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FILE: WAC 03 152 50468 Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2005

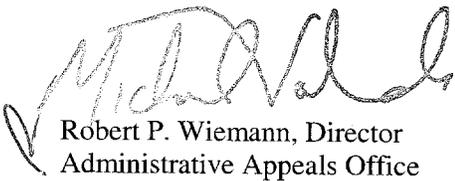
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 immigrant visa petition was denied by the Director, California Service Center, and, it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of food preservatives and baking goods. It is a sole proprietorship. It seeks to employ the beneficiary permanently in the United States as a market analyst. 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 no 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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 10, 1999. The proffered wage as stated on the Form ETA 750 is \$37,605.00 paid annually. On the Form

ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as a "lease employee"¹ since May 1996.

On the petition, the petitioner claimed to have been established on 1995, to have a gross annual income of \$1.6 Million in 2003, and, to employ eight workers. In support of the petition, the petitioner submitted the following evidence: copies of U. S. Form 1040 U.S. Income Tax Returns from years 1999 to 2001; W-2 Wage and Tax Statements for the beneficiary from 1998 to 2002 listed as the employee of "Professional Employer Options, Inc."; and, copies of documentation concerning the qualifications of the beneficiary.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date of June 10, 1999, 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, a federal tax return for 2002, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Form 1040 U.S. Individual Income Tax Returns for the petitioner for the years 1999, 2000, 2001 and 2002 that included the business income from the business in the calculation of adjusted gross income.

As stated in the director's decision, the tax returns reflect the following information for the following years:

- In 2002, the Form 1040 stated adjusted gross income of \$4,140.00, and, business income of \$4,573.00.
- In 2001, the Form 1040 stated adjusted gross income of -\$110, and, business income of -\$13,582.00.
- In 2000, the Form 1040 stated adjusted gross income of \$11,125.00, and, business income of \$-69,900.00
- In 1999, the Form 1040 stated adjusted gross income of \$20,224.00, and, business income of \$17,302.00.

Forms W-2 Wage and Tax Statements (1998 to 2002) of the beneficiary do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. The petitioner explained that the beneficiary was an "employee leased" from another company. The Forms W-2 Wage and Tax Statements of that other non-affiliated business submitted for beneficiary reflect wages less than the proffered wage for years 1999 to 2001. The proffered wage is \$37,605.00.² Adding the wage paid each of the above mentioned years to beneficiary by the "employee leasing" company to the adjusted gross income of the petitioner demonstrates the following results³:

¹ As explained in correspondence from the president of the business, dated November 26, 2003, to the California Service Center, the beneficiary is an "employee leased" from another company.

² Alien Labor Certification, priority date June 10, 1999, Employer, [REDACTED] P2000-CA-[REDACTED] item 12 entitled "Rate of Pay".

³ Since the petitioner asserts it paid a sum equating to the amount stated in the wage tax statements submitted into evidence, to its "employee leasing" contractor, the beneficiary's wages added to the petitioner's net income for 2002 through 1999 may be used to determine petitioner's ability to pay the proffered wage. The beneficiary's wages were \$36,360.00 in 2002, \$33,210.00 in 2001, \$26,000.00 in 2000, and, \$16,428.00 in 1999. The calculation using these amounts to determine ability to pay is as follows: petitioner's adjusted gross

- 2001, \$33,100.00,
- 2000, -\$37,125.00,
- 1999, \$36,652.00.

In the intervening time between the filing of the I-140 application and the director's decision mentioned below, both petitioner and petitioner's counsel provided additional information to the Service not found in the petition. Correspondence was received by the Service as dated November 26, 2003 and December 4, 2003, respectively.

In the petitioner's letter of November 26, 2003, he provided information concerning the beneficiary as a "leased employee"; in addition he stated that certain realty owned by his wife could be used to secure an equity line of credit, and, he made the observation that in his estimation depreciation taken as a deduction in the calculation of adjusted gross income on petitioner's tax returns should be added to taxable income.

For his part, by letter dated December 4, 2003, the petitioner's counsel forwarded four additional documents to be included in the petition's supporting exhibits. These documents were the Form 1040 U.S. Individual Income Tax Return of petitioner for 2002, an employer's letter confirming the beneficiary's employment in the company, a letter from an accountant on the characterization of depreciation expenses taken by petitioner, and, a "...supplemental letter from the company reiterating its ability to pay the wage offer...."

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 February 10, 2004, he denied the petition.

On appeal, counsel asserts in his brief, and, in "Addendum to Part Three" received with appeal Form I-290B, that the petitioner did show by evidence submitted that petitioner had the ability to pay the proffered wage from the priority date of the alien labor application if the depreciation expense taken as a deduction by petitioner is added to the petitioner's taxable income.

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.

Alternately, 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 the Immigration and Naturalization Service, now called U. S. Citizenship and Immigration Services (CIS), had properly relied on the petitioner's net

income plus wages actually paid to beneficiary equal money available to pay the proffered wage. This sum is then compared to the proffered wage to determine whether or not the petitioner had the ability to pay the proffered wage from the priority date of the alien labor application.

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 the Service 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.

Only in 2002 did the petitioner make sufficient taxable income to pay beneficiary's preferred wage of \$37,605.00. There existed deficiencies in years 1999 through 2001. 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*, 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 that was structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. In 2002, the petitioner had less than \$3,000 remaining after paying the wage, to support himself and his dependents. Although the director did not request a statement of of petitioner's personal expenses, the AAO finds it unlikely that a family of two could live on less than \$3,000.00 in that year.

Petitioner's counsel advocates the addition of depreciation, taken as a deduction in those years' tax returns, to eliminate the abovementioned deficiencies. Counsel asserts that depreciation is a component of working capital to be added to the petitioner's taxable income. Since depreciation is a deduction in the calculation of taxable income on tax Form 1040, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention. In a similar case, the court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

Additionally, petitioner's counsel submitted several bank statements. The petitioner's bank statements submitted were dated from May 1999 to July 2004. The petitioner's bank statements demonstrate closing balances of a high of \$1,568.01 to a low of -\$262.03.

While these balances are admittedly small, counsel's reliance on the balances in the petitioner's bank account is still misplaced. 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. Bank statements show the amount in an account on a given date, and cannot show a sustainable ability

to pay the proffered wage. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return.

As an additional, or alternative method to demonstrate its ability to pay, petitioner submits that it could establish lines of credit from a bank on realty his spouse owns. 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 total 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. 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.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999 through 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.