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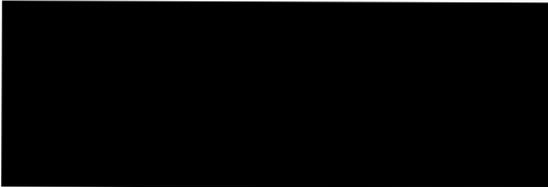
U.S. Department of Homeland Security  
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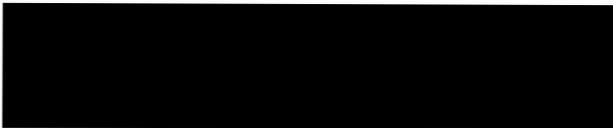


FILE: WAC 04 126 53485 Office: CALIFORNIA SERVICE CENTER Date: **MAY 12 2006**

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition 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 an automotive repair shop. It seeks to employ the beneficiary permanently in the United States as an automotive mechanic. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 7, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. 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)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date 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 priority date in the instant petition is April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$19.00 per hour or \$39,520 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on

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<sup>1</sup> 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

appeal includes a copy of a list of the owner's loans from Chicago Title, a listing of the owner's home and property, and a copy of an Interoffice Memorandum, dated May 4, 2004, from William R. Yates, Associate Director for Operations. Other relevant evidence in the record includes copies of the petitioner's 2001 and 2002 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business, copies of the petitioner's bank statements for the periods April 26, 2001 through May 25, 2001, June 26, 2002 through August 27, 2002, and December 27, 2002 through January 28, 2003, copies of the beneficiary's 2001 through 2003 Forms W-2, Wage and Tax Statements, and copies of the petitioner's Forms DE-6, Quarterly Wage and Withholding Reports, for the first three quarters of 2003. Counsel did not submit an itemized listing of the petitioner's monthly expenses. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 adjusted gross income was \$21,654, and the petitioner's 2002 adjusted gross income was \$23,065. The petitioner's list of loans reflects a revolving credit line of \$100,000 in 2002 and \$150,000 in 2004. The bank statements reflect balances ranging from a low of \$3,189.81 to a high of \$10,576.75. The beneficiary's Forms W-2, issued by the petitioner, reflect wages earned of \$14,400 in 2001, \$15,000 in 2002, and \$15,300 in 2003. The petitioner's Forms DE-6 for the first three quarters of 2003 reflect the petitioner paid the beneficiary \$11,700 during that time.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$39,520 based on the petitioner's cash, his lines of credit, and the value of his personal property.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not include the petitioner as a past or present employer. However, the petitioner did provide copies of the beneficiary's 2001 through 2003 Forms W-2 reflecting wages earned of \$14,400, \$15,000, and \$15,300, respectively. The petitioner has not established that it employed the beneficiary in 2001 through 2003 at a salary equal to or greater than the proffered wage of \$39,520. The petitioner is obligated to demonstrate that it has sufficient funds to pay the difference between the actual wages paid to the beneficiary and the proffered wage of \$39,520. In the instant case, that difference would be \$25,120 in 2001, \$24,520 in 2002, and \$24,220 in 2003.

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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).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that 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).

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. 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 (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 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, the sole proprietor supported a family of four in 2001 and a family of three in 2002. In 2001, the petitioner's adjusted gross income of \$21,654 was \$17,866 less than the proffered wage of \$39,520. The petitioner could not have paid the proffered wage of \$39,520 and supported a family of four with an adjusted gross income less than the proffered wage in 2001. The petitioner has not established its ability to pay the proffered wage and support a family of four in 2001.

In 2002, the petitioner's adjusted gross income of \$23,065 was \$16,455 less than the proffered wage of \$39,520. The petitioner could not have paid the proffered wage of \$39,520 and supported a family of three with an adjusted gross income less than the proffered wage in 2002. The petitioner has not established its ability to pay the proffered wage and support a family of three in 2003.

The petitioner did not submit its 2003 tax return. However, the beneficiary's Form W-2 for 2003 reflects earnings of \$15,300. The petitioner must show that it has sufficient funds to pay the difference of \$24,220 between the actual wages earned by the beneficiary and the proffered wage of \$39,520. The petitioner has not established its ability to pay the proffered wage and support a family of three in 2003.

Counsel contends that the petitioner has established its ability to pay the proffered wage with its lines 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 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).

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 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).

Counsel claims that the petitioner had \$77,000 in cash in 2001 that could have been used to pay the beneficiary in 2001. Counsel then states that the petitioner put the \$77,000 down as a deposit on a house he bought at the end of July, 2001. Counsel has not, however, provided any evidence of where the \$77,000 for the deposit came from. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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)).

Counsel also contends that the home purchased in 2001 was an investment and, as such, should be considered when determining the petitioner's ability to pay the proffered wage. However, property is considered a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. The language of the regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases," CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record.

Counsel maintains that the petitioner was denied due process by CIS in that it did not receive a request for evidence when the director determined that the petitioner did not establish its ability to pay the proffered wage. However, 8 C.F.R. § 103.2(b)(8) states in pertinent part:

*Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence, including blood tests.

In the instant case, the petitioner submitted copies of its 2001 and 2002 income tax returns, copies of the first three quarters of 2003 Forms DE-6, copies of the beneficiary's 2001 through 2003 Forms W-2, and copies of its bank statements for the periods April 26, 2001 through May 25, 2001, June 26, 2002 through August 27, 2002, and December 27, 2002 through January 28, 2003. The record of proceeding was complete in that it contained all the necessary initial evidence; and, therefore, the director was not obligated to issue a request for evidence. In addition, since the record of proceeding included evidence of ineligibility on the petitioner's part, the director was justified in denying the petition on that basis alone.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided two tax

returns (2001 and 2002), which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 through 2003 were uncharacteristically unprofitable years for the petitioner.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was appropriate, based on the evidence in the record before the director.

In addition, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

Given that the beneficiary has the same last name as the owners, the facts of the instant case suggest that he too is a family member. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of the this beneficiary.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.