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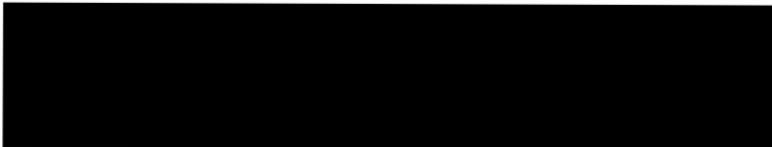
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **SEP 14 2007**  
SRC 05 199 53036

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration and entry of a new decision.

The petitioner is a financial estate planning and insurance company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 original March 20, 2006 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 or seasonal 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.70 per hour or \$24,336 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 appeal includes counsel's brief. Other relevant evidence in the record includes partial copies of the petitioner's owner's 2001 through 2003 Forms 1040, U.S. Individual Income Tax Returns, a copy of a letter, dated October 5, 2005, from the petitioner's owner, a copy of a letter, dated February 8, 2006, from [REDACTED], and copies of the petitioner's owner's Forms W-2, Wage and Tax Statements, for 2001 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's partial 2001 through 2003 Forms 1040 reflect adjusted gross incomes of \$96,309, \$162,478, and \$288,036, respectively. Schedule C, Profit or Loss from Business, was not submitted for any of the three tax returns.

The petitioner's owner's 2001 through 2004 Forms W-2 reflect wages earned by the owner of \$36,859.61 in 2001,<sup>2</sup> \$190,146.73 in 2002,<sup>3</sup> \$356,543.01 in 2003,<sup>4</sup> and \$227,278.47 in 2004.<sup>5</sup> These wages were paid by several insurance companies.

The letter, dated October 5, 2005, from the petitioner's owner states:

The purpose of this letter is to clarify my income as it pertains to [the beneficiary's] employment.

I am a commission-only life insurance salesperson. These commissions are paid directly to me from the various insurance companies I represent in the form of 1099 and/or W-2 income.

While Pacini & Company is the DBA under which I do business, the company in no way compensates me. My total income comes only from the insurance companies.

The letter, dated February 8, 2006, from [REDACTED] states:

I am a sole proprietor operating as a commission-only life insurance salesperson under the assumed name of Pacini & Company. The Assumed Name Certificate names [REDACTED] and I as owners of Pacini & Company. However, Pacini & Company does not conduct business, does not own property, file taxes, or otherwise operate independently as Pacini &

<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 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).

<sup>2</sup> Line 12 of the petitioner's owner's Form 1040 reflects \$77,879 as business income for 2001. Schedule C was not submitted, and there is no explanation for the difference between the business income and the owner's wages.

<sup>3</sup> Line 12 of the petitioner's owner's Form 1040 reflects \$155,313 as business income for 2002. Schedule C was not submitted, and there is no explanation for the difference between the business income and the owner's wages.

<sup>4</sup> Line 12 of the petitioner's owner's Form 1040 reflects \$283,128 as business income for 2003. Schedule C was not submitted, and there is no explanation for the difference between the business income and the owner's wages.

<sup>5</sup> The petitioner's owner's 2004 Form 1040 was not submitted. Therefore, the AAO cannot determine if the owner's wages and line 12 of the 1040 were the same or different.

Company. and I do not have an arrangement to carry on business for profit as Pacini & Company. The registration of Pacini & Company is solely for purposes of entering a business name for my or [REDACTED] personal and independent business dealings with insurance companies.

Additionally, [REDACTED] also conducts her business as a sole proprietor under the assumed name as Pacini & Company. Her use of the Pacini and Company also assists in her independent business. [REDACTED] does not share her profits from her business and I do not share my profits with [REDACTED]. Therefore, although I am named on the assumed name certificate as owner of Pacini & Company, Pacini & Company does not operate business independently and I operate my own business as a sole proprietor.

On appeal, counsel states:

The response cover letter to the November 17, 2005 Request for Evidence provided an analysis of Texas partnership law under the Texas Business Organizations Code §§ 152.051, 152.052. The legal conclusion, applying Texas law on partnerships, was that [REDACTED] and [REDACTED] were not a partnership as they do not receive or have a right to receive a share of profits from each other, have not expressed an intent to be partners, do not participate in the control of each other's sole proprietorships, do not have an agreement to share losses or liability for claims by third parties, and they do not contribute money or property for Pacini & Company. See also *Petitioner's Response to Notice of Intent to Deny affixed to USCIS Letter dated March 21, 2006* for the conclusion that the USCIS's reliance on an assumed name certificate is insufficient under Texas law to consider [REDACTED] and [REDACTED] as a Texas partnership. . . .

\* \* \*

[REDACTED] operating as Pacini & Company as a sole proprietorship provided ample evidence of this ability to pay. For the year 2001, 2002, and 2003, [REDACTED] provided her personal income taxes reflecting an adjusted gross income well in excess of the proffered wage. . . . The petitioner supplements the record with her 2004 individual federal tax return<sup>6</sup> also showing an adjusted gross income in the amount of \$129,969 to allow the USCIS. [sic] (*See Copy of Individual Federal Tax Returns for the Year 2004*).

The USCIS indicated in the denial notice that "when evaluating a sole proprietor's ability to pay the proffered wage. . .the sole proprietor must show that they can sustain themselves and their dependents. Therefore, the Service must look to the sole proprietor's Adjusted Gross Income, as reflected in the sole proprietor's individual federal tax return. The Federal Poverty Guidelines. . .may be used as a reference point for evaluating ability to pay." (*See Copy of Notice of Denial of Immigrant Petition for Alien Worker, Page 3, Paragraph 3*). Here, the petitioner has a family of five and the 2006 Federal Poverty Guidelines indicates that the 125% poverty line for a family of five equals to \$29,250. The petitioner's adjusted gross income was \$96,309, \$162,478, \$288,036, and \$129,969 for the years 2001, 2002, 2003, and 2004, respectively. Therefore, the USCIS erred as the petitioner. [REDACTED]

<sup>6</sup> This tax return is not in the record of proceeding.

operating as Pacini & Company, has conclusively established an ability to pay the proffered wage.

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 20, 2001, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to show that the petitioner had employed the beneficiary in any of the pertinent years (2001 through 2003). Therefore, the petitioner has not established that it employed the beneficiary in 2001 to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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.

The petitioner is a sole proprietorship,<sup>7</sup> 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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of five in 2001 through 2003. In 2001 through 2003, the sole proprietor's adjusted gross incomes were \$96,309, \$162,478, and \$288,036, respectively. These incomes appear to be more than sufficient to pay the proffered wage of \$24,336 and support a family of five in each of the pertinent years (2001 through 2003). However, although not requested by the director, the record of proceeding does not contain a list of the sole proprietor's personal monthly recurring expenses, and, therefore, the AAO cannot determine if the sole proprietor had sufficient funds to support her family of five after paying the proffered wage of \$24,336.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$24,336 based on the sole proprietor's adjusted gross income and the Federal Poverty Guidelines. The AAO does not, however, recognize the Poverty Guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses as they are not geographically specific, and, therefore, will not consider them when determining the ability to pay the proffered wage. The poverty guidelines issued by the Department of Health and Human Services are used for administrative purposes — for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The only time CIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the Act as a public charge. The beneficiary in this matter has not advanced to

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<sup>7</sup> It is noted that the director requested the federal tax returns of the other owner of Pacini & Company to show the petitioner's ability to pay the proffered wage of \$24,336. Both owners of Pacini & Company responded to the director's request stating that they were each sole proprietors with Pacini & Company being the DBA (Doing Business As) under which they each conduct their business. Neither owner is compensated by Pacini & Company, but rather by the individual insurance companies they represent while conducting business. While it would have been more appropriate for the sole proprietor to file the labor certification and visa petition herself instead of Pacini & Company filing them (since Pacini & Company has no income, etc.), the AAO will consider the labor certification and visa petition properly filed.

a consular processing or adjustment of status phase of the proceeding. In addition, as discussed above, the record of proceeding does not contain the sole proprietor's personal monthly recurring expenses, and, therefore, it is unclear if the sole proprietor had sufficient funds to pay the proffered wage and to support her family of five in 2001 through 2003.

The director must afford the petitioner reasonable time to provide evidence of its ability to pay the proffered wage, to include the sole proprietor's personal monthly recurring expenses, the complete Forms 1040 for the petitioner's owner including any and all Schedule Cs that are part of the Forms 1040, and any other evidence the director deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's March 20, 2006 decision is withdrawn. The petition is remanded to the director for further consideration and for entry of a new decision, which is to be certified to the AAO for review.