

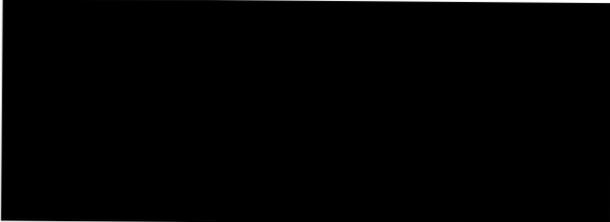


U.S. Citizenship
and Immigration
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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 24 2006
WAC-03-173-54277

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

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. 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 additional evidence¹.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 16, 2001. The proffered wage as stated on the Form ETA 750 is \$750 per week (\$39,000 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in April 2000, to have a gross annual income of \$169,536, to have a net annual income of \$17,586, and to currently employ two (2) workers. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship.

Because the petition was filed without any documents pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 24, 2004, the director issued a request for evidence (RFE). In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide

¹ 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's tax returns for the years 2001 to 2003, and Form DE-6, Quarterly Wage Reports for all employees for the last four quarters.

In response, the petitioner submitted Form 1040 for the years 2001 through 2003, and a bank statement for the line of credit from Bank of America.

On August 3, 2004, the director determined that the petitioner had not demonstrated that it had the continuing ability to pay the proffered wage as well as to cover the owner's personal expenses from the priority date and denied the petition accordingly.

On appeal, counsel asserts that the loans of \$124,000 made to the company by its shareholders, line of credit of \$130,000 and wages paid demonstrate that the petitioner had the ability to pay the proffered wage. The petitioner claims that it will increase its gross revenues by at least \$43,000 per year based on current daily sales of \$830.

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 petitioner did not submit W-2 forms for the beneficiary and did not claim that he hired and paid the beneficiary the proffered wage.

The evidence indicates that the petitioner is a sole proprietorship. 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. 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. In addition, they 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33², Adjusted Gross Income, of the sole proprietor's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2003. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,000 per year.

² The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 35 for 2002 and Line 34 for 2003.

In 2001, the Form 1040 stated adjustable gross income of \$17,548.
In 2002, the Form 1040 stated adjustable gross income of \$24,818.
In 2003, the Form 1040 stated adjustable gross income of \$32,443.

The sole proprietor's adjusted gross income on Form 1040 was \$21,452 in 2001, \$14,182 in 2002 and \$6,557 in 2003 less than the beneficiary's proffered wage. Therefore, the petitioner had insufficient income to pay the proffered wage to the beneficiary for years 2001 through 2003 even without consideration of its owner's household personal expenses.

Former counsel advised in response to the director's RFE that the beneficiary would replace the owner as a full time permanent chef and that except for wages paid to the owner himself, the petitioner did not hire and pay any other employees. Schedule Cs of Form 1040 show that the petitioner paid wages of \$5,400 in 2001, \$25,200 in 2002 and \$31,900 in 2003. However, the wages paid to the sole proprietor in these years are not reflected on line 7 of Form 1040 tax returns and supported by W-2 forms for the sole proprietor. The petitioner did not provide evidence that the petitioner has replaced or will replace the owner with the beneficiary. 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). Going on record without 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)). Furthermore, 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. Moreover, there is no evidence that the owner involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the duty, and termination of the worker who performed the duties of the proffered position. If the owner performed other kinds of work, then the beneficiary could not have replaced him. The petitioner must address this issue in any future proceedings.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, counsel claims on appeal that the sole proprietor made loans of \$124,000 to the company and submits the declaration of the sole proprietor to support the claim. The declarations that have been provided on motion are not affidavits as they were not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. See *Black's Law Dictionary* 58 (West 1999). Statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Neither counsel's assertion nor the sole proprietor's declaration is supported by any corroborative evidence. Going on record without 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)). Furthermore, a sole proprietorship is not separate from its owner. The sole proprietor is responsible for his own and the business' liabilities with the business' assets and his own personal assets. The loan made to the business by the sole proprietor has already been accounted for Schedule C of Form 1040 filed by the sole proprietor, and therefore, cannot be considered as additional liquefiable assets in determining the petitioner's ability to pay the proffered wage.

Counsel also contends that the line of credit should be considered as additional liquefiable assets of the sole proprietor in determining the ability to pay. Counsel submitted four pages of Account Transaction History from Bank of America on the account 68240012034799 for a period from January 3, 2001 to April 18, 2003

as evidence of the petitioner's line of credit in the amount of \$130,000. However, the bank account record submitted does not show the petitioner as the account's holder. 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 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). Moreover, 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 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 record of proceeding does not contain any evidence showing that any other liquefiable assets of the sole proprietor are available to be used to pay the beneficiary the proffered wage and cover the sole proprietor's household expenses. The petitioner must address this issue in any future proceedings.

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 as of the priority date. Counsel's assertion and evidence submitted on appeal do not overcome the director's decision.

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.