U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 28 2005

WAC 03 029 53016

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director initially denied the employment-based visa petition on April 30, 2003, and the matter was before the Administrative Appeals Office (AAO) on appeal. The director then requested that the AAO remand the petition to the service center. On April 12, 2004, the AAO withdrew the director's previous decision and remanded the matter to the California Service Center for a new decision. The director then issued a Notice of Intent to Deny to the petitioner, and certified the Notice of Intent to Deny to the AAO for review. The appeal is dismissed. The petition is denied.

The petitioner is a guest home for the elderly. It seeks to employ the beneficiary permanently in the United States as a cook. 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, the petitioner submits a new statement.

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 March 13, 2001. The proffered wage as stated on the Form ETA 750 is $11 per hour, which amounts to $22,880 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner stated that it was established in 1989, has six employees, and had gross annual income of $325,704 and net annual income of $29,594. With the petition, the petitioner submitted two certificates of employment from the beneficiary's previous employers. The first letter was from [redacted] Proprietor, FM-GM Bakeshop and Restaurant, Cabanatuan City, The Philippines, and stated the beneficiary had worked for the business as head cook from April 1, 1992 to December 31, 1995. The second letter was written by [redacted] Owner/Manager, FM Cheeseburger and Restaurant, Cabanautan City, The Philippines, and stated that the

beneficiary had worked as a cook in the restaurant from October 1, 1990 to November 30 1991. The petitioner submitted the petitioner's Forms 1040 for 1999, 2000, and 2001 with three Schedules C for each return. This documentation indicated the petitioner had an adjusted gross income of -$17,339 in 1999, $23,873 in 2000, and $23,581 in 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 4, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns with all accompanying schedules and tables, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date in 2001 to the present. The director also requested a statement of monthly expenses for the petitioner's family that included such items as food, housing, car payments, insurance, utilities, credit cards, student loans, clothing, school, daycare, gardener, nanny, and any other reoccurring monthly household experience.

The director also requested state of California Forms DE-6, Quarterly Wage Report, for the last four quarters for all employees, with names, social security numbers and number of weeks worked for all employees. The director also requested Forms W-3 Transmittal of Wage and Tax Statements to show wages paid to employees in 2001 and 2002; copies of the petitioner's current valid business licenses for city, county, state, and federal government; the petitioner's date of birth, and further evidence of the beneficiary's foreign employment history. The director specifically requested letters, contracts, and pay statements to verify that the beneficiary worked for the listed employers, and a name, address and telephone number at which the CIS or another U.S. government agency could contact all foreign employers.

In response, counsel submitted the computer-generated IRS Form 1040 for the petitioners 2001 and a copy of Form 1040 for the petitioner's 2002 federal income tax return. The 2001 return indicated an adjusted gross income of $23,581 and the 2002 returns indicated an adjusted gross income of $20,644. The petitioner submitted three Schedules C for the following businesses: the petitioner, Seacrest, and Moneta Home Care. The petitioner also submitted a statement of monthly expenses that indicated total monthly expenses of $1,447, or annual expenses of $17,364. The petitioner also submitted a copy of a Deed of Trust for a residence that is paid in full; certificates of title for two automobiles, and state of California Forms DE-6 for the four quarters of 2002. These documents indicated that for the first three quarters the petitioner employed two individuals, while a third individual was employed in the final quarter of 2002. The DE-6 forms, along with submitted W-2 Forms indicated that the petitioner employed the beneficiary during 2001 and 2002. In both years, the beneficiary earned $13,200. The petitioner also resubmitted the two letters of employment verification originally submitted with the initial petition, and submitted valid city and state business licenses. The license from the Sate of California Department of Social Services identified the petitioner's facility as having a total capacity for six ambulatory patients, with a preference for developmentally disabled adults, ages 18 through 59 years.

On April 23, 2003, the director denied the petition. In his decision, the director examined the petitioner's adjusted gross incomes for 2001 and 2002, as well as the beneficiary's actual wages. The director then stated that in 2001, the petitioner's adjusted gross income of $23,581 was more than the proffered wage of $22,880; however after paying the difference between the beneficiary's actual wages of $13,200 and the proffered

wage, the petitioner would be left with $13,901 to pay the household expenses for herself and one dependent. The director also stated that in 2002, the petitioner's adjusted gross income of $20,644 was less than the proffered wage, and that after paying the difference between the beneficiary's actual wages and the proffered wage, the petitioner would be left with $10,964 to pay its annual household expenses of $17,364. The director then determined that the petitioner had not established the ability to pay the beneficiary's proffered wage, as well as maintain the petitioner's cost of living.

On appeal, counsel states that the director erred in only considering the petitioner's adjusted gross income in his determination that the petitioner did not have the capability to pay the proffered wage. Counsel states that the depreciation expense listed on the petitioner's tax return is not an actual cash outlay and should actually be added to the net income. Counsel also states that items such as repairs and maintenance could actually be a one-time expense, so that these amounts could be added as income in the following tax year. Counsel also asserts that the petitioner has other assets such as a fully paid residential home, two fully paid cars and most importantly, money in the bank. Counsel submits a letter from [redacted], Senior Personal Banker, Bank of America Harbor City Banking Center that lists four checking accounts, and two certificate of deposits, the dates the accounts were opened and their balances. Based on the Bank of America letter, the petitioner's two certificates of deposit total some $177,807.21, and were both opened in 2003. Counsel cites an AAO decision, involving Michael's Jewelers, A70183319, decided on June 12, 2001. Counsel states that this decision establishes that if the petitioner's taxable income, depreciation, and cash at year-end were combined, a petitioner could have sufficient funds to pay the proffered wage.

On April 8 2004, the director requested that the AAO remand the matter to the service center for further consideration and a new decision. The director stated that the service center had obtained additional information that was not previously considered in the director's original decision. Accordingly, the AAO withdrew the director's previous decision and on remand sent the petition back to the California Service Center for a new decision. The AAO stated that if the new decision would be adverse to the petitioner and was based on information considered by the director and of which the petitioner was unaware, the petitioner must be advised of these facts and offered an opportunity to rebut the information before the decision is rendered.

On April 30, 2004, the director reopened the petition on a Citizenship and Immigration Services (CIS) motion and issued a notice of intent to deny to the petitioner. The director stated that the CIS Officer-in-Charge, Manila, The Philippines, had sent the director the results of a field investigation conducted at Cabanatuan City, on June 23, 2003. The director stated that the field investigator indicated that both previous employers for the beneficiary (FM-GM Bakeshop and Restaurant and FM Cheeseburger & Restaurant) were closed and offered for rent by the owner, [redacted]. The director further stated that [redacted] was interviewed at his new business establishment, FM Restaurant, and shown the letter of work verification allegedly signed by him to examine it and identify his signature. According to the investigative report, [redacted] denied ever having signed the letter and disowned the signature affixed to the letter, although he acknowledged that the beneficiary had worked for his business as a cook. [redacted] also signed an acknowledgement letter and put his actual signature on it.

The director then stated that although [redacted] acknowledged that the beneficiary had previously worked for him, he failed to specify the beneficiary's previous duties, dates of employment and number of hours worked per week. The director also stated that CIS could not determine whether the beneficiary had the requisite experience as outlined on the ETA 750, as the original work verification letter was fraudulently written and signed by someone other than [redacted] As such, the director stated that the letter of employment verification was not valid. The director cited *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), and stated it was incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

With regard to the petitioner's ability to pay the proffered wage, the director reiterated the statements contained in the original denial of the petition with regard to the petitioner's adjusted gross income not being sufficient to both pay the petitioner's monthly household expenses and pay the difference between the beneficiary's actual wages and the proffered wage. The director then determined that the petitioner had not established that it had the ability to pay the proffered wage as of the 2001 priority date and onward, or that the beneficiary was eligible for the classification sought.

In response to the notice of intent to deny the petition, with regard to the beneficiary's qualifications, counsel submits a notarized affidavit from [redacted] dated May 2004. In this letter, [redacted] states that he remembers hiring the beneficiary to work as a cook because he hired her for her knowledge and experience in preparing and cooking special meals for elderly people who have to keep watch on their sodium, cholesterol, sugar and sugar intake. [redacted] stated that the beneficiary worked regularly for eight hours a day, Monday to Friday, and often on Saturdays, because she had to instruct other cooks in cooking low cholesterol, low salt, low sugar and non-spicy foods and meals. [redacted] stated that, if his memory serves him right, the beneficiary worked with his business from 1992 to 1995. [redacted] then stated that when an investigator from the American Embassy inquired about the beneficiary's employment in the restaurant, he informed the investigator that the beneficiary had worked as a cook. When the investigator showed Mr. [redacted] an employment certification letter and asked Mr. Manuel if the signature was his, [redacted] stated that the signature was not his and that he did not remember signing such a letter for the beneficiary.

[redacted] in his affidavit stated that he then talked to [redacted] who used to assist him in the management of the restaurant. [redacted] told him that she signed a certification letter for the beneficiary, and the she signed his name to the letter after he authorized her to do so. [redacted] informed him that he had authorized her to do so and that he just did not remember giving her the authority.

[redacted] finally stated that the investigator did not clarify why he was inquiring about the beneficiary employment and that [redacted] did not quite understand why the investigator was making such an inquiry. [redacted] states that he was intimidated by the investigator and that the manner in which he asked the questions made [redacted] states that in fairness to all concerned and after having made the necessary verification, he was executing his affidavit to put matters in perspective and to state for the record that the beneficiary did work in his restaurant as a cook during the period of time previously described.

Counsel also states that with regard to the petitioner's ability to pay the proffered wage, this issue was discussed in the director's original decision and a brief was already submitted to the AAO with regard to this

matter. Counsel states that he adopts the arguments raised in the initial appeal with regard to the petitioner's ability to pay the proffered wage.

With regard to the first issue addressed in the director's decision, namely, whether the letter of employment verification for the period of time April 1, 1992 to December 1995, the investigative report submitted by the director to the record that contains a specimen of [redacted] signature, substantiates that [redacted] did not sign the initial undated letter submitted with the original petition. The same report, as stated in the director's decision, also noted that [redacted] did acknowledge that the beneficiary had worked for him. Since the purpose of the investigation was to ascertain whether the beneficiary had the requisite two years of work experience as a cook outlined in the ETA 750, the record is not clear as to why the period of times of the beneficiary's employment were not established, clarified, or debunked in the course of the field investigation. It is further noted that there appears to be no further corroboration of the second employment letter during the investigator's visit with [redacted]. This second letter was signed by [redacted] identified as the owner and manager of FM Cheeseburger and restaurant at the Cabanatuan City Supermarket. This letter was submitted to establish one year of employment as a cook ostensibly prior to the employment of the beneficiary by [redacted]

With regard to the affidavit submitted by [redacted] in response to the director's denial of the petition, this letter states that another person who used to assist [redacted] acknowledged signing the letter of employment verification, and further stated that [redacted] simply did not remember having given her authority to do so. In addition, [redacted] then describes additional job duties not described on the ETA 750 such as cooking for persons with particular dietary needs, such as low salt, low cholesterol, low sugar, and non spicy foods and meals, that perhaps coincide with the beneficiary's present cooking duties. The submission of these new job duties by [redacted] only confuses the record, and does not provide further clarification of when the beneficiary worked for [redacted]. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Given the fraudulent nature of [redacted] signature, the director was well within his authority to question the reliability and sufficiency of the contents of the letter as they pertained to the beneficiary's length of work experience.

Based on the beneficiary's more specialized cooking duties that [redacted] added in his affidavit, the assertions contained in the affidavit provided by [redacted] o not overcome the fraudulent nature of the signature provided on the letter of employment verification. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner needs to submit more persuasive evidence, beyond [redacted] assertions, as to the beneficiary's employment by [redacted] in order to overcome the substantiation of [redacted] fraudulent signature on one letter of work verification. Such documentation could include evidence of wages paid, paychecks, or similar documentation. In addition, the writer of the second letter of employment verification should be required to submit more substantive evidence as to the period of time and the hours worked by the beneficiary and her duties.

Therefore, even though the petitioner submitted a second letter that has not been identified as fraudulent based on its signature or contents, the petitioner has not provided credible evidence to establish that the

beneficiary has the requisite two years of work experience prior to the 2001 priority date. It is also noted that although the nature of the two letters submitted to the record, namely the apparent use of the same typewriter, and the lack of information as to the fulltime or part time nature or hours worked in both positions, does raise questions as to evidentiary worth of such documents or their authenticity, the issue of the beneficiary's qualifications is not the primary reason for denying the petition.

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. The petitioner provided W-2 forms and Forms DE-6 that indicated the beneficiary had earned $13,500 in 2001 and $13,500 in 2002. Therefore, although the petitioner established that it has previously employed the beneficiary, it did not establish that it paid the beneficiary a salary equal to or greater than the proffered wage of $22,800.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor filed as head of household and claimed her son as a dependent in both 2001 and 2002. In response to the director's request for further evidence, the petitioner submitted an itemized list of monthly expenses that totaled $1,447 a month or $17,364 yearly. As correctly noted by the director, in 2001, the sole proprietorship's adjusted gross income was $23,581. After subtracting the petitioner's household expenses of $17,364 from her adjusted gross income, the petitioner would only have $6,219, to pay the $9,860 difference between the beneficiary's actual wages and the proffered wage in 2001. In 2002, the sole proprietorship's adjusted gross income of $20,644, minus $17,364, the annual household expenses of the sole proprietor and her dependent, would leave only $3,280 to pay the difference between the beneficiary's actual wages and the proffered wage, which is $9,860. Based on the petitioner's yearly expenses, and the funds identified above that are needed to pay the difference between the beneficiary's actual wages and the proffered wage, the petitioner has not demonstrated the financial resources to support herself and her dependent and pay the difference between the beneficiary's actual wages and the proffered wage.

On appeal, counsel states that depreciation expenses and/or one-time repairs expenses can be used to augment the petitioner's adjusted gross income. However, 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 that 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. (Original emphasis.) *Chi-Feng* at 537.

In addition, counsel cites a previous AAO decision as evidence that depreciation costs can be added to taxable income and to cash on hand at year-end to determine a petitioner's total assets. 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 the petitioner in the previous AAO decision is not a sole proprietorship, and its financial circumstances are not necessarily analogous to those of the petitioner in the instant petition.

Counsel also drew attention to the petitioner's current financial resources in the aggregate amount of $238,471, as documented by the Bank of America letter submitted on appeal. However, the petitioner's financial assets are examined based on the types of financial resources, namely whether they are checking accounts, savings accounts, or certificate of deposits, etc. Based on this examination, the actual weight to be given to the petitioner's aggregate documented financial resources and their use in establishing the petitioner's ability to pay the proffered wage changes. For example, the Bank of America letter identifies four checking accounts established prior to the March 2001 priority date. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, letters from the banks that hold such accounts and accompanying 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, the balances 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. For example, if the four checking accounts were the sole proprietor's business checking accounts, the funds shown on balance are likely reflected in the petitioner's net profits as shown on Schedule C. Furthermore the Bank of America letter submitted by the petitioner on appeal does not establish that the petitioner had additional funds in the respective bank accounts continuously from the 2001 priority date. While certificates of deposit are viewed as liquidable assets since the petitioner can liquidate at any time, although with certain

fines, the Bank of America letter also indicates that the petitioner's two certificates of deposit were set up in 2003, which is after the March 2001 priority date. Therefore the record does not reflect any certificate of deposit monies available to pay the difference between the actual wages and the proffered wage as of March 2001, the priority date.

While counsel asserts that the petitioner has residential properties and automobiles on which she owes no money, these real estate and real assets are not viewed as liquidable assets that the petitioner can easily convert into funds available to pay the proffered wage. In other words, in order to use the equity in her personal property to pay the proffered wage, the petitioner would have to sell some of the property. Even if the petitioner were to execute a line of credit based on her residence, the AAO would not view such a line of credit as additional funds available 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 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).

Without more persuasive evidence with regard to the petitioner's assets, the petitioner has not established that it has the ability to pay the proffered wage as of 2001 and onward.

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 or to the beneficiary's qualifications to perform the duties of the position.

ORDER: The appeal is dismissed.