**U.S. Department of Homeland Security**
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

B-4

**U.S. Citizenship and Immigration Services**

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 0 2 2004

IN RE: Petitioner: [redacted]
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:

[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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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**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 sustained. The petition will be approved.

The petitioner is a farm. It seeks to employ the beneficiary permanently in the United States as a farm equipment 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.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 27, 1998. The proffered wage as stated on the Form ETA 750 is $8.38 per hour, which amounts to $17,430.40 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted no evidence of its ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 29, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1997 through 2001 along with each return's Schedule F, Profit or Loss from Farming.

The tax returns reflect the following information for the following years:

| | 1997[1] | 1998 |
|---|---|---|
| Proprietor's adjusted gross income (Form 1040) | $59,721 | $-5,326 |
| Petitioner's gross income (Schedule F) | $758,258 | $761,437 |
| Petitioner's labor hired (Schedule F) | $55,200 | $71,000 |
| Petitioner's net farm profit (Schedule F) | $69,508 | $-1,884 |

| | 1999 | 2000 |
|---|---|---|
| Proprietor's adjusted gross income (Form 1040) | $-93,851 | $-17,385 |
| Petitioner's gross income (Schedule F) | $756,060 | $1,467,600 |
| Petitioner's labor hired (Schedule F) | $199,170 | $345,177 |
| Petitioner's net farm profit (Schedule F) | $-97,878 | $81,810 |

| | 2001 |
|---|---|
| Proprietor's adjusted gross income (Form 1040) | $8,680 |
| Petitioner's gross income (Schedule F) | $1,769,365 |
| Petitioner's labor hired (Schedule F) | $414,657 |
| Petitioner's net farm profit (Schedule F) | $28,873 |

Because the evidence submitted was still insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability on January 8, 2003. The director specifically requested IRS computer generated printouts of the returns in lieu of "stamped" copies. The petitioner complied with the director's request, and the IRS computer generated printouts corroborated the figures provided on its prior submission.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 17, 2003, denied the petition. The director specifically cited the petitioner's low or negative adjusted gross income figures from 1998 through 2001 as evidence of its inability to pay the proffered wage

On appeal, counsel asserts that the combination of wages actually paid to the beneficiary, non-wage income, and the sole proprietor's assets illustrates the petitioner's ability to pay the proffered wage. The petitioner submits copies of cancelled paychecks issued by the petitioner to the beneficiary from January 2003 through May 2003[2];

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[1] The visa petition has a priority date of 1998. Thus, the financial information in 1997 is irrelevant to the petitioner establishing its continuing ability to pay the proffered wage beginning on the priority date.

[2] The director's final request for evidence was issued in January 2003. The director's decision does not address the period January 2003 through May 2003. The timeframe addressed by the director will be addressed on

copies of Form W-2s issued by the petitioner to the beneficiary for the years 1998 to 2002; a statement from the petitioner's accounting firm attributing value to non-wage income received by the beneficiary from the petitioner; a copy of the sole proprietor's 2002 U.S. individual income tax return; copies of the petitioner's monthly bank statements from May 1998 through December 20000; and copies of the petitioner's yearly promissory notes on its revolving line of credit.

The Forms W-2 Wage and Tax Statements reflect the following wages paid to the beneficiary from the petitioner:

| | |
|---|---|
| 1998: | $8970.00 |
| 1999: | $10,925.00 |
| 2000: | $9903.75 |
| 2001: | $19,811.75 |
| 2002: | $22,116.50 |

The sole proprietor's tax return for 2002 reflects the following information:

| | |
|---|---|
| Proprietor's adjusted gross income (Form 1040) | $258,524 |
| Petitioner's gross income (Schedule F) | $1,801,446 |
| Petitioner's labor hired (Schedule F) | $409,450 |
| Petitioner's net farm profit (Schedule F) | $230,948 |

A letter from Quirk & Scholar written by Timothy M. Quirk is submitted on appeal and in pertinent part states the following:

> An employee's income includes the value of employer provided lodging. In the case of [the sole proprietors,] I estimate the value of the lodging provided to this employee to be $700 per month, which includes a house and related utilities and upkeep.
>
> This income is exclude [sic] from the employees [sic] taxable gross income by Internal Revenue Code 119.
>
> In the case of [the beneficiary,] he is required to accept lodging on the taxpayers [sic] farm as a condition of his employment. Because the farm is remotely located and requires attention at all times of the day and often for short periods it is necessary that employees be on the premises to preform [sic] their duties. For example; frost protection needs to be initiated when certain climate conditions are reached. These conditions come at irregular times and cannot be controlled. However, the time needed to preform [sic] the task is relative [sic] short, and [sic] hour or so. Consequently the employee must be on the property when the condition arises. It is not practical to travel from an off site location for an operation that may only require minimal time but if not preformed [sic] may cause loss of crops. The lodging is for the convince [sic] of the owner to have this work preformed [sic] timely and at minimal cost.

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appeal. Thus, these cancelled paychecks will not be considered on appeal.

> However, this income is not included in W-2 wages because of the exclusion provided by internal revenue code section 119.

On appeal the petitioner submitted copies of the sole proprietor's banking statements. These statements show ending monthly balances of a low of $5,537.37 to a high of $101,478.47 during the period May 1998 through January 2001. Additionally, copies of promissory notes for funds borrowed by the sole proprietor from Taft National Bank reflect a revolving credit line of $150,000 on February 20, 1997; $200,000 on February 5, 1998, $200,000 on February 5, 1999; $250,000 on February 5, 2000; $300,000 on May 4, 2001; $300,000 on March 29, 2002; and $400,000 on April 3, 2003.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary more than the full proffered wage in 2001 and 2002. Thus, the petitioner has established its ability to pay the proffered wage in those years. However, the petitioner paid the beneficiary wages less than the proffered wage in 1998 through 2000. Thus, it must establish its ability to pay the remainder of the proffered wage, less what it actually paid the beneficiary, for each year. For 1998, the remaining wage is $8,460.40. For 1999, the remaining wage is $6,505.40. For 2000, the remaining wage is $7,526.65. The remainder of this decision will only address 1998 through 2000 and the petitioner's ability to pay the remaining wages owed after actually paying partial wages to the beneficiary.

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).

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 for non-corporate farming businesses are reported on Schedule F and are carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 648, 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 supports a family of two. In 1998, the sole proprietorship's adjusted gross income of $-5,326 cannot cover the remaining proffered wage of $8,460.40. It is impossible that the sole proprietor could support himself and his family on negative net income and pay the remaining proffered wage. In 1999, the sole proprietorship's adjusted gross income of $-93,851 cannot cover the remaining proffered wage of $6,505.40. It is impossible that the sole proprietor could support himself and his family on negative net income and pay the remaining proffered wage. In 2000, the sole proprietorship's adjusted gross income of $-17,385 cannot cover the remaining proffered wage of $7,526.65. It is impossible that the sole proprietor could support himself and his family on negative net income and pay the remaining proffered wage.

Counsel asserts that the sole proprietor's line of credit should be added into the factors considered when evaluating the petitioner's ability to pay the proffered wage. Contrary to counsel's assertions, 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).

The petitioner's line of credit will not be considered for two reasons. First, 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, 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 its assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a current 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. *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner's counsel asserts that the AAO should consider evidence of the beneficiary's non-wage income from the petitioner. Counsel does not provide legal authority for the AAO to consider such evidence. The only evidence that the beneficiary actually enjoys room and board from the petitioner is a letter from an accounting firm. There is no other objective information pertaining to this issue. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Absent the advisory opinion of an individual from an accounting firm, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, although there is a section to do so, the labor certification application does not indicate

that "required" room and board is a condition of the proffered position.[3] If that information had been advertised for potential job applicants, the outcome could have been different. To alter the terms of the proffered position at this point in the proceeding is unfair and contrary to the spirit of employment-based immigrant visa petitions in the context of disqualifying U.S. citizen and lawful permanent resident applicants. If a qualified U.S. citizen or lawful permanent resident were aware that room and board was required of the position, more applications may have been forthcoming. Altering this requirement of the proffered position impugns the validity of the employment offer. Thus, for the multiple reasons cited above, the "non-wage" income will not be considered.

In 1998 and 1999, the petitioner showed heavy losses. While its current financial figures show the petitioner's current financial strength, the regulations require an illustration of a *continuing* ability to pay the proffered wage beginning on the priority date. While 2000 turned around for the petitioner, it is not dispositive of the petitioner's ability to pay the proffered wage because of its poor showing in 1998 and 1999.

However, the record of proceeding contains bank statements from the petitioner's checking accounts covering the period May 1998 through January 2001, with an average monthly balance of $23,768,11[4]. The average balance is substantial enough to cover the full or remaining proffered wage as each month's balance could alone support the full proffered wage for a year. Additionally, for 1998 and 1999, the ending balances are almost always sufficient enough to cover the remaining wage and always sufficient enough to cover the full wages paid on a monthly basis. The petitioner's substantial cash assets as reflected in its checking accounts shift this decision in the petitioner's favor.

The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during 1998 through 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

**ORDER**: The appeal is sustained. The petition is approved.

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[3] The letter from the accounting firm states that room and board is "required" as a convenience to the petitioner for urgent matters that arise in its "remote" location.

[4] This average figure was calculated by adding the ending balances and dividing by the number of months submitted.