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U.S. Citizenship
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Services

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FILE: WAC 03 125 53310 Office: CALIFORNIA SERVICE CENTER Date:

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

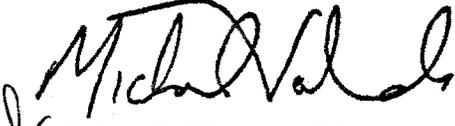
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a sole proprietor who operates residential care facilities for the elderly. It seeks to employ the beneficiary permanently in the United States as a live-in practical nurse. 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, counsel submits a brief and additional documentation.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (The Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(1)(3) also provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 December 23, 1997. The proffered wage as stated on the Form ETA 750 is \$9.19 per hour, which amounts to \$19,115 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from December 1, 1997 to the present.

On the petition, the petitioner claimed to have been established in 1986, and to currently employ twelve workers. The petitioner did not identify its gross or net annual income. In support of the petition, the petitioner submitted a letter of support, the petitioner's license to operate a residential facility for the elderly,

its federal income tax forms from 1999 to or 2000 and 2001 with accompanying schedules, an educational evaluation of the beneficiary's high school diploma from the Philippines, along with training certificates in home health care, among others.

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 May 29, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal tax returns with accompanying schedules from 1997 to 2002. The director also stated that Citizenship and Immigration Services (CIS) computer records indicated that the petitioner had previously filed a second I-140 petition that was approved. The director requested that the petitioner submit evidence to establish that the petitioner had the ability to pay the proffered wages of both beneficiaries.

Furthermore, the director noted that the petitioner was a sole proprietor, and requested that the petitioner submit a statement of monthly expenses for the petitioner's family that included the family's household living expenses, such as housing, car payments, insurance, and utilities. The director requested clarification as to whether the beneficiary was currently employed by the petitioner, as well as any W-2 Forms for the beneficiary. The director also requested Form DE-6, a state of California quarterly wage and withholding tax document, for all employees for the last four quarters, with the job title and a brief description of the duties of each employee. The director also requested evidence that the beneficiary has fulfilled California licensing requirements for health, fingerprinting, criminal screening, and first aid training certificates. Finally the director requested the petitioner's date of birth.

In response, the petitioner submitted its federal tax returns from 1997 to 2002. The petitioner stated that information taken from these tax returns would adequately establish the petitioner's ability to pay the beneficiary's salary and examined how to calculate total personal income and cash flow. The petitioner stated that two beneficiaries of I-140 sponsored petitions [REDACTED] and [REDACTED] were working for the petitioner. The petitioner submitted W-2 forms for the beneficiary from 1998 to 2002. The petitioner also submitted the state of California DE-6 Quarterly Wage Report for all employees. The petitioner stated that all the employees are live-in caregivers (practical nurses) who assist the petitioner's elderly residents with daily living activities. The petitioner requested an extension to submit additional evidence to calculate the number of weeks worked by all employees, and identified the number of employees as 40. The petitioner also submitted its date of birth.

On September 14, 2003, the director sent another request for additional evidence to the petitioner. The director stated that the petitioner cited payment of property taxes as evidence of real estate assets that could be used to pay the proffered wage. The director stated that CIS did not have the resources to extrapolate the assets of the petitioner through property taxes, and that if the petitioner wanted to present additional evidence on its real financial assets, the petitioner had to present more detailed evidence. In response, counsel submitted a deed of trust that indicated the petitioners bought property in Panorama City, California. The petitioner also provided information on the property, including a floor plan, and an appraisal report dated June 25, 2003. This report stated that the market value of the petitioner's property was \$420,000.

The director denied the petition on January 9, 2004. The director examined the petitioner's federal income tax forms from 1997 to 2002, along with Forms W-2 that indicated wages paid to the beneficiary from 1998 to 2002. The director determined that the petitioner's tax returns showed sufficient adjusted gross income to establish the petitioner ability to pay the proffered wage from 1997 to 2001. However, in 2002, the director determined that the petitioner's 2002 federal income tax return showed \$163,676 in wages, a business income of \$26,016 and an adjusted gross income of -\$21,871. The director determined that in the year 2002, the petitioner's tax return did not indicate sufficient adjusted gross income to pay the beneficiary's proffered wage. The director noted that the petitioner had paid the beneficiary \$3,243 in 2002, and that even with these wages, the petitioner did not have sufficient financial resources to pay the proffered wage. With regard to the petitioner's real estate property, the director stated that the petitioner had not established that the real estate property could have been readily converted into funds to pay the beneficiary's wage.

On appeal, counsel submits checking account statements from Manufacturers Bank for the petitioner's joint checking account from January 2002 to January 2004. Counsel states that the checking account statements establish that the daily balance for the checking account from January 2002 to January 2004 never went below \$302, a figure that counsel describes as the combined daily salary for the petitioner's two beneficiaries as well as the petitioner's household expenses.¹ Counsel also stated that the sole stockholder of the petitioner created a family trust in 1997. Counsel further states that the petitioner bought a property at [REDACTED] that the petitioner transferred to the family trust and that in late 2003, the petitioner placed the same property on the market. Counsel states that the petitioner was not unrealistic in his expectation of being able to quickly convert his real estate holding into cash, either by selling the real estate property or by tapping into an equity line of credit. Counsel states that the CIS statement that real estate could not have been readily converted into funds to pay the beneficiary wage fails to consider the equity in property that the petitioner acquired more than twenty years ago and that the petitioner could easily have taken a home equity line of credit or sold off the property. Counsel finally states that based on a strong market for housing sales in Los Angeles and the availability of equity in petitioner's real estate assets, the petitioner has established that he had the ability to pay the proffered wage to the beneficiary from 2002 to the present.

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. As established by the beneficiary's W-2 forms, the petitioner did employ and pay the beneficiary as of 1998. However, the priority date for the petition is December 23, 1997. The petitioner provided no substantive documentation that it had employed and paid the beneficiary as of the priority date. With regard to the W-2 Forms submitted by the petitioner for the years 1998 to 2002, the beneficiary earned \$10,965 in 1998, \$11,551.73 in 1999, \$12,399.19 in 2000, \$11,371.21 in 2001, and \$3,243.12 in 2002. Without more persuasive evidence, the petitioner has not established that it employed and paid the beneficiary on the priority date. It did establish that it employed and paid the beneficiary from 1998 to 2002, but not at the level of the proffered wage, namely \$19,115.

¹ Counsel states the salary of the previously approved beneficiary as \$23,379, and the annual household expenses for the petitioner as \$35,952. As stated previously, the proffered wage for the beneficiary is \$19,115. Counsel added up these figures and then divided them by 260 days, 52 weeks by five days of work during a week, to arrive at the \$302 figure.

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).

The petitioner submitted its federal income tax returns for 1997, 1998, 1999, 2000, 2001, and 2002. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date and continuing.

In addition, 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.

With regard to the petitioner's federal income tax return, the petitioner filed as married, filing a joint return with his wife. The monthly expenses for the petitioner and his wife are \$2,996 a month, or \$35,952 a year. The petitioner's tax return documents from 1997 to 2002 reflect the following adjusted gross incomes: \$78,417 in 1997; \$73,807 in 1998; \$77,402 in 1999; \$51,779 in 2000, \$71,529 in 2001, and -\$21,871 in 2002.

With regard to 1997, as previously stated, the petitioner did not establish that it paid wages to the beneficiary in December 1997. Thus the petitioner would have to establish that it had the ability in 1997 to pay the entire proffered wage of \$19,115, in addition to meeting the petitioner's annual household expenses of \$35,952. The sum of \$55,067 would be needed to both pay the proffered wage and pay for the petitioner's household expenses. Given the petitioner's adjusted gross income of \$78,417 in 1997, the petitioner had sufficient income to pay \$55,067. This also appears to be the case also with regard to the petitioner's ability to pay the difference between the proffered wage and the beneficiary's actual wages in 1998, 1999, 2000, and 2001, as well as its monthly household expenses. For example, in the year 2000, the petitioner had an adjusted gross income of \$51,779, the lowest adjusted gross income for the period in question up to 2002, and also paid the beneficiary \$12,399. Thus the petitioner would need enough financial resources to pay its yearly household expenses of \$35,952 and \$6,716, the difference between the actual wage and the proffered wage in the year 2000. The petitioner, with its adjusted gross income of \$51,779, clearly has sufficient funds to pay both its

household expenses and the remainder of the beneficiary's salary, or \$42,668, in 2000. The petitioner had higher adjusted gross income for the remaining years of the period in question, with the exception of 2002, and thus, has established that it had the ability to either pay the proffered wage or the difference between the actual wages and the proffered wage from 1997 through 2001.

What is less clear is whether the petitioner had sufficient funds to pay for the salaries of both beneficiaries of I-140 petitions. The director indicated in his initial request for evidence that the petitioner had submitted I-140 petitions for two employees. In turn the petitioner indicated that it had also submitted an I-140 petition for [REDACTED]. While the DE-6 documents submitted by the petitioner indicate that [REDACTED] earned \$22,661 from June 2002 to June 2003, the record is devoid of any information as to the wages, if any, paid in previous years, Ms. [REDACTED]'s proffered wage, and the priority date of Ms. [REDACTED] petition. Although counsel on appeal states that Ms. [REDACTED] salary is \$23,379, he provides no further documentation to substantiate his assertion. The assertions of the director, as well as of counsel, do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Without such information, it is not possible to definitely establish whether the petitioner had sufficient resources to pay the proffered salary of both beneficiaries.

With regard to the petitioner's federal income tax return for 2002, the document reflects the following information:

Proprietor's adjusted gross income (Form 1040)	\$ - 21,871
Petitioner's gross receipts or sales (Schedule C)	\$ 427,615
Petitioner's wages paid (Schedule C)	\$ 163,676
Petitioner's net profit from business (Schedule C)	\$ -32,829

The petitioner had to establish that it had sufficient funds to pay the beneficiary a salary of \$19, 115 in 2002. The petitioner's 2002 adjusted gross income of -\$21,871 is not sufficient to cover the beneficiary's proffered wage in 2002. It is also not sufficient to cover the salary of two beneficiaries.

In addition, the petitioner has not established that it has other financial sources with which to pay the proffered wage. On appeal, counsel examines both the petitioner's cash reserves and the personal real assets of the sole proprietor. With regard to the petitioner's cash reserves, counsel submits checking account summaries from the petitioner's account with Manufacturer's Bank from January 2002 to February 2004, and provides the lowest average daily balance for these months. These statements indicate that on November 7, 2003, the petitioner deposited \$254,295 in his checking account and that by January 13, 2004, the petitioner had withdrawn \$145,543 from the same account.

Counsel states that disregarding both the W-2 wages paid to the beneficiary and the average balances for the months December 2003 to February 2004, which show daily balances in excess of \$100,000, the petitioner's checking data indicates that the checking balances never fell below \$302 which counsel states represented the combined daily salary of the two beneficiaries, and the petitioner's household expenses. With regard to the petitioner's real estate interests, counsel states that in light of a strong market for housing sales and the availability of equity in the petitioner's real assets portfolio, the petitioner established that he had the ability to

pay the beneficiary's prevailing wage from 2002 to the present. Counsel further states that the petitioner could have tapped into an equity line of credit to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's checking account is misplaced. First, 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, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, while the checking accounts support the fact that in 2003, the petitioner sold a property and deposited the proceeds in his checking account, the petitioner's additional financial resources in its checking account in 2003 would not establish its ability to pay the proffered wage in tax year 2002. In addition, counsel's identification of a sum below which the petitioner's checking account balances did not go during the years 2002 to January 2004 is not persuasive. This sum is an artificial number that does not take into account the petitioner's other expenses that occur on other than a daily basis, any overtime work by the beneficiaries, and other unanticipated contingencies.

With regard to counsel's statement that the petitioner could obtained an equity line of credit to pay the beneficiary's 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). Furthermore, a line of credit creates a corresponding debt and liability.

Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing through 2002. Without more persuasive evidence, the record only reflects that in 2002, the petitioner showed a net income of -\$22,871, and did not, therefore, demonstrate the ability to pay the proffered wage from the priority date 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 the proffered wage. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed.