

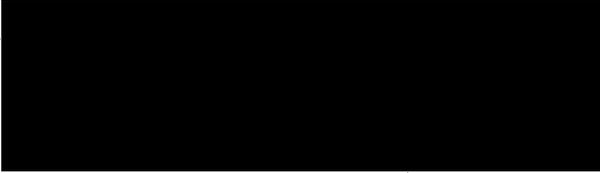
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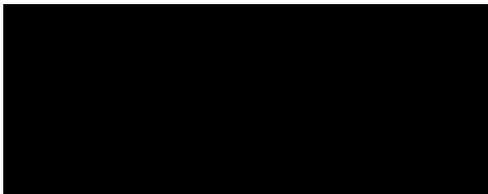


FILE: WAC-03-163-52012 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2006

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:



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 petition¹ was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in automotive electric business. It seeks to employ the beneficiary permanently in the United States as an automotive electrician. 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 brief statement and/or additional evidence.²

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 January 2, 1998. The proffered wage as stated on the Form ETA 750 is \$17.89 per hour (equating to \$715.60 per week, \$3,100.93 per month and \$37,211.20 per year).³ The Form ETA 750 states that the position requires 3 years experience in the job offered. On the Form ETA 750B, amended by the beneficiary on December 1, 1998, the beneficiary claimed to have worked for the petitioner since December 1991.⁴

On the petition, the petitioner claimed to have been established in September 1979, to have a gross annual income of \$275,000, to have a net annual income of \$75,000, and to currently employ 3 workers. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The

¹ CIS records show that the petitioner filed a previous I-140 petition (WAC-92-166-51823) for the same beneficiary on April 27, 1992 and the petition was denied.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ The director incorrectly calculated the monthly proffered wage as \$2,862.40 and annual proffered wage as \$34,348.80 based on a wrong method. The AAO's correct calculation method is that weekly wage times 52 weeks equals annual wage and the annual wage divided by 12 months equals monthly wage. It is noted that counsel also adopted the director's wrong method in calculating the monthly and annual proffered wage in the instant case.

⁴ The beneficiary claimed that he had worked for the petitioner since October 1991 on the Form 750B initially signed on December 15, 1997.

petition was filed with the petitioner's unaudited Quarterly Income Statement as of December 31, 2000 pertinent to the petitioner's ability to pay the proffered wage.

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, on February 14, 2004, the director issued a notice of request for evidence (RFE). The director specifically requested that annual reports, federal tax returns or audited financial statements as evidence of the ability to pay the proffered wage for the years 1998 through 2003, Form DE-6, Quarterly Wage Report for all employees for the last eight quarters (2002 and 2003), and the beneficiary's pay statements for the last three months (November and December of 2003, and January 2004). In response, the petitioner submitted Form 1040 for the years 1998 through 2003 filed by the owner of the petitioner, Forms DE-6 for all four quarters of 2002, the beneficiary's pay stubs for a period from January 2, 2004 to February 27, 2004, an undated letter from the petitioner saying that the beneficiary was allowed to be absent from September 15 to January 2.

On June 2, 2004, the director determined that the petitioner had not demonstrated the ability to pay the proffered wage for years 1999 and 2000. The director took into consideration the income for tax years 1998 through 2003, along with the fact that the beneficiary was currently receiving an annual salary of \$14,040, and accordingly denied the petition.

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 beneficiary claimed to have worked for the petitioner since December 1991. However, the petitioner did not establish that the amount of the salary paid to the beneficiary was equal to or greater than the proffered wage. Instead, the petitioner only submitted evidence for the payment to the beneficiary for 2002 (with DE-6 for four quarters of 2002) and a period from January 2 to February 27, 2004.

The record contains copies of Form 1040 for the years 1998 through 2003 filed by the owner of the petitioner, DE-6 for all four quarters of 2002 and the beneficiary's pay stubs for a period from January 2, 2004 to February 27, 2004⁵. The relevant documents show compensation paid by the petitioner, as shown in the table below.

Year	Total Paid Compensation	Compensation to the beneficiary	Proffered Wage	Wage increase needed to pay proffered wage
1998	\$22,520	\$0	\$37,211.20	\$37,211.20
1999	\$17,168	\$0	\$37,211.20	\$37,211.20
2000	\$18,720	\$0	\$37,211.20	\$37,211.20
2001	\$25,283	\$0	\$37,211.20	\$37,211.20
2002	\$32,754	\$13,610	\$37,211.20	\$23,601.20
2003	\$36,396	\$0	\$37,211.20	\$37,211.20

⁵ The beneficiary's pay stubs for the first two months of 2004 are not relevant in determining the petitioner's ability to pay the proffered wage here because the wage paid to the beneficiary in 2004 cannot approve the ability in 1998 through 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner must demonstrate that it had sufficient funds to pay the full proffered wage for years 1998 through 2001 and the year 2003, and to pay the difference \$23,601.20 between the wage paid to the beneficiary and the proffered wage in 2002. If the petitioner did employ the beneficiary, the petitioner should provide evidence of the compensation paid by the petitioner to the beneficiary in all years from priority date to present in any future proceeding.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than 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." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for the years 1998 through 2003. The record before the director closed on May 7, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner's owner for 2004 was not yet due. Therefore the owner's tax return for 2003 is the most recent return available.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income:

Tax year	Adjusted gross income	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	\$21,789	\$37,211.20	\$(15,422.20)
1999	\$15,826	\$37,211.20	\$(21,385.20)
2000	\$12,124	\$37,211.20	\$(25,087.20)
2001	\$20,609	\$37,211.20	\$(16,602.20)
2002	\$22,024	\$23,601.20	\$(1,577.20)
2003	\$22,370	\$37,211.20	\$(14,841.20)

The above information shows that the petitioner's adjusted gross income reflected on Line 33 of the Form 1040 was not sufficient to pay the proffered wage or the difference between the wages paid to the beneficiary and the proffered wage in the years 1998 through 2003. The petitioner failed to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Counsel asserts that the owner's cash and property assets, including bank statements, financial investments, and real estate properties, should be considered in determining the petitioner's ability to pay the beneficiary the proffered wage. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. However, the AAO does not generally accept a claim that the sole proprietor relies on the value of his homes and business to show his ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. Therefore, counsel's reliance on the sole proprietor's real estate properties to demonstrate his ability to pay is misplaced.

Counsel also asserts that the employer is willing to open a home equity line of credit or obtain a home equity loan in order to pay for expenses related to his business, including employee wages. 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 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).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary 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). Moreover, the record does not contain evidence that the petitioner has opened a home equity line of credit or obtained a home equity loan. 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 business' 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 record of proceeding contains bank statements from the petitioner's account covering the period January 9, 2002 through May 6, 2004. However, it appears to be the sole proprietor's business checking account. These funds were most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Furthermore, bank statements submitted show that the sole proprietor had the minimum monthly balance \$45.69, maximum \$3,962.76 and an average monthly balance of \$2,280.75 for the period.⁶ Even if the account was a savings account, money market account, certificate of deposits, or other similar account, and such money was considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses, the average balance would not be substantial enough to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for a year. The ending balances would not have been sufficient enough to cover the remaining wages of \$16,602.20 in 2001 and \$14,841.20 in 2003 out of all adjusted gross incomes in those years. Additionally counsel did not submit

⁶ The bank statements submitted show that the sole proprietor's business checking account had balances of \$1,755.25 on January 9, 2002, \$1,724.13 on February 6, 2002, \$3,648.37 on April 9, 2002, \$1,882.60 on May 8, 2002, \$1,279.50 on July 10, 2002, \$1,255.61 on August 8, 2002, \$3,962.76 on September 9, 2002, \$2,878.93 on October 8, 2002, \$3,771.92 on November 6, 2002, \$2,502.49 on March 8, 2003, \$3,821.19 on April 8, 2003, \$872.81 on November 7, 2003, \$3,917.54 on December 8, 2003; \$331.01 on January 8, 2004, \$2,683.30 on February 5, 2004, \$2,439.63 on April 9, 2004 and \$45.69 on May 6, 2004.

bank statements for 1998 through 2001. The record of proceeding does not contain any other documents showing the petitioner's liquid assets. The petitioner should address this issue in any subsequent proceedings.

Counsel asserts that sole proprietorship's ability to pay the proffered wage should be determined with adjusted gross income without consideration of the sole proprietor's household living expenses. Counsel refers to decisions issued by the AAO, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, sole proprietors must not only show that they can cover their existing business expenses as well as pay the proffered wage, but also show that they can sustain themselves and their dependents. This is well established by judicial precedent. *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 (approximately thirty percent of the petitioner's gross income). In addition, the instant case is distinguishable from the cases cited by counsel. In the AAO's decisions to which counsel cites, the adjusted gross incomes reflected on Form 1040 were sufficient to cover the proffered wage. However, in the instant case, the adjusted gross incomes on Line 33 of Form 1040 in the years 1998 through 2003 were at least \$14,841 less than the proffered wage. Even before taking the petitioner's living expenses into account, the petitioner still failed to establish its ability to pay the beneficiary the proffered wage.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker⁷ at the same wage, using the same priority date, reflected on a Form ETA 750. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, the assets counsel argues to be considered, such as the petitioner's business checking account, line of credit and the sole proprietor's real estate as discussed above, are not acceptable as other liquid assets in determining the petitioner's ability to pay the proffered wage.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1998 through 2003. The adjusted gross income in each year reported in tax returns was not sufficient to pay the proffered wage or the difference between the wage paid to the beneficiary and the proffered wage. The petitioner did not demonstrate any other liquid assets available for the petitioner to pay the proffered wage. The petitioner also failed to establish that the petitioner's income and assets would cover the petitioner's living expenses in each of the years 1998 through 2003. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage.

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.

⁷ CIS receipt number: WAC-03-163-53420.

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ORDER: The appeal is dismissed.