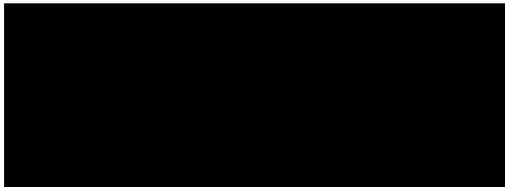


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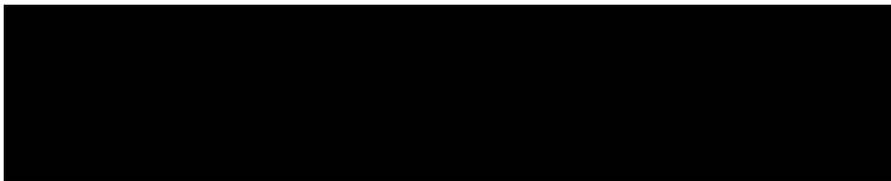
IN RE:

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:



PHOTOCOPY

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and the appeal was subsequently dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on the petitioner's motion to reopen based on ineffective assistance of counsel. The motion based on ineffective assistance of counsel will be denied, however the AAO will reopen the appeal *sua sponte* pursuant to its discretionary authority set forth in 8 C.F.R. § 103.5.

The petitioner is a print shop. It seeks to employ the beneficiary permanently in the United States as a computer typesetter/keyliner. 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 on July 28, 2004.

In a decision rendered on February 21, 2006, the AAO dismissed the petitioner's appeal filed by former counsel. The AAO reviewed the documentation contained in the record including the sole proprietor's individual federal income tax returns for 2001 and 2002, and a compiled financial statement for 2003. Although the sole proprietor's 2003 federal income tax return was provided on appeal, at the time, the AAO declined to review it as it found that the tax return had been previously requested by the director in his February 23, 2004, request for additional evidence. The AAO also considered an affidavit from the sole proprietor pledging to pay the proffered wage from his personal income and assets if necessary, as well as a letter from the petitioner's accountant accompanied by a compiled financial statement covering the period ending June 30, 2004.

On March 27, 2006, current counsel filed a motion to reopen based on ineffective assistance of counsel citing former counsel's failure to include documentation indicating that an extension to file the sole proprietor's 2003 tax return had been filed and submitting a compiled financial statement for 2003 instead. Current counsel maintains that the sole proprietor was never requested to provide evidence of personal assets. An affidavit from the sole proprietor is submitted in support of this allegation. He further asserts that he submitted such evidence in January 2006 prior to the AAO's decision but presumes that it was not considered due to the late filing.

Any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

It is noted that current counsel has provided a copy of his letter, dated March 23, 2006, to former counsel outlining the petitioner's allegations of ineffective assistance, as well as a copy of a completed Texas State Bar grievance form of the same date. By affidavit, dated March 24, 2006, counsel states that he sent both documents to former counsel by facsimile and by U.S. mail on March 23, 2006, and that former counsel had not yet responded. While it is noted that the requirements of *Lozada* have been satisfied as to the reasons for the allegations against former counsel and the filing of a complaint with the Texas State Bar, we do not find that it has been established whether or if former counsel was given an adequate opportunity to respond to the complaint,

as current counsel sent the complaint to former counsel on Thursday, March 23, 2006, and filed this motion on Monday, March 27, 2006. While it is noted that the regulatory deadline obliged a motion to reopen to be filed by March 27, 2006, we find that the complaint of ineffective assistance served to former counsel two business days before that date provides insufficient notice that any response to that complaint could be considered with this motion. As it is unclear whether or if former counsel responded to such a complaint impugning his representation, we do not find that the motion should be granted based on ineffective assistance of counsel.

That said, the AAO will reopen this appeal, as a matter of fairness and discretion, based on the evidence that current counsel submitted to the record and not previously considered, as well as a revision of the AAO's statement on page 3 of its prior decision that the director requested the petitioner's 2003 tax return in his request for evidence issued on February 23, 2004. Further review of the request for evidence indicates that while the director generally requested evidence covering the period of 2001-2003, as set forth in 8 C.F.R. § 204.5(g)(2), there was no specific request for the 2003 tax return. As such, this tax return, as well as other documentation provided to the record by current counsel, will herein be considered.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

As noted in the AAO's previous decision, the regulation at 8 C.F.R. § 204.5(g)(2), as finalized in 1991, requires that a petitioner's evidence demonstrating its continuing ability to pay the proffered wage as of the priority date must include either annual reports, federal tax returns, or audited financial statements. As stated in the regulation, "the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." *Id.* The priority date is established as the date that the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is March 28, 2001.¹ If the petition is approved, the priority date is also used in conjunction

¹ On Part 5 of the preference petition, filed on February 14, 2003, the petitioner claimed that it employed two workers. As previously noted, the petitioner is structured as a sole proprietorship.

with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

As noted above, the petitioner's evidence demonstrating its ability to pay the proffered wage must include either audited financial statements, federal tax returns, or annual reports covering the relevant period. For 2001, 2002, and 2003 provided on appeal and on motion, the sole proprietor's individual tax returns reflect that he filed jointly as a married person and claimed one dependent. The 2004 individual tax return, provided on motion, shows the same filing status as in the previous years. These returns contain the following information:

	2001	2002	2003	2004
Petitioner's gross income (Schedule C)	\$ 265,601	\$385,858	\$342,653	\$ 301,728
Petitioner's total expenses (Schedule C)	\$ 217,521	\$ 335,271	\$252,038	\$ 208,507
Petitioner's net profit (Sched. C & Form 1040)	\$ 48,080	\$ 50,587	\$ 90,615	\$ 93,507
Sole Proprietor's wages (Form 1040)	\$ none	\$ none	\$ none	\$ none
Taxable interest (Form 1040)	\$ 24	\$ 35	\$ 30	\$ 20
Adjusted Gross Income (Form 1040)	\$ 38,144	\$ 38,294	\$70,443	\$ 73,297

It is noted that the tax returns indicate that the sole proprietor derives his declared income from the petitioning business and from interest income. The business operations are reflected on Schedule C, Profit or Loss from Business which accompany each individual tax return. The respective net profits of the business are carried forward to line 12 of the first page of the sole proprietor's tax return. In 2001, the interest income was derived from an account at Western Sierra Bank; in 2002 and 2003, the interest was produced by an account at 49er Federal Credit Union; and in 2004 the interest income reported was equally apportioned between an account with 49er Federal Credit Union and Bank of America.

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 during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If lesser amounts are paid as compensation, they will also be given consideration. If the difference can be covered by either a petitioner's net income or net current assets,² this will also demonstrate an ability to pay a proposed wage offer during the pertinent period. In this case,

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. As noted in the previous AAO decision, net current assets can be calculated from the figures provided on Schedule L of a corporate tax return. Net current assets of a sole proprietorship or the sole proprietor, however, cannot be similarly extracted from an owner's personal tax return or from Schedule C. Because these assets and liabilities are considered collectively and properly combined in order to determine the petitioner's continuing ability to pay the proffered wage, the sole proprietor must show that he could have paid the petitioner's business expenses as well as show that he could have supported himself and his dependents.

as submitted on appeal, copies of payroll records indicate that the petitioner employed the beneficiary beginning in April 2005 and is paying him the proffered annual wage of \$37,200 at the rate of \$1,550 twice a month.

As noted previously, in determining the petitioner's ability to pay the proffered wage, the CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

When the petitioner is a sole proprietorship, a modified review is necessary because, unlike a corporation, a sole proprietorship is not a separate entity from its owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). It is a business in which an individual operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are 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. As noted above, the business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return and included in the calculation of the sole proprietor's adjusted gross income. 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). Because the overall circumstances of a sole proprietor are part of the review of the ability to pay a certified wage, sole proprietors often provide summaries of their monthly household expenses. In this case, such information has not been offered on motion, although the AAO's previous decision on February 21, 2006, cited this requirement on page 6.

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, additional evidence has been provided by current counsel that was not considered in the AAO's prior decision. The evidence includes a copy of a letter dated September 16, 2005, from Western Sierra Bank. Signed by [REDACTED] an assistant branch manager, it states that the sole proprietor has been a customer since 1989 and carries an average balance of ten to fifteen thousand in the business checking account, as well as "five to ten thousand in a personal savings" along with a \$150,000 line of credit. No first hand evidence of the balances in these accounts has been provided, although it is noted that the petitioning business' cash flow would be reflected as part of the day-to-day operations encompassed within the figures of receipts and expenses already presented on Schedule C of the sole proprietor's corresponding tax return. It is also unclear if [REDACTED] is referring to a current personal savings account held by the sole proprietor at the Western Sierra Bank, or to the one held in 2001. An accurate figure as to the principal amount reflected by the interest income earned in 2001, 2002, and 2003, has not been provided, and so the reference to these resources does not reliably establish how much cash or cash equivalent liquid assets was available to pay the proffered wage. Going on record without

specific supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

In this matter, CIS will not consider the sole proprietor's line of credit. In calculating the ability to pay the proffered salary, CIS will not augment a 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, it is unclear from the Noonan letter when it was established or how the acquisition of a potential debt to be repaid should be considered. 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).

A copy of an August 31, 2005, portfolio account statement indicates additional cash equivalent personal assets held by the sole proprietor in 2002 and 2004-2005. In April 2002, the accounts opened by the sole proprietor and/or his spouse totaled \$38,922.11. Beginning in October 2004 and ending in April 2005, an additional portfolio account showed \$5,582.42. Such assets may be included in the determination of the petitioner's ability to pay the proffered wage.

Through counsel, the petitioner has additionally provided copies of property tax statements referring to two parcels of real property held jointly by the sole proprietor and his wife and the sole proprietor. These statements do not indicate when these assets were available, whether there are outstanding encumbrances owing, and to what purpose these assets are utilized. Counsel's brief on motion references "investment property" held by the sole proprietor that is based on a brief mention in the sole proprietor's declaration submitted on motion, but no further detail is offered. See *Matter of Soffici*, 22 I&N Dec. 158, 165, *supra*. Moreover, such holdings will not be considered as readily available liquid assets to support the payment of the proposed wage offer. Although CIS will consider a sole proprietor's overall personal assets and liabilities, they must represent cash or cash equivalent assets that would be a readily available resource out of which the proffered wage could be paid. Real estate is a generally considered a long-term asset and is not readily convertible to be available to pay the proffered wage. Moreover, if it is considered part of a petitioner's total depreciable assets used in the business, it would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

The petitioner has further submitted copies of checks drawn on the petitioner's checking account during 2001 and 2002. Counsel refers to them on motion only as cancelled checks for contractor payments and the petitioner's quarterly wage and withholding reports, as does the sole proprietor in a declaration provided on motion. No further detail has been provided. First, it is observed that the copies provided show only one side of the check and do not indicate that they have been negotiated or cancelled. Second, there is no first-hand evidence of the significance of the checks written to [REDACTED] from November 13th to December 13th, representing \$2,056.49, or the checks written to [REDACTED] in 2002, and [REDACTED] in 2003, or the last three quarterly wage statements identifying an employee named [REDACTED] or how any of these payments specifically relates to the petitioner's ability to pay the proffered wage. These documents will not be considered. See *Matter of Soffici*, 22 I&N Dec. 158, 165, *supra*.

In this case, given that the AAO's prior decision, which gave notice to the petitioner that the sole proprietor must show that, in addition to paying the proffered wage and the existing business expenses, he can support himself and his dependents, the AAO finds it significant that the sole proprietor has failed to supply specific evidence of

the level of support required. Neither counsel, nor the sole proprietor's declaration offered on motion, mention the level of individual household expense typically incurred by the sole proprietor in any given year.

It is noted that starting with 2001, even without consideration of payment of any additional living expenses, which have not been provided, the proffered salary of \$37,200 represented 97% of the sole proprietor's adjusted gross income in 2001. It would be highly unlikely that a household of three (albeit smaller than the *Ubeda* household) could pay living expenses with the remaining \$944 after paying the proffered wage. The AAO does not find that the petitioner demonstrated the ability to pay the proffered wage in 2001.

In 2002, as noted above, the sole proprietor's liquid assets of \$38,922.11 could have been used to pay the proposed wage offer of \$37,200 and left the difference, combined with the adjusted gross income of the \$38,294, to pay household expenses. As noted above, without specific evidence showing the level of household expenses, we do not find that the petitioner has established its ability to pay in 2002.

In 2003, while the sole proprietor's adjusted gross income increased to \$70,443, the proposed wage offer still represented 53% of the adjusted gross income. Without specific documentation showing that actual household living expenses were affordable, it cannot be concluded that the petitioner has demonstrated the ability to pay the proffered salary during this year.

The petitioner has provided the sole proprietor's 2004 individual tax return on motion showing that his individual adjusted gross income increased to \$73,297. With the majority of the portfolio account balance of \$5,582.42 available to be allocated in 2004, the sole proprietor had approximately \$78,880. The proposed wage offer still represents 47% of these assets. Similar to 2003, without specific documentation showing that actual household living expenses were affordable, it cannot be concluded that the petitioner has demonstrated the ability to pay the proffered salary. Counsel's assertions on this issue do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although the evidence suggests that the petitioner established its ability to pay the proffered wage in 2005 due to employment and payment of sufficient compensation to the beneficiary, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date.

Based on these figures, and the evidence provided to the record, we conclude that it is unlikely that the sole proprietor could have sufficient funds to pay the full proffered wage as well as support himself, his spouse and one dependent during the period under consideration.

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.