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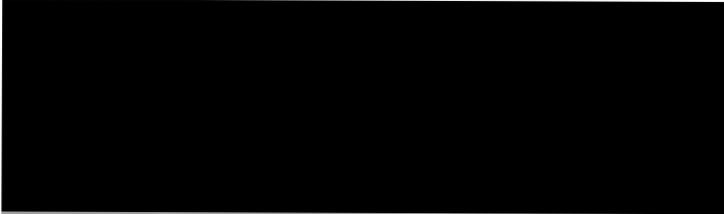
IN RE:

Petitioner:
Beneficiary



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:



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 Acting Center Director (director), Vermont 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 upholsterer and furniture repair firm. It seeks to employ the beneficiary permanently in the United States as an 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 submits additional evidence and maintains that the petitioner has established the petitioner's continuing financial ability to pay the certified wage.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$18.05 per hour, which amounts to \$37,544 per year. On Part B of the ETA 750, signed by the beneficiary on April 7, 2001, the beneficiary claims employment with the petitioner since November 2000.

The petition is structured as a sole proprietorship. On Part 5 of the preference petition, filed on June 20, 2003, the petitioner claims an annual income of approximately \$85,000.

With the petition, the petitioner submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2000. As this evidence was deemed insufficient, on April 27, 2004, the director requested additional documentation pertinent to the petitioner's ability to pay the proffered wage of \$37,544 per year, including a summary of the sole proprietor's household expenses for 2001.

In response, the petitioner, through counsel, submitted copies of the sole proprietor's individual tax returns for 2001, 2002, and 2003. They indicate that the sole proprietor filed as a qualifying widower with three

dependents in 2001. In 2002 and 2003, he filed as a head of household and claimed one dependent. The tax returns contain the following information:

	2001	2002	2003
Petitioner's Gross income (Schedule C)	\$148,640	\$114,441	\$223,458
Total Expenses (Schedule C)	\$ 41,350	\$ 62,530	\$156,417
Business Net Profit (Schedule C & Form 1040, line 12)	\$ 63,661	\$ 51,911	\$ 67,141
Adjusted Gross Income (Form 1040, line 33)	\$ 59,378	\$ 47,838	\$ 56,162

The petitioner also provided a summary of the sole proprietor's household expenses for 2001 and 2002. It shows that his annual living expenses were approximately \$45,306 in 2001 and \$48,033 in 2002.

The petitioner further supplied copies of Chevy Chase bank statements held individually by the sole proprietor or jointly with his daughter in three different accounts. Account # [REDACTED] shows that the account had a balance of \$84,674.75 as of December 20, 2001 and \$69,184.03 by January 22, 2002. Account #076-452051-2 reflects that its balance was \$40,051.89 as of December 16, 2002 and by December 15, 2003, it was \$39,179.73. Account # [REDACTED] reflects that it had a balance of \$11,949.54 as of January 24, 2002 and by January 23, 2003, it was \$3,929.13. The petitioner also provided a copy of a home equity credit line established with a bank in June 2004, as well as copies of documents reflecting interest paid on a money market account, however, the value of the account is not stated.

The petitioner also submitted a copy of the beneficiary's individual tax return for 2003 and a copy of a Wage and Tax Statement (W-2) for 2003. Consistent with the income tax return, it shows that the petitioner paid wages of \$9,620 to the beneficiary in 2003.

The director denied the petition on August 18, 2004. She determined that the sole proprietor's tax returns did not demonstrate the petitioner's continuing financial ability to pay the proffered wage to beneficiary beginning on the priority date. She noted that the sole proprietor's adjusted gross income of \$59,378 did not provide sufficient funds to both cover the sole proprietor's annual living expenses for that year as well as pay the proffered salary of \$37,544. The director also determined that the ending balances of the bank statements do not show sufficient funds to sustain the payment of the proffered wage in the year of filing.

On appeal, counsel submits a letter, dated September 27, 2004, from the Fidelity and Guaranty Life Insurance Company, which confirms that the sole proprietor opened an annuity policy as of November 9, 2002, with an initial investment of \$30,000 and a current value of \$32,492.02. Counsel additionally provides an affidavit, dated October 4, 2004, from the sole proprietor, [REDACTED] Mr. [REDACTED] states that he employed the beneficiary as a subcontractor at \$400 per week until October 2003, when he began to carry the beneficiary on his payroll at \$740 per week. He asserts that the beneficiary will continue to be paid the prevailing wage.

Counsel further offers updated bank statements for Account [REDACTED] showing that as of June 15, 2004, its balance was \$28,488.76, and that as of September 24, 2004, its current balance was \$15,511.91. Counsel maintains that the bank statement balances provide sufficient assurance that the beneficiary's monthly wages could have been paid. The proffered wage of \$37,544 at a monthly rate would be \$3,128 per month. Counsel also contends that the director overlooked the petitioner's home equity line of credit and that

pursuant to *Matter of Sonegawa*, 12 I&N Dec. 615 (BIA 1967), the petitioner's ability to pay the proffered wage may be extrapolated from the increase in the growth of the petitioner's gross revenue.

In this matter, CIS will not consider the sole proprietor's home equity line of credit. 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 a 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. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Moreover, as mentioned above, this credit line was not established until June 2004. 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).

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 may have 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, other than the W-2 provided for 2003, showing the payment of \$9,620 in wages to the beneficiary, the sole proprietor's statements as to the amount of other compensation paid to the beneficiary is not sufficiently probative to be considered. If such compensation were paid, it has not been supported by the submission of Form 1099s (Miscellaneous Income) or other payroll records. It is also not reflected in the beneficiary's individual 2003 tax return contained in the record. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, in this regard, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

If a petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). Any emphasis on the petitioner's gross sales or receipts is misplaced. It is not reasonable to consider gross receipts without also considering the expenses incurred to generate the revenue.

As a sole proprietorship, the petitioner is 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, individual assets and 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. 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, we find that the bank statements and evidence of the annuity policy provide sufficient evidence of the petitioner's ability to pay the proffered wage. In 2001, after paying the household expenses annualized to approximately \$45,306, the sole proprietor needed an additional sum of approximately \$23,472 to cover the proffered annual salary of \$37,544. Between the balances available in Account # [REDACTED] of approximately \$69,000 as of January 2002, and Account # [REDACTED] balance of approximately \$12,000 as of January 2002, it appears that this shortfall could have been covered.

In 2002, the sole proprietor needed an additional \$37,739 to cover the proffered salary after paying the annualized household expenses of \$48,033 out of the 2002 adjusted gross income of \$47,838. It appears that Account # [REDACTED] had a balance of \$40,000 as of December 2002 that could have been accessed to meet this amount.

Similarly, as indicated on appeal, the annuity account of \$30,000 has existed since November 2002. Although no living expense summary was provided for 2003, if an approximate figure of \$48,033 for 2002 were used, the sole proprietor would need an additional \$29,415 to pay the proffered wage after covering the household expenses out of the adjusted gross income of \$56,162. Subtracting the wages of \$9,620 that were already paid in 2003, the sole proprietor would need \$19,795 to pay the full proffered wage. Although a precise calculation cannot be made, it appears that a \$30,000 annuity would provide sufficient value to cover the \$19,795.

Based on a review of the evidence submitted to the underlying record and argument offered on appeal, the petitioner has demonstrated that it had the continuing financial ability to pay the proffered wage beginning at 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 met that burden.

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