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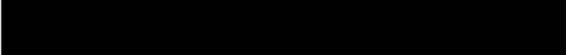
**U.S. Citizenship  
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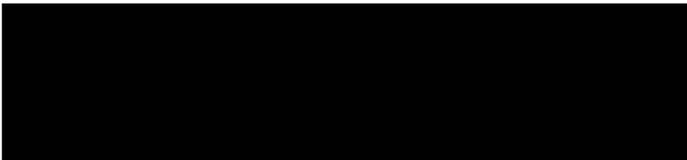


FILE:  Office: TEXAS SERVICE CENTER Date: JUL 26 2007  
SRC 06 101 51956

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, 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 dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director in his decision determined that the sole proprietor petitioner did not have the ability to pay the proffered wage in either tax year 2003 or 2004. The director denied the petition accordingly.

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 April 17, 2006 decision, the single issue in this case is whether or not the sole proprietor had the ability to pay the proffered wage as of the 2004 priority date and continuing.

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 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).

Here, the Form ETA 750 was accepted on January 2, 2004. The proffered wage as stated on the Form ETA 750 is \$20.28 an hour, or \$42,182.40 per year. The Form ETA 750 states that the position requires four years of experience in the job offered, or four year in the related occupation of general manager.

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>. On appeal, counsel submits a brief and the following documentation:

The sole proprietor's Form 1040 for tax year 2005;

Appraisal documents on four properties owned by the sole proprietor, including residential properties in Laguna Niguel, California, and Albuquerque, New Mexico, as well as restaurant property in Albuquerque, New Mexico;

A letter from the Bank of Albuquerque dated May 16, 2006 signed by [REDACTED] Assistant Vice President. In his letter [REDACTED] identified three business checking accounts and two personal savings accounts held by the sole proprietor, and their year to date balances;<sup>2</sup> and

The front page of a checking account statement from Wells Fargo bank for March 7 through April 6, 2006 that indicates the sole proprietor had a checking balance of \$96,729.70.

Other relevant evidence in the record includes the sole proprietor's Forms 1040 for tax years 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on May 15, 2003, to have a gross annual income of \$107,692, a net annual income of -\$48,508, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on December 2, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the sole proprietor has the ability to pay the proffered wage, and refers to an interoffice memorandum written by William R. Yates<sup>3</sup> that outlines three criteria used to examine a petitioner's ability to pay a proffered wage.

Counsel states that the sole proprietor meets the criteria of having sufficient net current assets to pay the proffered wage, and that Citizenship and Immigration Services (CIS) should also examine factors such as the sole proprietor's accounting practices, and the sole proprietor's personal assets. Counsel cites to *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA). Counsel also refers to two unpublished AAO decisions, and states that one decision held that the Department of Homeland Security may consider the petitioner's net income to determine the petitioner's ability to pay the salary, but must also consider the normal accounting

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<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> One business checking account, Account Number [REDACTED], was opened on October 9, 2003, prior to the January 2, 2004 priority date while the other bank accounts were opened after the 2004 priority date.

<sup>3</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

practices of the petitioner even if the ability to pay is not reflected in the tax returns. With regard to the second unpublished AAO decision, counsel states that in this decision, the sole shareholder of a medical corporation routinely minimized taxable income by taking it as compensation to avoid double taxation. In this case, counsel states that the AAO held that the sole proprietor's net profit should not control.

Counsel notes that the sole proprietor's personal assets, including three real estate properties far exceed the proffered wage of \$42,182.40. Counsel states that these three properties are readily liquidifiable and readily accessible to pay the proffered wage by means of an equity line or loan that could be provided within 30 days. Counsel also states that CIS allows personal property to be used as a basis to evidence ability to support an immigrating alien on the I-864 Affidavit of Support, as it is "readily available" and "readily liquidifiable".

Counsel also notes that the sole proprietor has over one million dollars in cash in her personal business checking accounts with the Bank of Albuquerque. Counsel states that the petitioner has attached evidence of her five banking account statements indicating her average balance on each account from the priority date until the present. Counsel draws attention to the sole proprietor's Wells Fargo bank statement for April 2006 submitted to the record and states that the sole proprietor has over \$95,000 in cash readily accessible to pay the proffered wage. Counsel notes that the sole proprietor would readily submit individual account statements for each month for the relevant years, if CIS requested them.

Counsel also asserts that the Yates memo should have incorporated ability to pay principles that were established at the Vermont Service Center American Immigration Lawyers Association (AILA) teleconference of November 16, 1994. Counsel states that in the case of a sole proprietorship, the minutes of this teleconference call indicate the Service Center may consider the proprietor's personal assets and liabilities; that if the taxable income is negative and the beneficiary is not yet employed by the petitioner, the Service Center will generally assume that the petitioner can handle the additional salary if it has a favorable enough ratio of total current assets to total current liabilities; and that depreciation can generally be considered with taxable income in evaluating the ability to pay an additional employee. Counsel states that, in the instant petition, once the depreciation is added to net income and the individual assets are added, the sole proprietor has the ability to pay the proffered wage. Counsel also states that the sole proprietor's taxable income for the majority of the relevant years far exceeds the proffered wage. Counsel identifies the sole proprietor's taxable income in 2003 as \$98,003, and in 2004 as \$107,692.<sup>4</sup> Counsel also states that the sole proprietor's individual assets exceed two million dollars and the sole proprietor's liabilities are *de minimus*.

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, Citizenship and Immigration Services (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).

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<sup>4</sup> These figures are taken from the sole proprietor's Schedule C, line 1, gross receipts or sales, for both tax years.

On appeal, counsel refers to the minutes of ESC/AILA Liaison Teleconference, Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995) (AILA minutes) to suggest that the sole proprietor's depreciation deductions should be utilized in the examination of the sole proprietor's ability to pay the proffered wage. Counsel's reliance on the AILA minutes is misplaced. The guidance provided by the Service Center or through interoffice memoranda does not have the evidentiary weight of relevant precedent decision. Counsel does not provide a published citation relating to the use of total assets or depreciation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS 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). Second, the AAO does not consider depreciation in its examination of the sole proprietor's ability to pay the proffered wage, as will be discussed more fully further in these proceedings.

In addition, contrary to counsel's assertion, the sole proprietor did not submit any documentation on the average balances for each of her bank accounts with the Bank of Albuquerque from the 2004 priority date to the present, as indicated by counsel. The document submitted to the record from the Bank of Albuquerque also does not indicate any year to date figures that would calculate the sole proprietor's year to date balance since the opening of each account. The document submitted to the record appears to record the year to date balances in each of the five accounts listed as of May 2006. The AAO will examine the sole proprietor's bank accounts with both the Bank of Albuquerque and Wells Fargo further in these proceedings when it discusses the use of the sole proprietor's personal assets, such as personal savings or investment accounts, to pay the proffered wage.

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 in 2004 onwards. Therefore it cannot establish its ability to pay the proffered wage based on the beneficiary's wages. In addition, it must establish its ability to pay the entire proffered wage as of the January 2004 priority date and onward.

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, contrary to counsel's suggestion, 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. 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 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 three. As previously stated, the priority date for the instant petition is January 2, 2004, and as correctly noted by counsel, the sole proprietor's Form 1040 for 2003 is not dispositive in these proceedings. The AAO will examine the sole proprietor's tax returns only for the years 2004 and 2005. The tax returns reflect the following information for the following years:

	2004	2005
Proprietor's adjusted gross income (Form 1040)	\$ 27,000	\$ 14,731
Petitioner's gross receipts or sales (Schedule C)	\$ 107,692	\$ 87,511 <sup>5</sup>
Petitioner's wages paid (Schedule C)	\$ 5,100	\$ 15,681
Petitioner's net profit from business (Schedule C)	\$ -48,508	\$ -24,018

In 2004 and 2005, the sole proprietorship's adjusted gross incomes of -\$48,508 and -\$24,018 fail to cover the proffered wage of \$42,182.40. It is improbable that the sole proprietor could support herself and two dependents on a deficit. In addition, the AAO notes that the director did not request nor did the petitioner provide an itemized list of monthly household expenses, such as food, clothing, insurance for house and cars and medical coverage, utilities, mortgage payments and other items. Schedules A from the sole proprietor's tax returns for 2004 and 2005 identify the sole proprietor's home mortgage interest payments of \$17,268 in tax year 2004 and home mortgage interest payments of \$20,584 in tax year 2005. However, these sums are not a complete picture of the sole proprietor's yearly household expenses. An itemized list of household expenses and the household expenses listed on the sole proprietor's Schedules A do support an even greater deficit for the sole proprietor with regard to her ability to both pay the proffered wage and her yearly household expenses.

On appeal, counsel asserts that the sole proprietor's personal assets can be used to establish the sole proprietor's ability to pay the proffered wage, and cites to *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA). Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification

<sup>5</sup> The sole proprietor has two Schedules C in both Forms 1040 for tax years 2004 and 2005. The sole proprietor had two restaurants in tax year 2004, one in Albuquerque and the other in Laguna Niguel, California. In tax year 2005, the sole proprietor had two Thai restaurants in the Albuquerque area. The petitioner on Form I-140 petition identified her business as being located at 1225 Eubank NE., Albuquerque, New Mexico. The sole proprietor's Schedule C for tax year 2004 identifies the business located at 1225 Eubank NE as Thai Dining with no EIN. The figure used above for tax year 2005 is from the Schedule C business identified as Queen of Sushi Pattaya Thai, 1225 Eubank NE, Albuquerque, New Mexico, with Employer Identification Number (EIN) [REDACTED]. If the petitioner pursues this matter any further, the sole proprietor should provide more documentation as to the name change or any possible change in ownership of the original business indicated by the two Schedules C.

Appeals (BALCA) precedent is binding on the AAO. 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, BALCA 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). Nevertheless, the AAO, as previously stated, does not view the sole proprietorship as an entity existing apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the AAO does examine the sole proprietor's adjusted gross income, assets, and personal liabilities in considering the petitioner's ability to pay.

Counsel states that the petitioner's residential and commercial real estate holdings can be utilized to pay the proffered wage, as they are easily liquifiable through obtaining a line of credit or a loan. However, 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 sole proprietor's ability to obtain a bank line, loan, or a line 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 a 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). Moreover, the petitioner's existent loans will be reflected in the Schedule Cs provided in the tax return or audited financial statement and will be fully considered in the evaluation of the sole proprietor's adjusted gross income. 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). Therefore the AAO will not consider loans or lines of credit based on the sole proprietor's real estate holdings in its examination of the sole proprietor's additional personal assets available to pay the proffered wage and her yearly household expenses.

On appeal, counsel submits further documentation with regard to the sole proprietor's additional financial resources in her banking accounts. With regard to the sole proprietor's bank statements from the Bank of Albuquerque and from Wells Fargo, neither document establishes the sole proprietor's ability to pay the proffered wage as of the January 2, 2004 priority date. As stated previously, the Bank of Albuquerque correspondence dated May 2006 does not establish the sole proprietor's monthly balances for the relevant period of time in question, namely January 2004 to the present, nor does the correspondence establish any year to date balances of the sole proprietor's bank statements for any other time period other than May 16, 2006, the date the correspondence was written. Furthermore, the list of Bank of Albuquerque accounts includes two business checking accounts that may have been included in the sole proprietor's tax returns or schedules. The AAO further notes that the only bank account issued prior to the January 2004 priority date is business checking account number [REDACTED], that was opened on October 9, 2003. As stated previously, the sole proprietor's business checking account most likely will be reflected on the sole proprietor's Schedule C as gross receipts and expenses. Also, the correspondence from the Bank of Albuquerque is not viewed as

probative evidence of the sole proprietor's financial assets with this bank. Copies of relevant bank statements would be more probative. Relevant bank statements would consist of statements from the January 2004 priority date to the present time. The AAO additionally notes that for the relevant years of 2004 and 2005, the ending balances for the sole proprietor's personal checking or savings accounts would have to be sufficient enough to cover the proffered wage and always sufficient to cover the full wages paid on a monthly basis.

With regard to the Wells Fargo statement for the sole proprietor's checking account for March 7 through April 6, 2006, while this statement indicates both a significant balance of \$96,729.70 as of April 6, 2006 as well as significant aggregate deposit and withdrawals figures for the month of March 2006, the document does not specify whether this account is a business or personal checking account. The comments directed at the sole proprietor's bank accounts with the Bank of Albuquerque would also apply to the sole proprietor's checking account with Wells Fargo. The 2006 documentation does not support the sole proprietor's ability to pay the proffered wage by means of her personal checking or savings account as of the January 2, 2004 priority date and continuing to 2006. It merely indicates the sole proprietor's checking account balance as of April 6, 2006. Thus the sole proprietor's bank statements for her business and personal checking and savings accounts are not sufficient to establish her ability to pay the proffered wage of \$42,182.40 and her household yearly expenses that have yet to be identified. The sole proprietor has not established its ability to pay the proffered wage and her yearly household expenses based on her additional financial assets. Therefore, the petitioner has not established its ability to pay the proffered wage as of the 2004 priority date and continuing until the beneficiary obtains lawful 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.