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**U.S. Citizenship
and Immigration
Services**

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BG

FILE: EAC 02 219 53004 Office: VERMONT SERVICE CENTER Date: MAR 25 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: 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 Director, Vermont Service Center, denied the preference visa petition. A subsequent appeal was treated as a motion to reopen by the director, and the petition was denied again. The appeal is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a tree care business. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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, the petitioner submits a statement 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$18.80 per hour or \$39,104 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner from September 1999 until the present.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, failed to submit any evidence of its ability to pay the proffered wage from the priority date and continuing to the present.

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 March 10, 2003, the director requested evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide a copy of its 2001 federal income tax return with all schedules and attachments, and a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement, if the petitioner employed the beneficiary in

2001. The petitioner was informed that if the business was organized as a sole proprietorship, the petitioner must submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business. It is noted that in the case of a sole proprietorship, 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 submitted a complete copy of the owner's 2001 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business. The 2001 tax return reflected an adjusted gross income of \$30,196, and the 2001 Schedule C reflected gross receipts of \$151,403, wages paid of \$0, a net profit of \$19,951, and a cost of labor of \$52,785.

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 20, 2003, denied the petition.

On June 19, 2003, the petitioner filed an appeal. On August 12, 2003, the director treated the appeal as a motion to reopen and redened the petition. On September 4, 2003, the petitioner filed another appeal that is now before the AAO.

On appeal, the petitioner submits copies of 2001 monthly bank statements showing balances ranging from a low of \$1,914.96 to a high of \$11,812.64. The petitioner also provides evidence of credit lines from various credit card companies showing available credit of \$42,094.75. The petitioner states:

The enclosed copies of my bank statements for 2001 show total deposits of \$163,431. This exceeds schedule C Line, (Business Income) by \$12,028. This excess represents gifts and loans which are not taxable income, but were readily available to meet the wage. Also available for paying my bills were my unused lines of credit. Enclosed are copies of various statements which show readily available funds in excess of \$30,000 for early 2002. (I cannot find 2001, but I assure you they were very similar).

In summary:	Form 1040 Line 22	\$34,845
	Add non-taxable deposits	<u>\$12,028</u>
		\$46,873 (exceeds proffered wage by \$7,769)
	Add readily available credit	<u>\$30,000</u>
	Total readily available	\$76,873

Please reconsider denial.

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 employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.¹

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 present case, the wage proffered to the beneficiary was more than the petitioner's adjusted gross income in 2001.

The petitioner points to his bank statements and lines of credit as evidence that he has established the ability to pay the proffered wage. The petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank

¹ It is noted that although the Form ETA 750 indicates that the petitioner employed the beneficiary from September 1999 to the present, the record of proceeding contains no evidence of any wages paid to the beneficiary either by a copy of a Form W-2, Wage and Tax Statement, or a Form 1099, Miscellaneous Income.

statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Even if the AAO were to accept the bank statements as funds to pay the proffered wage, the beneficiary's wage of \$39,104 equals approximately \$3,258.67 per month, and a review of the bank statements show that the balances for February 5, March 5, April 5, and July 5, are all below the amount needed to pay the proffered wage for that month. 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).

It is noted that in 2001, the petitioner paid \$52,785 in cost of labor. However, the petitioner has not stated that the beneficiary would replace any of the employees paid under cost of labor, and there is no evidence that the position of the other employees involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not replace them.

The sole proprietor supported a family of four in 2001. Even though the petitioner failed to provide a statement of monthly expenses for 2001 (again, it is noted that the director failed to request this information), it is clear that since the proffered wage is more than the petitioner's adjusted gross income, the petitioner could not pay the proffered wage and pay the monthly expenses for a family of four.

The record of proceeding does not contain any other evidence or source present (personal bank statements, CDs, etc.) of the petitioner's ability to pay the proffered wage from 2001 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.

EAC 02 219 53004

Page 6

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.