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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 03 161 52813

Office: CALIFORNIA SERVICE CENTER

Date: JUN 14 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 April 13, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour or \$24,024 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted copies of the owner's 2001 and 2002 Forms 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The petitioner also submitted copies of Forms DE-6, Quarterly Wage Reports, for the quarters ended September 30, 2002 and December 31, 2002. The 2001 Form 1040 reflected an adjusted gross income of \$24,011 and Schedule C reflected gross receipts of \$907,805, wages paid of \$236,578, and net profit of \$22,753. The 2002 Form 1040 reflected an adjusted gross income of \$48,860, wages paid of \$221,975, and net profit of \$51,003. The Forms DE-6 show that the petitioner did not employ the beneficiary during the third and fourth quarter of 2002.

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 July 3, 2003, the director issued a notice of intent to deny (NOID) informing the petitioner that since it had petitioned for two employees at a salary of \$24,024 each, it must

show the ability to pay the proffered wage for both employees of \$48,048. It is noted that the director failed to request the petitioner's household expenses, and since the petitioner is a sole proprietor, to inform the petitioner that he may provide additional evidence of the ability to pay the proffered wage to include bank statements, CD's, etc.

In response, the petitioner, through counsel, submitted complete copies of the owner's previously submitted tax returns, additional Forms DE-6 showing that it still had not employed the beneficiary, and a bank statement showing a credit line of \$100,000 with \$90,000 available. In his response, counsel contends that the depreciation could be added back to the owner's income to establish the ability to pay the proffered wage.

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 October 9, 2003, denied the petition.

On appeal, counsel submits previously submitted documentation; additional copies of Forms DE-6 showing that the petitioner has not employed the beneficiary, photos of the petitioning restaurant, and a personal bank statement reflecting a balance of \$118,651.68 as of October 10, 2003. Counsel states:

This restaurant grossed \$907,805 in the year 2001. It paid out \$236,578 in wages. We have submitted to the Service the California DE-6 reports for all of the four quarters of the year 2001. These reports list the petitioner's employees and wages for the quarter. Please examine these reports for each quarter of this year 2001. The petitioner is paying wages to between 24 to 31 workers listed each quarter. This is a large restaurant! We find that the Service telling the petitioner that it cannot afford two additional workers to be narrow minded (looking at only the "Trees") in light of the facts presented that there were already 24 to 31 employees already working there at all times during that year.

This restaurant (petitioner) grossed \$1,028,703 in the year 2002. It paid out \$221,975 in wages. Again, we have submitted to the Service the California DE-6 reports of the petitioner for all for [sic] quarters. The petitioner is paying wages to an average of 25 workers each and every quarter. Again, we find the Service to be without merit and perhaps without logic.

Let us now examine some information for this year 2003. We have already submitted the DE-6 reports for the first quarter. We are now submitting these reports for the second and third quarters. Each quarter shows 23 to 24 workers. This is an extremely viable business.

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 did not establish that it had employed or paid the beneficiary a salary equal to or greater than the proffered wage.

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 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 supported a family of five. In 2001, the petitioner's gross salary was less than the proffered wage. In 2002 after paying the beneficiary's salary (\$24,024) the petitioner would have had \$24,836, remaining to pay the salary of the additional beneficiary and to support a family of five. As the petitioner failed to provide a statement of monthly expenses for the years 2001 and 2002 (again, it is noted that the director failed to request this information), the AAO cannot determine if the petitioner was able to pay the proffered wage and his household expenses with the remaining income.

Counsel points to the owner's personal bank statement and line of credit as proof that the petitioner has the ability to pay the proffered wage. However, the personal bank statement is for the period ended October 10, 2003 and does not provide evidence of the owner's personal bank statements for the year ended 2001 and 2002. In addition, 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 petitioner'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 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). 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).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided tax returns for two years, 2001 and 2002, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wages (\$48,048) from 2001 and continuing to the present. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the petitioning owners' household expenses, to provide verifiable evidence of its current assets and liabilities, to provide evidence of additional resources with which to pay the proffered wage such as bank accounts, CDs, etc., to provide documentation of payments and date of wages for the beneficiary, other alien beneficiaries, or other petitions filed by the petitioner, 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 October 9, 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.