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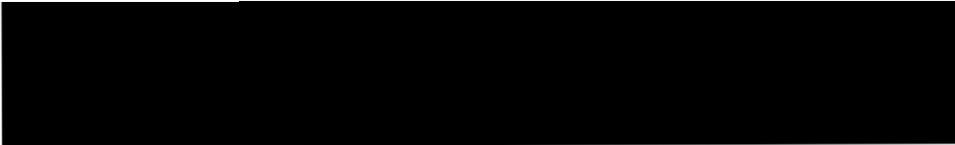
Date: APR 24 2007

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:



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

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 adult residential facility serving developmentally disabled individuals. It seeks to employ the beneficiary¹ permanently in the United States as a cook, institution. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Here, the Form ETA 750 was accepted on November 26, 1997.² The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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.³

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated February 15, 2005; an explanatory letter from counsel dated August 26, 2005; [REDACTED] and [REDACTED] U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002 and 2003; a "Statement of Monthly Expenses" for [REDACTED] California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last two quarters of 2004 and the first two quarters of 2005; the petitioner's facility license; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as sole proprietorship. On the petition, the petitioner claimed to have been established in 1995, and, to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 10, 2005, the beneficiary did not claim to have worked for the petitioner. According to counsel's brief, the beneficiary commenced working for the petitioner in June of 2005.

On appeal, and, as supplemented by counsel on February 1, 2006, the petitioner asserts in pertinent part that the petitioner has been continuously in operation since 1995, and, its business is care of the developmentally disabled. Counsel contends that the petitioner's business "is not just moneymaking trade where "income" and "number of employees" are usually the gauges in determining the structure and complexity of the organization." Counsel asserts, but he does not provide a reference, that the determination of the ability to pay the proffered wage is the sole responsibility of the U.S. Department of Labor, and not, Citizenship and Immigration Services (CIS). Further, counsel asserts that the petitioner's credit line is evidence of the ability to pay the proffered wage.

As a preface to the following discussions, in determining the respective jurisdictions of the U.S. Department of Labor (DOL) and CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

² It has been approximately nine years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

Although the advisory opinions of other Government agencies are given considerable weight, CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States' workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

As set forth in the director's denial dated September 26, 2005, 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.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes copies of the following documents: U.S. Internal Revenue Service Form 1040 tax returns for [REDACTED] and [REDACTED] for 1997, 1998 and partial copies of 1999 and 2000 tax returns as well as a statement of the petitioner's monthly expenses for six months ended June 30, 2005. The petitioner also provided a non-audited income statement for the six months ending June 30, 2005, for [REDACTED] which is the petitioner's business. Since this statement was not audited it does not have independent, objective, also called probative, value as evidence of the petitioner's ability to pay according to regulation. *See* 8 C.F.R. § 204.5(g)(2).

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 (BIA 1967).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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.

Therefore, to determine the ability of the petitioner to pay the proffered wage and meet her/his living costs, the director requested the petitioner to submit a statement of recurring household expenses for the petitioner's family. This statement must indicate all of the family's household living expenses. Such items generally include the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. 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).

A statement of the petitioner's monthly expenses for the six months ended June 30, 2005 stated year-to-date total expenses for nine expense items totaling \$9,869.00, or \$19,738.00 yearly. We note there are no housing expenses or gas/electric/heating fuel costs stated on the petitioner's monthly expenses, but we note that the on the petitioner's tax returns there are substantial mortgage expenses for what appear to be business properties. For example, in 1997 the Schedule C, Part II, Line 16.a stated mortgage interest payments of \$36,888.00 as a result of six loans. There is no explanation why the petitioner has not stated personal housing or gas/electric/heating fuel expenses.⁴ We do not find the statement of the petitioner's personal expenses credible. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.

⁴ We cannot speculate based upon the lack of evidence submitted and the failure of the petitioner to include housing expenses or gas/electric/heating fuel costs relating to the petitioner's housing arrangements, if a portion of the expenses allocated on Schedule C actually are personal expenses. The federal employer Identification number (FEIN) for the facility identified as [REDACTED] Tujunga California is [REDACTED] (the number is obscured for privacy purpose) according to a Form 1099-MISC in the file. The Schedules C submitted list a combination of other FEIN numbers. If this matter is pursued, this issue should be investigated since it appears that other facilities expenses and revenues at other addresses are combined by the petitioner on the returns submitted.

In the instant case, the sole proprietor supports a family of two. The proffered wage is \$24,024.00 per year. The tax returns reflect the following information for the following years from the priority date of November 26, 1997:

	<u>1997</u>	<u>1998</u>
Proprietor's adjusted gross income ⁵ (Form 1040)	\$ 25,280	\$ 61,172
Petitioner's gross receipts or sales ⁶ (Schedule C)	\$167,089	\$232,166
Petitioner's wages paid ⁷ (Schedule C)	\$ 6,164	\$ 12,900
Petitioner's net profit from business ⁸ (Schedule C)	\$ 27,003	\$ 65,822
	<u>1999</u>	<u>2000</u>
Proprietor's adjusted gross income (Form 1040)	\$--- ⁹	\$ 66,324
Petitioner's gross receipts or sales (Schedule C)	\$377,516	\$428,874
Petitioner's wages paid (Schedule C)	\$--- ¹⁰	\$ 70,026
Petitioner's net profit from business (Schedule C)	\$ 81,039	\$ 72,744
	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$ 51,772	\$ 37,427
Petitioner's gross receipts or sales (Schedule C)	\$444,465	\$454,064
Petitioner's wages paid (Schedule C)	\$ 63,558	\$ 61,686
Petitioner's net profit from business (Schedule C)	\$ 58,264	\$ 42,239
	<u>2003</u>	
Proprietor's adjusted gross income (Form 1040)	\$ 48,004	
Petitioner's gross receipts or sales (Schedule C)	\$447,777	
Petitioner's wages paid (Schedule C)	\$ 54,170	
Petitioner's net profit from business (Schedule C)	\$ 51,654	

Assuming the Schedules C relate to the petitioner, the adjusted gross income for each year exceeds the proffered wage except in 1999 (in which no wages were stated). However, it is improbable and the preponderance of the evidence does not show that the sole proprietor could support himself and his spouse on what remains after reducing the adjusted gross income by an amount required to pay the proffered wage in any year for which evidence was submitted.

⁵ IRS Form 1040, Line 32, 33, 34 or 35 depending upon the year of the tax return. We also note there are four separate FEIN numbers stated on a supporting statement to this return.

⁶ IRS Form 1040, Schedule C, Part I, Line 1.

⁷ IRS Form 1040, Schedule C, Part II, Line 26 or Part III, Line 37.

⁸ IRS Form 1040, Schedule C (boarding care facility), Part II, Line 31.

⁹ No IRS form 1040 submitted.

¹⁰ No wages stated.

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 through an examination of his/her adjusted gross income.

Counsel asserts that the petitioner's credit line is evidence of the ability to pay the proffered wage. 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 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. 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). 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 petitioner'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 evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date and, continuing until the beneficiary obtains permanent residence.

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.