation insufficient, and, on May 6, 2003, requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of annual reports, signed federal tax returns, or audited financial statements. The director specifically requested copies of the petitioner's payroll summary, W-2's and W-3's evidencing wages paid to all employees for the years 2001 and 2002.

In response, the petitioner submitted copies of its 2001 and 2002 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, copies of Forms 1099, Miscellaneous Income, for 2001 and 2002, and a copy of Form 1096, Annual Summary and Transmittal of U.S. Information Returns, for 2002. The tax return for 2002 reflected an adjusted gross income of \$29,852, gross receipts of \$81,595, net profit of \$35,659, and wages of \$0. The Forms 1099 did not show that the beneficiary had worked for the petitioner in 2001 or 2002.

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 June 13, 2003, denied the petition.

On appeal, the petitioner provides previously submitted documentation, copies of the petitioning owner's personal bank statements from March 17, 2001 through December 5, 2002, copies of two lines of credit with Bank of America, copies of the 2001 and 2002 poverty guidelines, and letters from the petitioning owner's two brothers stating that they share living expenses with the petitioning owner. The bank statements reflect balances ranging from \$29,454.97 to \$78,456.92 and the two lines of credit are for \$15,000 each with available credit of \$14,072.37 and \$14,228.93. The petitioner states:

At the time I filed for [REDACTED] labor certification, I had a bank account with \$37,755 which has been continuously growing and as of December, 2002 there is a total of \$78,457. Please see my bank statements - **Exhibit A**.

I wish to point out that the Net Annual Income on Schedule C (Business) for my 2001 Tax Return was \$27,008 + \$1000 depreciation = **\$28,008. Exhibit B**. Not \$25,238 as stated in the Notice of Decision dated June 13, 2003. The latter figure is the total of my personal tax return. As stated above, I also have a bank account with ample funds in case I need additional funds for my business plus I also have credit lines of over \$14,000 each. **Exhibit D**.

For the year of 2002, my Schedule C (Business) Net Annual Income was \$35,659 + \$923 depreciation = **\$36,582. Exhibit C**. Not \$29,852 as stated in the Notice of Decision dated June 13, 2003. The 2002 Poverty Guidelines for the year 2002 for a family of four (4) was \$18,100. **Exhibit E**.

I also wish to point out that all of the vehicles I possess are paid in full and my family, and I live modestly. According to the 2001 Poverty Guidelines a family of four (4) can live off of \$17,650. **Exhibit F**. My family, however, can get by with a lot less as I share expenses with two (2) of my brothers who also work and contribute to the living expenses of our home. Please see affidavit attached as **Exhibit G**. Of course, they file their own individual tax returns.

In conclusion, for the year 2001 \$17,680 + \$17,650	=	\$ 35,330
2001 total on Schedule C \$28,008 + \$37,755 (bank balance)	=	\$ 65,763

for the year of 2002 \$17,680 + \$18,100	=	\$ 35,780
2002 total on Schedule C \$36,582 + \$78,457 (bank balance)	=	\$115,039

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not provide evidence that it employed the beneficiary from 2001 to the present at a salary equal to or greater than the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

The adjusted gross incomes for the petitioner were \$25,238 and \$29,852 for 2001 and 2002, respectively.

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 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. In addition, they 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). The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. The petitioner's 2001 and 2002 adjusted gross incomes were slightly more than the proffered wage in each year, \$7,558 and \$12,172, respectively. However, there is no evidence in the record of the petitioner's household living expenses, and, therefore, it is impossible to determine if the petitioner can pay the proffered wage and the petitioning owner's living expenses (for a family of four) even when considering the petitioning owner's large bank balance.

The petitioner presents evidence of two lines of credit that the petitioning owner would like to be considered when determining the ability to pay. However, 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 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 petitioning owner states that he shares living expenses with two of his brothers; however, there is no evidence in the record that reflects the petitioning owner's portion of those living expenses. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioning owner also states that the Poverty Guidelines for a family of four in 2001 and 2002 were \$17,650 and \$18,100, respectively, and that his family could get by with a lot less. 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, the guidelines 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.¹

¹ 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

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the petitioning owner's living expenses and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's June 13, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.