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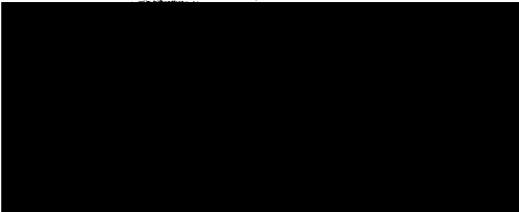
FILE: WAC 02 217 51392 Office: CALIFORNIA SERVICE CENTER

Date: JUN 03 2005

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 sustained. The petition will be approved.

The petitioner is an individual who is a licensed operator of residential care homes. He seeks to employ the beneficiary permanently in the United States as a household domestic worker/caregiver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation 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 regulation 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on August 14, 1998. The proffered wage as stated on the Form ETA 750 is \$1913.60 per month (\$22,963.00 per year). The Form ETA 750 states that the position requires three months experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1040 U.S. Corporation Income Tax Return for 1998, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on August 28, 2002, requested evidence pertinent to that issue consistent with 8 C.F.R. § 204.5(g)(2).

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted copies of the petitioner's 1040 Individual Tax Returns for years 1998, 1999, 2000, and 2001, deeds of trust, a bank statement, and the limited liability company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all its employees for the quarters ending December 31, 2001, March 31, 2002, June 30, 2002, September 30, 2002, and, December 31, 2002, the beneficiary's Wage and Tax Statements for 1999 through 2001, and, additional documents concerning the personal qualifications of the beneficiary.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$22,963.00 per year from the priority date.

- In 2000, petitioner stated a profit of \$52,485.00 on Schedule "C," and, on Form 1040, adjusted gross income of \$33,264.00.
- In 1999, petitioner stated a loss of <\$63,056.00> on Schedule "C," and, on Form 1040, adjusted gross income loss of <\$87,052.00>.
- In 1998, petitioner stated a profit of \$65,852.00 on Schedule "C," and, on Form 1040 stated adjusted gross income of \$46,179.00.

On December 7, 2002, the California Service Center issued a Request for Evidence to petitioner and requested the following: the beneficiary's date of birth; U. S. Internal Revenue Service computer print-outs for the tax years 1998 through 2002; the beneficiary's W-2 wage and Tax Statements for the years 1998 through 2002.

The director denied the petition on February 5, 2004 finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

"1. The Service Director failed to consider the other evidence on record, as additional evidence to establish petitioner's ability to pay the proffered wages of \$22,963.00.

2. The evidence on record to prove petitioner's ability to pay from the priority date of August 14, 1998 consists of the following: (1) Tax Returns of [REDACTED] (2) Tax Returns of [REDACTED] partner in [REDACTED] LLC; (3) Tax Returns of [REDACTED] LLC; (4) Credit Line of [REDACTED] and (5) Deeds of Trust to real property (4 care homes) owned by [REDACTED]

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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 present case, the beneficiary received the following wages in 2000 (\$12,000.00), in 2001 (\$13,200.00), and, in 2002 (\$14,400.00), all from a limited liability company organized by the daughter of the petitioner. From Forms 1065¹ for tax years 2001 and 2002 in evidence, the petitioner is not listed as a "partner," nor has petitioner provided a list of members of that limited liability company. Therefore, there is no evidence that petitioner paid the proffered wage at any time between the years 1999 through 2002 for which petitioner's tax returns are offered for evidence.

Counsel offers [REDACTED] tax returns as evidence of petitioner's ability to pay the proffered wage. Petitioner's daughter formed a limited liability company in 1999. [REDACTED] and [REDACTED] are listed as partners of the [REDACTED] Limited liability companies may file informational returns on Form 1065. The signatory on those returns is not identified from documents in evidence. There is no evidence [REDACTED] a member of the limited liability company. However, even if he was a member, the Alien Employment Application filed in 1998, and, the petition filed in 2002 were both filed in the name of [REDACTED] as a sole proprietorship owned by [REDACTED]

There is no evidence in the proceeding's record of an assignment from the sole proprietorship to any entity of the employment contract between [REDACTED] of [REDACTED] and the beneficiary. The employment contract is dated April 12, 2002. Counsel's brief and the record of proceedings are devoid of any explanation of the relationships, successor-ship rights and obligations among the individuals of what is presumably a family enterprise reformed as a limited liability company.² Counsel in her brief assumes that without the above foundation, the AAO will imply that a successor in interest arrangement was created when we clearly do not have evidence for it other than counsel's assertions.³ The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer. An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). Since none of these necessary requirements have

¹ The subject forms were submitted with a blank signatory line, or, the signatory is unreadable.

² A limited liability company may pay federal taxes as a sole proprietorship, partnership, or corporation. The limited liability company submitted Forms 1065 for tax years 2001 and 2002 listing [REDACTED] and [REDACTED] as partners of the [REDACTED] [REDACTED] filed Form 1040 returns for those years.

³ Counsel on page two of her brief refers to the "... income of the partners to the limited partnership namely, [REDACTED] and [REDACTED] .." The Forms 1065 above noted do not reflect this partnership arrangement.

been met, for purposes of determining the ability to pay the proffered wage on and after the priority date, the AAO will look exclusively to the income and assets of [REDACTED] of [REDACTED]

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).

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.

As recounted above, the limited liability company organized by petitioner's daughter paid the beneficiary wages in the years 2000 through 2002 for which beneficiary's W-2 Wage and Tax Statements are in evidence. In 1999, the petitioner paid wages of \$12,000.00 to the beneficiary. In that year the petitioner suffered an income loss of <\$87,052.00>⁴. The petitioner's income was insufficient to pay the proffered wage of \$22,963.00 per year in that year.

Based upon information in the proceedings, an examination can be made to determine if the petitioner could⁵ have paid the proffered wage in years 1998, 2000, 2001 and 2002,⁶ and, also pay his living expenses.

- In 1998, petitioner's Form 1040 return stated adjusted gross income of \$46,179.00.
- In 2000, petitioner's Form 1040 return stated adjusted gross income of \$33,264.00.
- In 2001, petitioner's Form 1040 return stated adjusted gross income of \$45,601.00.
- In 2002, petitioner's Form 1040 return stated adjusted gross income of \$114,441.00.

The petitioner's income was sufficient to pay the proffered wage of \$22,963.00 per year in years 1998, 2000, 2001 and 2002,⁷ and, his living expenses, without consideration of wage payments made by the limited liability company to the beneficiary.

⁴ Schedule "C" to petitioner's Form 1040 tax returns stated varying deduction amounts under Part II, Line 21 "repairs and maintenance." In tax years 2002, 2001 and 2000, zero (-0-) deductions were stated. Petitioner declared the following deductions in tax 1999, \$103,235.00; and, in tax year 1998, \$52,178.00.

⁵ Although [REDACTED] admittedly paid the beneficiary's wage for years 2000 through 2002, credit can not be given to the petitioner for the payments in the calculation of whether or nor the petitioner had the ability to paid the proffered wage from the priority date. In a case having a similar issue, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "... nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." There is no evidence that [REDACTED] is legally bound to pay the proffered wage should the petition be approved and the immigrant status granted.

⁶ Petitioner provided additional Form 1040 Individual Tax Returns on appeal.

As an additional, or alternative method to demonstrate its ability to pay, petitioner submits that it had an established line of credit. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income 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 suggestion that its income could be augmented with a line of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner 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).

We reject the petitioner's assertion that the petitioner's realty assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business (i.e. Deeds of Trust to real property (4 care homes) owned by [REDACTED]). Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel offers the limited liability company's tax returns to prove petitioner's ability to pay the proffered wage. Although structured and taxed as a partnership, its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.⁸ As the owners and others are not obliged to pay those debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. Petitioner has submitted no legally binding agreements between the himself and the limited liability company that that would ensure that the company would pay or guaranty the obligations of

⁷ Petitioner's taxable income in 1998 was sufficient to pay the proffered wage.

⁸ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

the petitioner as the employer of the beneficiary. The petitioner must show the ability to pay the proffered wage out of his own funds.

However, the strongest evidence of petitioner's ability to pay is presented in the four individual tax returns as submitted by petitioner showing business profits and positive personal income. In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business in 1999 was in an uncharacteristically unprofitable period. Repair and maintenance costs doubled in 1999 from the previous year, and these expenses were the cause of an uncharacteristic income loss that was not repeated thereafter in the returns. In fact, there were no deductions taken at all for repairs and maintenance for tax years 2000 through 2002. There was evidence submitted to support the petitioner's ability to pay the proffered wage. Since 1999, petitioner has demonstrated steadily increasing business profits reflected in his adjusted income on the returns.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa* that created an uncharacteristically unprofitable year for the petitioner. Assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven his financial strength and viability and that he has the ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.