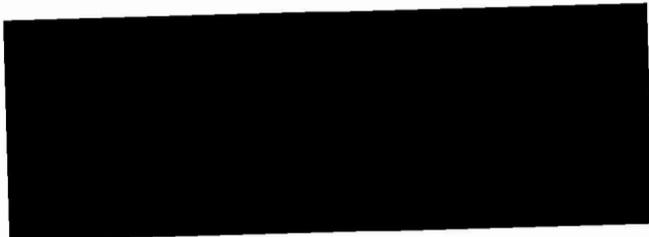


U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



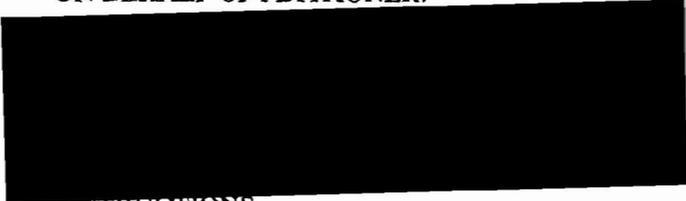
B6

FILE: WAC 01 236 57213 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 a subsequent motion to reopen was subsequently denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electrical construction company. It seeks to employ the beneficiary permanently in the United States as an electrician. 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, former counsel submits a brief with additional documentation.¹

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 December 27, 2000. The proffered wage as stated on the Form ETA 750 is \$24.04 an hour, or an annual salary of \$50,003.20. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 1997.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in January of 1992, to have two employees, and to have a gross annual income of \$245,000 and a net annual income of \$60,000. In support of the petition, the petitioner submitted a letter of employment verification for the beneficiary from [REDACTED] Company Manager, [REDACTED], Maitland, South Africa. The petitioner also submitted documentation of the beneficiary's qualifications as well as its Form 1040,

¹ Former counsel is [REDACTED], Reeves & Associate, Pasadena, California. After the appeal and Form I-290B were filed, the petitioner retained present counsel.

individual income tax return, for 1999. This document indicated that the petitioner had an adjusted gross income of \$55,959 in 1999.

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 October 27, 2001, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its 2000 federal tax return, with all accompanying schedules and tables. The director also requested copies of the petitioner's payroll, Forms W-2 and Forms W-3 that established the wages paid to the two employees listed on the I-140 petition.

In response, the petitioner submitted its federal tax return for 2000, with tables and schedules. The petitioner also submitted a copy of Form W-3 for the years 1998, 1999, and 2000, and copies of Forms W-2 for the years 1998, 1999, and 2000. The petitioner's Form 1040 for 2000 indicated an adjusted gross income of \$49,880. With regard to the Forms W-2 submitted, forms were provided for the following years and individuals: in 1998: [REDACTED]; for 1999: [REDACTED]; and for 2000: [REDACTED]

On March 8, 2002, the director sent a second request for further evidence to the petitioner. The director stated that based on the submitted tax documents, the petitioner did not appear to have enough income to support his household and also pay the proffered wage. The director requested that the petitioner submit a statement of monthly expenses for the petitioner and his family. The director stated that such items should include but were not limited to housing, food, car payments, insurance, utilities, credit cards, student loans, clothing, school, daycare, gardener, housecleaner, nanny, and any other reoccurring monthly household expenses. The director also stated that if the sole proprietor would use personal assets to pay the proffered wage, the petitioner had to submit evidence that the petitioner possessed sufficient assets to pay the wage continuously. The director also noted that the submitted W-2 Forms did not list the beneficiary as an employee, and that the petitioner should submit a statement to explain this discrepancy. The director also requested that the petitioner submit evidence to establish that either the beneficiary was paid the proffered wage, namely, \$50,003.20, as of December 27, 2000 to the present, or submit evidence that the petitioner had the ability to pay this wage from December 27, 2000 to the present. Finally the director requested that the petitioner submit copies of its business bank statements for the past year.

In response, the petitioner submitted the requested statement of monthly expenses. This document indicated that the petitioner had monthly household expenses of \$3,261.99, or yearly household expenses of \$39,143.88. Counsel, in his cover letter, stated that the petitioner was currently capable of paying the beneficiary's salary on a monthly basis out of company project revenues. On the petitioner's statement of monthly expenses, the petitioner also stated that he did not intend to pay wages out of his personal assets, but rather out of company projects. The petitioner listed four current projects and the monetary value of contracts for these projects. The value of the four projects totaled \$391,816. The petitioner also submitted copies of the following contracts: a contract between the petitioner and Ark Construction for \$37,261, and \$12,940; a subcontract with NSA Construction Group, Inc, Tarzana, California in which the petitioner agreed to perform work for Los Angeles World Airports for \$64,500; a subcontract agreement between the petitioner and F.H.

Paschen/Sn Nielsen, Inc to perform work at a cost of \$59,000; and a Form 1449 Solicitation/Contract Order between the petitioner and U.S. the 63rd Regional Support Command, Los Alamitos, California, for a project funded at \$43,475. The petitioner also submitted a copy of one monthly mortgage statement dated February 14, year unknown. In addition, the petitioner submitted a one-page breakout of the deposits made to two business banking accounts from January 2001 to March 2002. With regard to the petitioner's monthly bank statements, he submitted statements for two business banking accounts from February 2001 to April 2002.

On March 2004, the director denied the petition. In his denial, the director stated that he examined both the petitioner's adjusted gross income and depreciation expense in determining the sole proprietor's ability to pay the proffered wage. The director stated that any income that the petitioner earned must first be applied toward the maintenance of his own family's cost of living and then the remaining funds might be used to pay the beneficiary's proffered wage. The director stated that in 2000, the petitioner's combined adjusted gross income and depreciation equaled \$54,260. The director then stated that the petitioner claimed himself and three dependents on his Form 1040, and that after subtracting the annual household expenses of \$39,143.99 from the petitioner's combined adjusted gross income and depreciation, the petitioner would only have \$15,116.12 left, which was not a sufficient figure to pay the proffered wage of \$50,003.20. The director then determined that the petition had not established that it had continuously had the ability to pay the beneficiary's wage as of December 27, 2000 to the present.

On July 31, 2002, former counsel submitted a motion to reconsider the director's denial, and submitted new evidence to establish the petitioner's ability to pay the beneficiary's wage from the priority date to the present. The petitioner's new evidence included a copy of the petitioner's monthly mortgage statement with a due date of July 1, 2000 that indicated a current mortgage balance of \$120,000; a copy of a residential appraisal report dated July 26, 2002 that indicated the petitioner's home was currently valued at \$167,000; and a letter from [REDACTED], certified general real estate appraiser, that indicated the current market value of a parcel of land in Palmdale, California, that the petitioner and his wife co-owned with another couple. Mr. [REDACTED] states that the fair market value is \$60,000. The petitioner also submitted an Internet copy of a Union Bank of California accounts inquiry dated July 29, 2002 that showed current balances of three accounts totaling \$10,449.59. The accounts were identified as two checking accounts and one savings account. The savings account of the petitioner indicated a current balance of \$170.23.

Counsel stated that based on the appraisal of the petitioner's home and the petitioner's mortgage balance, the petitioner had \$47,000 in equity in his home. Counsel stated that the petitioner had been willing and able since before December 2000 to obtain a second mortgage or equity loan from his home equity to pay the beneficiary's proffered wage. Counsel also stated that the petitioner had been willing and able to sell his equal share of his co-owned property or obtain an equity loan on this property to pay the beneficiary's wages. Finally, counsel states that the sole proprietor is also permitted to use his personal funds to pay employees' wages. Counsel stated that the Union Bank statement submitted on motion indicates that the petitioner has almost \$60,000 in his savings and checking accounts at Union Bank, which he is willing and able to use to pay the beneficiary's proffered wage.

On February 3, 2004, the director granted the motion to reconsider the petition. The director stated that based on the submitted evidence, the petitioner had not established the ability to pay the proffered wage as of December 27, 2000 and to the present. The director again stated that W-2 Forms and W-3 Forms submitted by the petitioner did not indicate that the petitioner currently employed the beneficiary. The director stated that the petitioner's federal income tax returns failed to establish the petitioner's ability to pay the beneficiary's wage from the priority date to the present, and that the petitioner's checking account statements showed numerous entries of "non sufficient funds." In addition, the petitioner's monthly mortgage statement submitted on motion that had a due date of July 1, 2002 indicated that the petitioner had failed to pay the mortgage payment and was past due one month on the mortgage payment with unpaid late charges due. The director further stated the petitioner's historical financial practices cast doubt on the petitioner's ability to pay the beneficiary's wage from the priority date to the present, and that counsel's assertion that the petitioner is willing and able to secure equity loans on the petitioner's home and a parcel of land for which the petitioner is co-owner were not sufficient to prove the petitioner's ability to pay the proffered wage.

On appeal, former counsel states that CIS both misinterpreted and misapplied the regulations governing the use of the petitioner's assets to determine ability to pay the proffered wage. Counsel then states that the tax returns submitted by the petitioner for 2000 and 2001 show that the petitioner earned an adjusted gross income of \$49,880 and \$55,949 respectively. Counsel states that since the proffered wage is \$50,003, the petitioner's income is adequate to pay the beneficiary's proffered wage, except for \$223 in the year 2000.

Counsel submits copies of three prior AAO decisions that dealt with sole proprietorships and states that the decisions show that when an employer's individual income tax return reflects an adjusted gross income that exceeds the beneficiary's salary, the amount is deemed sufficient to pay the proffered wage. Counsel asserts that based on these decisions, the AAO should also conclude in the instant petition that the petitioner has the ability to pay the beneficiary's salary. Counsel states that the overall fiscal circumstances of the petitioner can be considered in determining its ability to pay the beneficiary's proffered wage. Counsel states that copies of the petitioner's bank account statements, previously submitted to the record, showed that the petitioner had more than \$50,000 in cash, which was sufficient to pay the beneficiary's wage.

Counsel also cites a Board of Alien Labor Certification Appeals (BALCA) decision, *In Matter of Ranchito Coletero*, 2002-INA-105 (Jan. 2004) and states that this decision also stood for the principle that DOL must consider a sole proprietor's entire financial circumstances in determining its ability to pay the wage offered to the beneficiary. Counsel states that the petitioner's cash and property assets, including bank statements, financial investment and real estate properties, should have been considered in determining its ability to pay the beneficiary's salary. Counsel asserts that CIS did not evaluate the petitioner's fiscal circumstances and substantial assets, but rather dismissed the petitioner's willingness and ability to convert its property into wages. Counsel states that because the petitioner's livelihood is completely intertwined with the success of his business, the sole proprietor is willing to use his personal assets to pay operational costs, such as the beneficiary's wage.

With regard to the director's comment on the petitioner's past financial practices casting doubt on whether the petitioner could or would pay the beneficiary's wages, counsel states that CIS acted capriciously in

identifying several non-sufficient funds entries in the petitioner's bank statements and one delinquent mortgage payment and then denying the petition.

Upon review of the record, in response to the director's second request for further evidence, the petitioner stated that he did not intend to pay wages out of his personal assets. On appeal, counsel asserts that the petitioner is willing to pay the beneficiary's wages by securing equity loans or lines of credit. However, no further substantiation of this assertion, such as a statement by the petitioner as to his willingness to use his personal assets to pay the proffered wage, is found in the record. Thus, the record as presently constituted, presents conflicting testimony. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice". Without more persuasive evidence, the petitioner has not established that is willing to use personal assets to pay the proffered wage.

Furthermore, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). The petitioner's proposed line of credit will not be considered for another additional reason. Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary cannot establish that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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 firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In addition, former counsel refers to three decisions issued by the AAO concerning other petitioners who are sole proprietors, but does not provide any published citations. 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). In addition the analysis used in two of the AAO decisions, namely, LIN01136 54046 and EAC 0108152149, did not consider the petitioner's household expenses prior to determining that the petitioner's adjusted gross income was sufficient to pay the proffered wage. The AAO presently views this analysis as incomplete, and does not use it in present deliberations.

Finally, the director in his second request for further evidence dated March 8, 2002, requested the petitioner's bank statements for the past year. Counsel in turn submitted bank statements and an account enquiry statement dated July 29, 2002, that indicated deposits and current balances for all three bank accounts. Both the director's and counsel's reliance on the balances in the petitioner's bank accounts 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, although counsel asserts on motion, that the petitioner has almost \$60,000 in personal checking and savings accounts that is available to pay the proffered wage, the submitted Union Bank of California account inquiry dated July 2002 indicates deposits of \$58,945.83, rather than balances of \$60,000. The combined current balance of all three accounts is \$10,449.59. The balance of the petitioner's savings accounts, which could be viewed as assets readily available to pay the beneficiary's wage, is \$170.23.

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. Although the ETA Form 750 indicates that the beneficiary worked for the petitioner since 1996, and the petitioner has stated that the beneficiary works for the petitioner, the petitioner did not submit any further evidentiary documentation of any such employment, or explanation of how and when the petitioner employed the beneficiary. As previously stated by the director, the W-2 Forms submitted by the petitioner for 1998, 1999 and 2000 do not identify the beneficiary's wages in these years. Accordingly the petitioner can not establish that it ever employed the beneficiary or paid him a salary equal to or greater than the proffered wage as of the December 27, 2000 priority date and to the present.

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 the director's comments, CIS will examine the net income 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 (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 supports himself, his wife, and two children. With regard to his adjusted gross income, the petitioner submitted federal income tax returns for the years 1999 and 2000. It is noted that the priority date of the instant petition is December 27, 2000; therefore, the petitioner's federal income tax return for 1999 is not dispositive in these proceedings. In addition, because the petitioner did not establish that it had employed and paid the beneficiary as of the 2000 priority date and onward, the petitioner has to establish that it has the ability to pay the entire proffered wage as of the priority date and onward.

With regard to tax year 2000, the petitioner's adjusted gross income is \$49,880. In response to the director's request for an itemized list of household expenses, the petitioner provided a breakdown of monthly expenses that totaled household expenses of \$3,261.99, or yearly household expenses of \$39,143.88. When the monthly expenses of the petitioner are subtracted from \$49,880, the petitioner's gross adjusted wage for 2000, \$10,736.12 remains, which is considerably less than the proffered wage of \$50,003.20. Thus, the petitioner has not established that it can cover his existing business expenses, sustain himself and his three dependents, and pay the proffered wage, based on his 2000 adjusted gross income. Since the record contains no further documentation of the petitioner's financial resources as of 2001 and onward, the petitioner also cannot establish that it has the ability to pay the proffered wage beyond the priority date.

In addition, while former counsel indicated on motion and on appeal, that the petitioner is willing to pay the beneficiary's salary out of his personal assets, the record also reflects that the petitioner submitted a statement with his list of monthly expenses that clearly indicated the petitioner did not want to pay the beneficiary's wage out of his personal assets, but rather out of the company projects revenue. In addition, several of the assets to which counsel referred, such as personal residential or co-owned property, are not viewed as liquidable enough to be utilized to pay the proffered wage. In other words, in order to use the equity in his personal property to pay the proffered wage, the petitioner would have to incur additional debt or sell either his home or his co-owned property. The equity in the petitioner's real estate holdings is not readily available. In addition, as previously stated, the petitioner's checking and savings account balances do not establish the petitioner's ability to pay the proffered wage. Without more persuasive evidence with regard to the petitioner's assets, and the petitioner's willingness to use his assets to pay the proffered wage, the petitioner has not established that it has the ability to pay the proffered wage as of December 2000 and onward.

With regard to counsel's reference to *Ranchito Coletero*, counsel does not provide legal authority for the applicability of BALCA's precedent decision to these proceedings occurring under the Department of Homeland Security. Nor does counsel submit how CIS's regulatory authority to verify the petitioner's ability to pay the proffered wage is obviated by DOL.

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.

ORDER: The appeal is dismissed.