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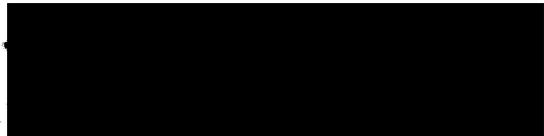
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2005  
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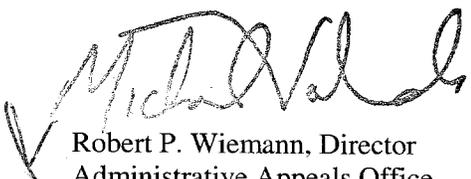
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

CC: [Redacted]

**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 re-upholstery and furniture repair business. It is a sole proprietorship. It seeks to employ the beneficiary permanently in the United States as a furniture upholsterer. 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<sup>1</sup> 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.

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 (7<sup>th</sup> Cir. 1983).

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<sup>1</sup> Since counsel did not include a Form G-28 with the appeal, but he has signed the appeal and filed a brief, the AAO will respond to counsel's brief and appeal while acknowledging that petitioner is self-represented in this matter.

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 February 13, 2001. The proffered wage as stated on the Form ETA 750 is 11.25 per hour or \$23,400.00 calculated annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 2003.

On the petition, the petitioner claimed to have been established on 1976, and to have a gross annual income of \$351,721.00 in 2002, and to employ four workers. In support of the petition, the petitioner submitted the following evidence: a copy of the Alien Labor Certification that was accepted for processing on February 13, 2001; a copy of an employment affidavit of prior experience as an furniture upholsterer in South Korea; a copy of U. S. Form 1040 U.S. Income Tax Returns for 2001; a copy of petitioner's support letter for the beneficiary confirming the position dated September 6, 2002; and, copies of documentation concerning the qualifications of the beneficiary.

In the intervening time between the filing of the I-140 application and the director's decision mentioned below, the petitioner's counsel provided additional information to the Service in response to a Request for Evidence transmittal by the Service on May 8, 2003. In correspondence dated July 17, 2003, accompanying the above, counsel stated that petitioner had an existing line of credit available to pay the proffered wage. In the letter counsel made the observation that the petitioner and his wife receive social security monthly payments, and, that these payments equaling a yearly payment of \$18,648.00, were available to pay the proffered wage. Lastly, counsel provided petitioner's brokerage account statement showing a balance of \$47,793.13 as an additional fund to pay the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's ability to pay the proffered wage beginning on the priority date of February 13, 2001, the director requested additional evidence pertinent to that ability in a second Request for Evidence dated August 27, 2003. 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, as postmarked November 17, 2003, the petitioner submitted a copy of its 2002 Form 1040 U.S. Individual Income Tax Return that included the income from the business in the calculation of adjusted gross income, and related tax filings.

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 January 26, 2004, and, he denied the petition.

As stated in the director's decision, the petitioner's tax returns reflect the following:

- In 2001, the Form 1040 stated adjusted gross income of \$3,215.00, and, business income of \$2,493.00.
- In 2002, the Form 1040 stated adjusted gross income of \$4,968.00, and, business income of \$3,385.00

On appeal, counsel asserts that the petitioner did show by evidence submitted that petitioner had the ability to pay the proffered wage. Along with the brief in the matter, counsel submits the following additional

evidence: Exhibit #1, a copy of Form I-797C approved August 20, 2003, that is the employment authorization document issued to the beneficiary; Exhibit #2, a copy of petitioner's California Form DE 6 Wage Report for the third quarter of 2003; Exhibit #3, a copy of petitioner's California Form DE 6 Wage Report for the fourth quarter of 2003; Exhibit #4, a copy of Form W-2 Wage and Tax Statement for 2003 for petitioner's employees including the beneficiary; and, Exhibit 5, copies of petitioner's cancelled payroll checks to the beneficiary from the business covering the period 9/2003 to 9/2004.

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 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.

In the instant case, the beneficiary was the employee of petitioner beginning in September 2003. Since the priority date of the Application for Alien Labor Certification is February 13, 2001, the beneficiary's employment with the petitioner predates the priority date by approximately 31 months. It is from the priority date that petitioner is required to demonstrate that it has the ability to pay the proffered wage.

Counsel in his brief accompanying the appeal raises an assertion that the director in his decision is incorrect in requiring petitioner to demonstrate that it has the ability to pay the proffered wage from the date the Application for Alien Labor Certification was accepted for processing (i.e. the priority date").

In counsel's letter, transmitting the Form I-290B appeal of the director's decision, he states:

"The last paragraph of the Service's denial concludes that the petitioner lacks the ability to pay the beneficiary the proffered wage "from the priority date." The beneficiary did not start working for the petitioner until September 2003 because that is when he received his work authorization. We have proved that the petitioner can and does pay the beneficiary the proffered wage and that the Service's conclusion as to payment "to the present or when the beneficiary obtains lawful permanent residence" is erroneous.

As stated above, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is 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). The critical date is not *when* petitioner did first employ the beneficiary, but *when* the petitioner's Application for Alien Employment

Certification was accepted for processing by the U. S. Department of Labor. A petitioner must establish the elements for the approval of the petition at the time of filing and thereafter. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Although the petitioner appealed the decision of the director on February 20, 2004, there is no later tax return for petitioner other than for years 2001 and 2002. Petitioner has submitted evidence of the payment to beneficiary of wages by petitioner from September 2003 through January 30, 2004. In 2003, the beneficiary received \$7200.00 for three months work. In 2004, the evidence of record shows one paycheck in the amount of \$807.53.

It would be speculative to use only four months of wage payments with no indication of petitioner's taxable income after tax year 2002 to determine or prove petitioner's ability to pay the proffered wage. Still, petitioner, through its counsel, insists that petitioner is able to pay the proffered wage. 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).

However, present in the record are copies of petitioner's tax returns for years 2001 and 2002 that may be used to determine petitioner's ability to pay the proffered wage. The proffered wage stated in the Alien Labor Certification accompanying the petition may be added to the petitioner's adjusted gross income for 2001 and 2002 to determine petitioner's ability to pay the proffered wage. The proffered wage was \$23,400.00

In tax year 2001, the petitioner stated its adjusted gross income as \$3,215.00. The amount added to the proffered wage of \$23,400.00 equals a deficient of -\$20,185.00.<sup>2</sup> In tax year 2002, the petitioner stated its adjusted gross income as \$4,968.00. The amount added to the proffered wage of \$23,400.00 equals a deficient of -\$18,432.00. If the petitioner also contributed the total amount of his and his spouse social security benefit payment for tax year 2002 to this sum (i.e. \$20,000.00 plus -\$18,432.00 equals \$1,568.00) then the petitioner could pay the proffered wage in year 2002.

However, for a sole proprietor there exist an additional concern. 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 (7<sup>th</sup> 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 \$1568.00 remaining after paying the wage, to support himself and his dependents. Although the director did not request a statement of petitioner's personal expenses, the AAO finds it unlikely that a family of two could live on less than that amount.

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<sup>2</sup> Counsel suggests that the petitioner and his spouse could contribute their monthly social security benefits payments to the proffered wage obligation. In tax year 2001, petitioner did not state an amount of the benefits received on their tax return and the record is silent on this yearly amount. Therefore, there cannot be an addition of social security benefits payments to this calculation.

Additionally, petitioner's counsel submitted petitioner's brokerage account statement showing a balance of \$47,793.13. Counsel's reliance on the balances in the petitioner's bank account is still misplaced. Brokerage and savings 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. Brokerage 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 brokerage account statements somehow reflect additional available funds that were not reflected on its tax return. The AAO notes in some instances, sole proprietorships may be able to demonstrate that brokerage accounts can be liquid assets available to pay the wage. However, in the instance case the statement is for 2003 and it cannot show the ability to pay for either 2001 or 2002.

As mentioned in correspondence dated July 17, 2003, counsel stated that petitioner had an existing line of credit available to pay the proffered wage in the amount of \$31,015.00. The Citizenship and Immigration Services (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).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage on the priority date or thereafter. 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.