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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: WAC 04 021 52948 Office: CALIFORNIA SERVICE CENTER

Date: **SEP 21 2006**

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

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, 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 a Software Development business. It seeks to employ the beneficiary permanently in the United States as a Software Engineer. 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 (DOL). 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. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and 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.

As set forth in the director's February 15, 2005 denial, the single issue in this case is whether 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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 is accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$955.60 per week or \$49,691.20 annually. The Form ETA 750 states that the position requires six years of grade school, four years of high school and four years of college, culminating in a Bachelor's Degree in Computer Science.

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 on appeal.¹ Relevant evidence in the record includes: the petitioner's Schedule C, Profit or Loss from Business (Sole Proprietorship), filed in conjunction with the sole proprietor's Form 1040, U.S. Individual Tax Return, for 1998, 1999, 2000, 2001, 2002 and 2003; the sole proprietor's Form 1040 for 1998, 1999, 2000, 2001, 2002 and 2003; the Form 1099-MISC, Miscellaneous Income, which documents the wages that the petitioner paid the beneficiary for 1998, 1999, 2000, 2001, 2002 and 2003; a spreadsheet dated 2005 that lists the monthly household expenses for the sole proprietor and his family; a copy of a letter on Superior Court, State of California, Kern County letterhead dated March 15, 2005 and signed by the Systems Administrator, Superior Court of California, that verifies the petitioner's role in managing the court's case management systems and in meeting the court data needs of other government agencies; and counsel's brief. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1985 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on December 7, 1997, the beneficiary claimed to have worked for the petitioner from January 1996 through the date that he signed the form.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) should add in loan amounts, bank lines of credit and credit card account credit limits which are available to the sole proprietor when determining the petitioner's ability to pay the proffered wage. Counsel also asserts that CIS should consider the petitioner's ability to "generate income" in the future by taking into account the petitioner's steady increase of income demonstrated by its contractual commitments with the Superior Court of California and other sources of income pledged to the petitioner. Counsel further asserts that the wages which the sole proprietor pays himself should be added to "net income" when determining the petitioner's ability to pay the proffered wage. Finally, counsel suggests that the sole proprietor's estimated tax payments, including the amount applied from any overpayment of taxes on the previous year's tax return, which are deducted from the amount of taxes owed on the proprietor's Form 1040 should be added to "net income" when determining the petitioner's 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 a Form ETA 750 establishes a priority date for any immigrant petition that is later based on that Form 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 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 this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from

¹ 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 this 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).

the priority date in 1998 onwards. The petitioner did provide the Form 1099-MISC for the years 1998 through 2003. These forms document that the petitioner paid the beneficiary \$10,862.76 in 1998, \$22,080.27 in 1999, \$20,477.39 in 2000, \$15,987.38 in 2001, \$27,585.92 in 2002 and \$30,843.63 in 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period of analysis, 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). Thus, 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 demonstrate 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 this case, the sole proprietor lists his spouse and two children as dependents on the Form 1040. He provided a list of monthly personal expenses for his family which amount to \$2,353 or \$28,236 annually. The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>
Proprietor's adjusted gross income (Form 1040)	\$24,042	\$34,529	\$34,839
Petitioner's gross receipts or sales (Schedule C)	\$199,141	\$262,499	\$212,639
Petitioner's wages paid (Schedule C)	\$56,514	\$39,898	\$37,424
Petitioner's net profit from business (Schedule C)	\$25,462	\$33,484	\$34,222
	<u>2001</u>	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$14,898	\$52,475	\$65,231
Petitioner's gross receipts or sales (Schedule C)	\$155,351	\$390,403	\$434,376
Petitioner's wages paid (Schedule C)	\$43,154	\$43,139	\$43,125
Petitioner's net profit from business (Schedule C)	\$12,433	\$39,391	\$45,454

The sole proprietor's 1998 adjusted gross income of \$24,042 added to the amount that the petitioner paid the beneficiary in 1998 \$10,862.76 is \$34,904.76. This amount does not cover the proffered wage of \$49,691.20. Further, a deficit is all that remains to cover the sole proprietor's annual personal expenses of \$28,236 after the proffered wage is subtracted from the funds available to the sole proprietor in 1998.

The sole proprietor's 1999 adjusted gross income of \$34,529 added to the amount that the petitioner paid the beneficiary in 1999 \$22,080.27 is \$56,609.27. This amount does cover the proffered wage. However, it does not cover the sum of the sole proprietor's annual personal expenses and the proffered wage or \$77,927.20.

The sole proprietor's 2000 adjusted gross income of \$34,839 added to the amount that the petitioner paid the beneficiary in 2000 \$20,477.39 is \$55,316.39. This amount does cover the proffered wage. However, it does not cover the sum of the sole proprietor's annual personal expenses and the proffered wage or \$77,927.20.

The sole proprietor's 2001 adjusted gross income of \$14,898 added to the amount that the petitioner paid the beneficiary in 2001 \$15,987.38 is \$30,885.38. This amount does not cover the proffered wage of \$49,691.20. Further, a deficit is all that remains to cover the sole proprietor's annual personal expenses of \$28,236 after the proffered wage is subtracted from the funds available to the sole proprietor in 2001.

The sole proprietor's 2002 adjusted gross income of \$52,475 added to the amount that the petitioner paid the beneficiary in 2002 \$27,585.92 is \$80,060.92. This does cover the sum of the sole proprietor's annual personal expenses and the proffered wage or \$77,927.20. Thus, the petitioner has demonstrated the ability to pay the proffered wage in 2002.

The sole proprietor's 2003 adjusted gross income of \$65,231 added to the amount that the petitioner paid the beneficiary in 2003 \$30,843.63 is \$96,074.63. This does cover the sum of the sole proprietor's annual personal expenses and the proffered wage or \$77,927.20. Thus, the petitioner has demonstrated the ability to pay the proffered wage in 2003.

Counsel's assertion that CIS should add in loans, bank lines of credit and credit card account credit limits which are available to the sole proprietor when determining the petitioner's ability to pay the proffered wage is misplaced. In analyzing a sole proprietor's ability to pay the proffered wage, CIS will not augment the proprietor's adjusted gross income by adding in the proprietor's credit limits or lines of credit. A "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 beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. Yet, a petitioner must establish eligibility at the time of filing; a petition may not be approved based on a new set of facts that arise on a date subsequent to the priority date by which the petitioner appears to become eligible. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

If the petitioner submits documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that a line of credit will augment and not weaken its overall financial position, a line of credit may be considered in the analysis of the petitioner's ability to pay. Such documentation was not submitted in this case.

The sole proprietor's existent loans may be considered in the evaluation of his or her ability to pay. However, CIS will give less weight to loans as a means of paying salary since such debts increase the proprietor's liabilities and do not tend to 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). In this case, counsel suggests that Exhibit 2, submitted on appeal, documents that, based on proceeds from a loan, the proprietor had an additional \$19,865.59 cash available to pay the proffered wage during 1998. Yet, while Exhibit 2 does document that some party received a cash advance/loan of \$20,000 two days before the priority date and that \$19,865.59 of that amount was owing to the bank which issued the loan, neither the proprietor nor any other party is listed as the loan's recipient on Exhibit 2. Thus, Exhibit 2 does not document that the sole proprietor had additional funds available to pay the proffered wage during 1998. Unsupported assertions are not evidence. *See Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel is also mistaken in his assertion that CIS should consider the petitioner's ability to "generate income" in the future by taking into account the petitioner's steady increase of income demonstrated by its contractual commitments with the Superior Court of California and other sources of income pledged to the petitioner. The petitioner must demonstrate the ability to pay the proffered wage from the priority date of January 14, 1998 onwards. *See* 8 CFR. § 204.5(g)(2).

Counsel's assertion that the wages which the sole proprietor pays himself should be added to "net income" when determining the petitioner's ability to pay the proffered wage is misplaced in that the proprietor has already incorporated his wages into his adjusted gross income on the Form 1040. The amount that he pays himself in wages shall not be double counted.

Finally, counsel is mistaken in his suggestion that any estimated federal income tax payments that the sole proprietor made to the Internal Revenue Service, including any income tax overpayment amount from the previous tax year which the sole proprietor applied to his estimated tax payments, should be considered additional funds available to pay the proffered wage. These amounts are already included in the sole proprietor's adjusted gross income and shall not be double counted.

The petitioner must demonstrate the ability to pay the proffered wage from the priority date of January 14, 1998 onwards. *See* 8 CFR. § 204.5(g)(2). The petitioner was only able to demonstrate the ability to pay the proffered wage for the years 2002 and 2003.

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.