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U.S. Citizenship
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 02 2006
LIN 04 178 50507

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker, Other, pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

ON BEHALF OF PETITIONER:
[Redacted]

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 service center director denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook of Mexican food. 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. Accordingly, the director denied the petition.

On appeal, counsel states that the petitioner does have the ability to pay the proffered wage, and the director's decision is incorrect based on the law and the facts. Counsel submits further documentation.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker*. If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 26, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$11.47, or an annual salary of \$23,857.60. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as a specialty cook since January 1998.¹

¹A letter submitted with the petition and signed by the petitioner's owner indicated the beneficiary began her

The petitioner is structured as a sole proprietorship. On the petition, the petitioner did not establish when it was established, how many employees it has, or its gross or annual net income. The sole proprietor submitted its Form 1040, individual income tax return, for tax years 2001 and 2002, with accompanying Schedules C, as evidence of the petitioner's ability to pay the proffered wage. These documents indicated the petitioner had an adjusted gross income of \$27,380 in tax year 2001 and \$31,445 in tax year 2002. The petitioner also submitted a Federal Asset Report dated April 20, 2002, as well as a W-2 Form for [REDACTED], the petitioner's co-owner, for wages of \$11,000 during tax years 2002. Finally the petitioner submitted a two-page bank statement history for an unidentified bank account.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's ability to pay the proffered wage beginning on the priority date, on May 11, 2005, the director requested that the petitioner, as a sole proprietor, submit its federal income tax returns for 2003 and 2004, and also submit a list of monthly recurring household expenses, such as mortgage or rent payments, automobile payments, installment loans, credit card payments and household expenses. Finally the director requested a copy of the petitioner's checking and saving account statements.

In response, counsel explained that over the past several years, the city of Redmond's roadwork had disrupted the petitioner's restaurant operations and that eventually the petitioner's restaurant building was bulldozed. Counsel stated that within the next several months, the petitioner's restaurant is reopening in a new location. Counsel also stated that the petitioner had continually maintained the restaurant business since the early 1990s, and the petitioner had every prospect of paying the beneficiary an \$11.47 wage for a forty-hour workweek.

Counsel also referenced a memorandum from William R. Yates, former Citizenship and Immigration Services (CIS) Associate Director for Operations dated May 4, 2004. Counsel drew attention to the circumstances outlined in the Yates memo with regard to analyzing whether the sole proprietor had the ability to pay. Counsel submitted a copy of the Yates memo.

Counsel then submitted the following evidence:

The petitioner's 2003 federal tax return with accompanying schedules, as well as a letter from the petitioner's accountant regarding the 2004 extension to file the petitioner's 2004 tax return. The 2003 tax return indicated an adjusted gross income of -\$2,627. This tax return had two Schedules C, one for the petitioner and a second one for Fiesta Mexicana, which indicated a net loss of -\$10,902.

The petitioner's business licenses, permits, or certificates for the state of Oregon, the City of Redmond, and Deschutes County for both the previous location at 1309 [REDACTED]

employment with the petitioner as an apprentice cook in December of 1994 and then worked as a specialty cook after three years.

Avenue, and the current location at 2392 S. Highway 97. These documents indicate the size of the petitioner went from 80 seats to 45 seats when the petitioner relocated

Correspondence from the state of Oregon with regard to the relocation of the petitioner's business due to the construction of a by-pass highway, and the Oregon department of Transportation 's order to vacate the property by September 18, 2004. The petitioner's rental agreement for the new restaurant location dated January 11, 2005 is also found in the record.

Counsel submitted numerous documents with regard to the petitioner's monthly or annual expenses. They include: the petitioner's USBank bank account statements for February, April, and May 2005 that indicated the following balances: \$1,420.44, -\$404.40, and \$287.83; a Washington Mutual wire transfer notice for \$10,299.67 dated June 24, 2005; a Chase Manhattan Mortgage loan statement for a monthly mortgage payment of \$758.10; an AutoOne Automobile monthly car payment statement of \$211.91; an Austin Mutual Insurance Company statement that indicates a car insurance premium of \$523;² a second Austin Insurance Company statement that indicates a homeowners insurance monthly payment of \$63.08;³ a monthly Pacific Power electricity bill of \$114.29 dated June 24, 2005; a City of Redmond monthly sewage and water bill dated February 2005 with a monthly charge of \$59.25; and a Carson Oil Company, Portland, Oregon, fuel bill dated December 21, 2004 for \$218.90.^{4 5}

With regard to wages paid to the beneficiary, the petitioner submitted a pay stub dated July 6, 2005 that indicated the beneficiary was paid a salary of \$11.47, and as of July 2005, had earned \$3,137.12. The petitioner also submitted a check register that identified four employees and their wages as of July 2005.

In their letter submitted to the record, the sole proprietor's two owners, [REDACTED] and [REDACTED] described the notification they received that the state of Oregon was building a bypass through the petitioner's business. The petitioner's owners stated that during the time between the notice and the actual vacating of the premises, the petitioner could not compete with its competition, could not sell the business, or renovate the business. The owners stated that the petitioner reopened the restaurant in March 2005 in a different location on Highway 97 and that the sole proprietor downsized the business to make it more efficient. The owners stated that the restaurant is the oldest Mexican restaurant in Redmond, Oregon and that the petitioner has been in business since 1991. The owners finally stated that they have streamlined their personal finances and that

² The record does not clearly reflect whether this sum is paid every six months or is the yearly premium.

³ The yearly homeowner's insurance premium is \$756.96, or the monthly premium of \$63.08 multiplied by 12.

⁴ There is not indication if this sum is a monthly bill, or for some other unspecified period of time.

⁵ Although counsel's cover letter did not indicate this, incomplete copies of the petitioner's Forms 1040 for tax years 1991, 1993, and 1999 are also contained in the record, and appear to have been submitted in response to the director's request of further evidence. These returns indicate that the sole proprietor, with four dependents, had adjusted gross income of \$32,138 in 1991 and \$29,917 in 1999. The sole practitioner did not submit the first page of its Form 1040 for 1993. Therefore, its adjusted gross income in 1993 is unknown.

Mr. [REDACTED] would be working of the United States Postal Service on a part time basis, from which the owners would get health insurance.

The director sent the petitioner a second request for further evidence (RFE) dated August 16, 2005. In this RFE, the director noted that the social security number for the beneficiary on the pay stub submitted to the record was partially obscured, and asked the petitioner to submit a legible copy of Social Security Administration documentation that assigned the social security number to the beneficiary. The director also requested copies of all pay vouchers issued to the beneficiary by the petitioner in 2005.

The director also examined the letter submitted by the petitioner's owners dated July 8, 2005 and asked for further documentation to corroborate the assertions by Mr. And Mrs. [REDACTED] that the sole proprietor suffered substantial uncharacteristic losses due to the actions of the State of Oregon. The director stated that since the petitioner's July 2005 letter was not notarized, the petitioner's assertions carried little if any persuasive value. The director requested that the petitioner submit a notarized signed explanation as to the events that caused it to suffer uncharacteristic business losses. The director also asked the copies of documentation issued by the state of Oregon to corroborate the petitioner's claim that the state of Oregon caused the business to temporarily shutdown and physically relocate.

In response, counsel submits a copy of the beneficiary's social security card, her Employment Authorization card (EAD) and a payroll check history report that lists the beneficiary's paychecks from May 6, 2005 to August 23, 2005. The entries indicate the beneficiary earned \$5,422.52 during this period. This document is notarized. The petitioner also submitted pay stubs or records for the beneficiary's wages from August 23, 2005 to October 24, 2005. These additional records indicated her gross pay as of October 24, 2005 was \$8,525.16.

With regard to the documentation requested by the director with regard to the beneficiary's shutdown of its business and the takeover of the premises by the State of Oregon Department of Transportation, Mr. And Mrs. [REDACTED] submitted another letter that stated the sole proprietor had no business at all from October 2004 to March 2005 and that the business suffered great losses during that time period. The petitioner's owners stated that the petitioner had to vacate the premises as of October 2004, and that the \$20,000 relocation fee received from the Oregon Department of Transportation could not have paid for the plumbing expenses to relocate the business. The petitioner stated that it did relocate the business in March 2005 as a substantially downsized restaurant. Mrs. [REDACTED] submitted a letter dated October 28, 2005 that stated in the last six months the sole proprietor had grown at a steady pace and that the beneficiary is the backbone of the business. Mrs. [REDACTED] stated that the petitioner is a restaurant that makes its own tortillas and that it was quite an art to make tortillas. Mrs. [REDACTED] stated that the petitioner's tortillas have been its trademark for over 15 years in business.

Counsel also submitted correspondence with regard to the petitioner's leased property from the owner of the sole proprietor's leased property in its original location; a document as to when the petitioner's owners bought the assets of another restaurant in 1993 to open their own restaurant; the appraisal document done by H & H Appraisal Services, Inc., Redmond, Oregon, with regard to the petitioner's trade fixtures used to establish the state of Oregon's proposed compensation for the loss of the petitioner's business; a letter from the Oregon

Department of Transportation dated March 12, 2000 that discussed the proposed alteration of the Highland Avenue extension project; and a letter entitled "Condemnation of Cinco de Mayo Mexican Restaurant," dated June 16, 2004 and signed by William F. Buchanan, the sole proprietor's attorney in the state proceedings in which a payment to the petitioner's owners of \$35,835 in exchange for their execution and delivery of a quitclaim deed was mentioned.

Counsel in a cover letter, referred to an article in *Immigration Law, Immigration Law and Procedures* that discusses how the Vermont Service Center looks at the petitioner's ability to pay the proffered wage. Counsel stated that depreciation can generally be considered with taxable income in evaluating the petitioner's ability to pay an additional employee. Counsel also refers to the Yates memo previously submitted to the record. Counsel also notes an unpublished AAO decision in which the adjusted gross incomes of general partners were found sufficient to both pay the proffered wage and support their families.

On February 16, 2006, the director denied the petition. In his decision, the director quoted extensively from the Yates memo. The director then examined the evidence submitted to the record and stated that the petitioner's Schedules C for tax year 2001 and 2002 showed sufficient net profit to have paid the proffered wage.⁶ The director then noted that the petitioner's tax return for 2003 shows a net loss of -\$4,088. The director stated that since the petitioner is a sole proprietor, CIS considered whether the owners realized sufficient income from other sources to have paid the proffered wage in 2003. The director noted that the petitioner's 2003 tax return included a Schedule C for another restaurant, Fiesta Mexicana; however, the director stated that this business realized a net loss of -\$10,902. The director noted the wages earned by Mr. [REDACTED] in 2003 but stated that in 2003 the sole proprietor only reported total wages of \$9,000 and that its total income was \$226. The director then determined that the petitioner could neither pay the entire wage in 2003 or the difference between the beneficiary's actual wages in tax year 2003 and the proffered wage of \$23,857.60. The director noted that the pay vouchers submitted in response to the second RFE showed that the petitioner did not commence paying the beneficiary the proffered wage of \$11.47 an hour until the pay period ending July 6, 2005.

The director also stated that he had considered the petitioner's forced relocation during tax year 2004. The director noted the letter dated November 1, 2005 from counsel that stated the petitioner received \$35,835 of the condemnation proceeds relating to the improvement of the property and an additional \$20,000 in lieu of relocation benefits. The director stated that this information did not support the petitioner's statement that the money provided would not even pay for the plumbing expenses to relocate the business or that the state of Oregon did destroy the restaurant.

The director concluded by stating that while the petitioner had established the ability to pay the proffered wage as of the 2001 priority date and continuing to the filing date of the instant petition, the petitioner had not established that it had sufficient net income to pay the proffered wage or the difference between the wages paid and the proffered wage in 2003, or that it could pay the proffered wage in 2004.

⁶ The AAO will discuss the director's determination on the petitioner's ability to pay the proffered wage in tax year 2001 and 2002 later in these proceedings.

The director stated that his decision was without prejudice to a new immigrant petition filed on the beneficiary's behalf and supported by evidence that the petitioner had paid the beneficiary at least the proffered wage prior to the filing date of the newly filed immigrant petition.

On appeal, counsel states that the CIS has admitted that the petitioner has the ability to pay the proffered wage of \$23,857.60 as of the 2001 priority and during tax year 2002. Counsel states that it is well settled law that there is not one set way to determine the petitioner's ability to pay the proffered wage and that all facts and circumstances should be considered when analyzing the petitioner's ability to pay the proffered wage. Counsel cites to a Board of Alien Labor Certification Appeals (BALCA) *Ranchito Coletero* 2002-INA-105 (January 8, 2004). Counsel states that in this decision the Board stated that the fiscal circumstances of the owner of a sole proprietorship should be considered when assessing the petitioner's ability to pay wages. Counsel then states that the petitioner has been in existence since 1991, and the petitioner did suffer a significant loss of business due to its forced relocation caused by the state of Oregon road project. Counsel cites to a letter written by [REDACTED] [REDACTED] certified public accountants, Redmond, Oregon, dated April 6, 2006. In this letter Mr. [REDACTED] states: "the restaurant's financial numbers were unimpressive in 2004 due to this disruption, but after the [petitioner's] new location opened its doors, their customers started to return." Mr. [REDACTED] continued: "I have not yet seen the restaurant's 2005 financial numbers but the restaurant continues to remain very busy." Mr. [REDACTED] stated that based on the sole proprietor's past performance in operating the restaurant over the past fifteen years, the owners' expectations that the restaurant would soon return to a positive cash flow were reasonable.

Counsel also cites to the Yates memo and notes the three alternative tests discussed in the memo by which a petitioner can demonstrate its ability to pay the proffered wage. Counsel states that the guidance provided in the Yates memo is not binding by either statute or regulation and that the application of *Matter of Sonogawa* 12 I&N Dec. 612 (Reg. Com. 19767) cannot be precluded in the instant petition. Counsel states that *Sonogawa* is directly applicable to the petitioner's case as in both petitions, the businesses had been operating for a considerable time, both suffered economic setbacks due to relocating their businesses that temporarily reduced their income and both had reasonable expectations of economic recovery.

Counsel then asserts that the AAO has consistently reversed CIS denials of petitions based on the petitioner's ability to pay after the Yates memo was issued on facts that are almost identical to the issues in the instant petition. Counsel also refers to other precedent decisions that concern H-1B petitions, *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002); and *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp. 2d (E.D. La. 1999, and also to precedent decisions that concern I-140 petitions *Masonry Masters, Inc v. Thornburgh*, 742 F Supp. 682 (D.D.C. 1990). In Exhibit R, counsel submits six unpublished AAO decisions that involve reversals of prior Service Center decisions primarily based on the respective petitioners' ability to pay the proffered wage either based on their net income or net current assets. Counsel then submits an article from *Legal Times* that stated a recent Supreme Court decision will allow lawyers to cite unpublished opinions in federal courts starting in 2007.⁷ Counsel states that the unpublished AAO decisions submitted to the record cannot be reconciled with the instant denial and with the holdings in *Ranchito* or *Sonogawa*.

⁷ Tony Mauro, "Supreme Court Votes to Allow Citation to Unpublished Opinions in Federal Courts, *Legal Times*, April 13, 2006, as found at <http://www.law.com>.

Counsel submits a statement from Mrs. [REDACTED] and two newspaper articles about the petitioner. Counsel also submits Form 1040, the petitioner's federal income tax return for tax year 2004 that indicates an adjusted gross income of \$15,579. In addition, counsel submits further evidence to establish the petitioner's personal assets and commitment to pay the proffered wage. Counsel submits a copy of a letter sent to Mrs. [REDACTED] with regard to available credit of \$3,700 and cash of \$740;⁸ a USBank bank statement for February 2006 that indicates a balance of \$1,480.94; a letter dated March 23, 2006 from an realtor regarding the estimated \$295,000 to \$310,000 current market value of the sole proprietor's home; a warranty deed for the sole proprietor's residence; a mortgage statement dated February 16, 2006 that shows a current principal balance of \$124,352.30; copies of the sole proprietor's personal lines of credit; copies of 2005 W-2 form for Mr. [REDACTED] current job with the U.S. Postal Service that indicates he earned \$4,057.31 in tax year 2005; and a copy of a statement from the Lumber Industry Pension Fund with regard to Mr. [REDACTED]' possible pension payments.

Counsel, on appeal, submits copies of six unpublished AAO previous decisions. 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). Furthermore, counsel makes reference to a recent Supreme Court ruling with regard to the future use of unpublished decisions in federal courts. The AAO notes that this ruling is not applicable to the AAO's unpublished administrative law decisions.

On appeal, counsel also cites precedent decisions such as *Louisiana Philharmonic* and *Unical Aviation*; however, these decisions involve H-1B petitions. The decision findings with regard to beneficiary's qualifications and identification of employers are not dispositive of the instant petition. With regard to counsel's reference to *Ranchito Coletero* 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. Nevertheless, *Ranchito Coletero* deals with a sole proprietorship and the review of a petitioner's overall fiscal circumstances when assessing a petitioner's ability to pay the proffered wage. The AAO does not view these findings as apposite to the director's findings in the instant petition. In addition, the AAO will discuss the totality of the petitioner's circumstances more fully further in these proceedings.

Counsel in the sole proprietor's response to the director's second request for further evidence stated that depreciation expenses are generally added to taxable income when considering the sole proprietor's ability to pay the proffered wage. The AAO does not consider depreciation expenses when considering the petitioner's ability to pay, but rather looks at the petitioner's net income, and net current income as will be discussed further in these proceedings.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. As established by the ETA Form 750, the petitioner did employ the beneficiary as of December 1994 and

⁸ The document does not indicate the business entity providing the credit or cash line.

therefore employed the beneficiary as of the April 26, 2001 priority date. With regard to wages paid to the beneficiary, the petitioner submitted a payroll check history for the beneficiary that listed her wages from May to September 2005. As of July 6, the beneficiary earned an hourly rate of nine dollars while her payroll history documentation indicates she earned an hourly wage of \$11.47 from July to September 2005. Nevertheless, the petitioner provided no further documentation on wages paid to the beneficiary as of the 2001 priority date to tax year 2005. Therefore the petitioner cannot establish that it paid the beneficiary a salary equal to or greater than the proffered wage as of the priority date and to the present time.

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, contrary to counsel's assertion with regard to depreciation expenses, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

In his decision, the director stated that the sole proprietor had established his ability to pay the proffered wage as of the 2001 priority date and through tax year 2002 based on the sole proprietor's adjusted gross income. While the record reflects a cursory examination of the petitioner's ability to pay the proffered wage in these two years, and the director in his first request for further evidence did request evidence of the sole proprietor's monthly expenses, this by itself does not establish that CIS did correctly examine this issue in its previous adjudication. Furthermore, the Administrative Appeals Office is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of the beneficiary based on the director's determination that the petitioner had the ability to pay the proffered wage, the AAO would not be bound to

follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Thus, the AAO will also examine the petitioner's ability to pay the proffered wage as of the 2001 priority date and continuing through tax year 2002.

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, as correctly noted by counsel, 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 (7th Cir. 1983). For this reason, in his first request for further evidence, the director requested further evidence as to the sole proprietor's recurring monthly household expenses.⁹

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 is a husband and wife with no additional dependents. The petitioner's adjusted gross income in the years 2001, 2002, 2003, and 2004 are as follows: \$24,572 in 2001; \$31,445 in 2002, -\$2,627 in 2003, and \$15,579 in 2004. While the director determined that the petitioner's adjusted gross income was sufficient in tax years 2001 and 2002 to pay the proffered wage of \$23,857.60, the director did not take into consideration the sole proprietor's monthly expenses in making this determination. Therefore the director's analysis of the petitioner's ability to pay the proffered wage in the priority year 2001 and during 2003 is incomplete.

As stated previously, the petitioner did not submit any evidence as to wages paid to the beneficiary in the years 2001 through 2002; therefore the petitioner has to establish it has the ability to pay the entire proffered wage as of the 2001 priority year, and during 2002. Furthermore, the sole proprietor has to establish that it has sufficient funds to both pay the entire proffered wage to the beneficiary in the 2001 priority year and in tax year 2002 and cover monthly household expenses. The record reflects that if the sole proprietor had used its adjusted gross income in 2001 and 2002 to pay the proffered wage, the petitioner would have the following amounts available to pay any monthly household expenses: \$714.40 in tax year 2001, and \$7,587.40 in tax year 2002.

As previously stated, in his first request for further evidence, the director asked the petitioner to submit documentation as to its monthly reoccurring household expenses. The petitioner submitted the following

⁹ The record also reflects that the director did not examine these household expenses in his final decision.

documents: a Chase Manhattan Mortgage loan statement for a monthly mortgage payment of \$758.10; an AutoOne Automobile monthly car payment statement of \$211.91; an Austin Mutual Insurance Company statement that indicates a car insurance premium of \$523;¹⁰ a second Austin Mutual Insurance Company statement that indicates a homeowners insurance monthly payment of \$63.08;¹¹ a monthly Pacific Power electricity bill of \$114.29 dated June 24, 2005; a City of Redmond monthly sewage and water bill dated February 2005 with a monthly charge of \$59.25; and a Carson Oil Company, Portland, Oregon fuel bill dated December 21, 2004 for \$218.90.¹² If only the bills most clearly identified as monthly bills are added together, the petitioner appears to have monthly household expenses of \$1092.34.¹³ On an annual basis, the sole proprietor's household expenses would appear to total \$13,108.08. Thus, the sole proprietor did not have sufficient net income in either the priority year or in tax year 2002 to both pay the proffered wage and pay its monthly household expenses. Thus the petitioner has not established that it has the ability to pay the proffered wage in either the 2001 priority year or in tax year 2002 based on its adjusted gross income.

The record is not clear why the director did not address the issue of monthly household expenses in his decision; however, that part of the director's decision is withdrawn. The petitioner has to establish its ability to pay the proffered wage and pay its household monthly or annual expenses as of the 2001 priority year and to the present.

With regard to tax years 2003 and 2004, as previously stated, the petitioner's adjusted gross income is -\$2,627 in 2003, and \$15,579 in 2004. If the petitioner were to subtract the annual household expenses projected by the AAO and noted above from the sole proprietor's adjusted gross income in 2003, only further negative adjusted gross income would result. With regard to tax year 2004, if the sole proprietor's annual household expenses of \$13,108.08 were subtracted from the sole proprietor's adjusted gross income, only \$2,470.92 would be available to pay the proffered wage of \$23,089.89. Thus, the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date and through tax years 2002, 2003 or 2004 based on its adjusted gross income.

With regard to tax year 2005, the petitioner did submit evidence of wages paid to the beneficiary that totaled \$8,525.16; however, the record does not contain the sole proprietor's tax return for tax year 2005. Therefore, the AAO cannot examine whether the petitioner had sufficient adjusted gross income to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$14,564.73, along with the sole proprietor's household expenses.

¹⁰ The record does not clearly reflect whether this sum is paid every six months or is the yearly premium.

¹¹ The yearly homeowner's insurance premium is \$756.96, or the monthly premium of \$63.08 multiplied by 12.

¹² As previously stated, there is no indication if this sum is a monthly bill, or for some other unspecified period of time.

¹³ In arriving at this figure, the AAO added only the sole proprietor's mortgage payment, monthly car payment, homeowners insurance, and monthly sewage and water bill. It is acknowledged that the sole proprietor is most suited to calculate the more accurate version of the sole proprietor's monthly household expenses.

As counsel and the director have indicated, the sole proprietor may use additional financial resources to pay the proffered wage. As previously stated, in response to the director's request for further evidence and on appeal, the sole proprietor submitted further documentation as to additional financial resources. Included among this documentation are the petitioner's USBank bank account statements for February, April, and May 2005 that indicated the following balances: \$1,420.44, -\$404.40, and \$287.83; a Washington Mutual Wire transfer of a note for \$10,299.67 dated June 24, 2005. On appeal, counsel submits a copy of a letter sent to Mrs. Pickens with regard to available credit of \$3,700 and cash of \$740;¹⁴ a USBank bank statement the sole proprietor for February 2006 that indicates a balance of \$1,480.94; a letter dated March 23, 2006 from an realtor regarding the estimated \$295,000 to \$310,000 current market value of the sole proprietor's private residence; a warranty deed for the sole proprietor's residence; a mortgage statement dated February 16, 2006 that shows a current balance of \$124,352.30; a copy of Mrs. [REDACTED] line of credit with MBNA for \$7,500; copies of a 2005 W-2 form for Mr. [REDACTED] current job with the U.S. Postal Service that indicates he earned \$4,057.31 in tax year 2005; and a copy of a statement from the Lumber Industry Pension Fund dated July 1, 1998, with regard to Mr. [REDACTED] possible pension payments.

It is noted that the majority of the financial documentation submitted to the record is dated either 2005 or 2006, and that the sole proprietor has to establish that it has additional financial resources as of the priority year 2001 and continuing to the present that could be utilized to pay the proffered wage of \$23,857.60 and the sole proprietor's projected annual household expenses. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The AAO will review below each type of documentation that the sole proprietor submitted.

With regard to the sole proprietor's USBank bank statements, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return. It is noted that bank statements could be used to show the sole proprietor's ability to pay the proffered wage, if the bank statements in question are not business accounts and are savings or money market accounts. However, in the instant petition, even if the USBank bank statements were for a savings or money market account, the balances in 2004 or 2006 are not sufficient to establish the sole proprietor's ability to pay the proffered wage.

With regard to the sole proprietor's line of credit, or to the Washington Mutual note submitted to the record, CIS will not augment the sole proprietor's adjusted gross income by adding in the sole proprietor'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

¹⁴ The document does not indicate the business entity providing the credit or cash line.

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). 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 sole proprietor 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).

With regard to the documents submitted to record as to the sole proprietor's equity in his residence or future pension payments, the AAO does not view the sole proprietor's residence or his pension as a liquidable asset that can easily be converted into available cash with which to pay the beneficiary's proffered wage. In other words, for the sole proprietor to use his home equity, it would be necessary to sell the residence so that such financial resources were readily available, or Mr. [REDACTED] would have to be receiving his pension in order for it to be examined as possible additional financial resources. Finally, Mr. [REDACTED] 2005 W-2 Form would be included in the sole proprietor's federal income tax return for 2005 and is not viewed as additional financial resources. Thus, the sole proprietor has not established that it has additional financial resources available to cover any funds lacking in tax years 2001, 2002, 2003, and 2004 to both pay the proffered wage and pay the sole proprietor's monthly expenses.

Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing through 2004.

On appeal, counsel states that the director did not examine the totality of the petitioner's circumstances, and cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In his decision, the director made reference to the sole proprietor's forced relocation due to the state of Oregon's road construction project, and appears to suggest that the money paid to the sole proprietor during condemnation proceedings and the payment to the sole proprietor in lieu of relocation benefits negated the sole proprietor's statements that the state of Oregon destroyed the restaurant and the insufficiency of money received from the state to cover even plumbing costs. The AAO views the director's comments with regard to the impact of the forced relocation on the petitioner's financial circumstances as inappropriate, and will withdraw these comments. The record reflects that the impact of the state's actions on the sole proprietor's business was significant, beginning with the condemnation of the sole proprietor's physical location, to the lack of any business activity for a significant period of time in 2004 and 2005, the reopening of the sole proprietor in another location, as well as the actual downsizing of the sole proprietor's business, as established by its business licenses, from 80 seats to 45 seats. As established by the March 12, 2000 letter from the Oregon Department of Transportation to the sole proprietor, the record also establishes that planning for the proposed highway construction project was well underway by March 2000, prior to the 2001 priority date year.

What the sole proprietor failed to establish is that prior to these actions, it had significant enough business activity to ever have paid the beneficiary's proffered wage. As stated previously, in *Sonegawa*, the petitioner had had an uncharacteristically unprofitable year, preceded and followed by profitable years. The sole proprietor, based on the record, has only had one unprofitable year, namely 2003. However, it has not established that in any year from 2001 to the present, it has the ability to pay the proffered wage or the difference between the beneficiary's wages and the proffered wage from 2001 to the present, based on the petitioner's adjusted gross income, or additional financial resources of the sole proprietor.

It is also noted that the documentation presented on appeal with regard to the local reputation of the sole proprietor and business acumen only consisted of two newspaper articles. One, for which two copies were submitted, was a 2002 review of the sole proprietor's food, while the other was a generic article about traditional Cinco de Mayo festivities that stated the sole proprietor would have its famous frozen blackberry margaritas as part of the festivities. It is also noted that Mrs. Pickens in her letter dated February 2006 and submitted on appeal states that 99 percent of the sole proprietor's losses can be attributed to the fact that there are 13 Mexican restaurants in Redmond, Oregon, a town with a population of 20,000. The totality of the petitioner's circumstances does not appear to be analogous to those of the petitioner in *Sonegawa*. Therefore upon review of the sole practitioner's total circumstances the sole practitioner still has not established its ability to pay the proffered wage as of the 2001 and to the present time.

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 with regard to the petitioner's ability to pay the proffered wage.

ORDER: The appeal is dismissed.