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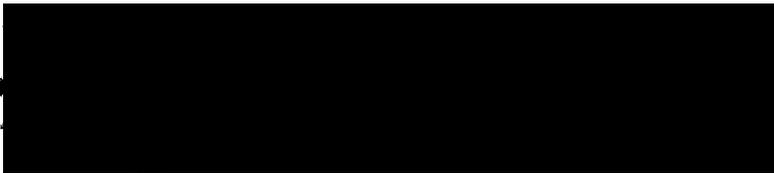
BC

FILE: WAC-02-246-52330 Office: CALIFORNIA SERVICE CENTER Date: **SEP 16 2005**

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

PETITION: 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 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 sustained. The petition will be approved.

The petitioner is a glazing contractor. It seeks to employ the beneficiary permanently in the United States as a project superintendent, glazing contractor. 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 and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is December 23, 1997. The proffered wage as stated on the Form ETA 750 is \$71,830.00 per year. On the Form ETA 750B, signed by the beneficiary on December 16, 1997, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on July 31, 2002. On the petition, the petitioner claimed to have been established on 1987, to currently have five employees, to have a gross annual income of \$150,000.00, and to have a net annual income of \$110,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 18, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on January 10, 2003.

In a second RFE dated March 31, 2003, the director requested additional evidence relevant to the beneficiary's registration status under the National Security Entry-Exit Registration System (NSEERS).

In response to the second RFE, the petitioner submitted a letter from counsel stating that the beneficiary had departed the United States prior to November 2002 and that he remained outside the United States. Counsel's letter in response to the second RFE was received by the director on May 28, 2003.

In a third RFE dated July 17, 2003, the director requested additional evidence relevant to the beneficiary's registration status under NSEERS. In response to the third RFE, the petitioner submitted a letter from counsel and photocopies of an airline ticket receipt and boarding pass for the beneficiary for a flight from New York to Istanbul on November 14, 2004, along with copies of four pages from the beneficiary's passport, two of which contain entry and exit stamps with dates in Arabic. No certified English translations of the passport stamps was provided. The petitioner's submissions in response to the third RFE were received by the director on August 28, 2003.

In a fourth RFE dated October 1, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the fourth RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the fourth RFE were received by the director on December 15, 2003.

In a fifth RFE dated February 20, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the fifth RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the fifth RFE were received by the director on May 14, 2004.

In a decision dated June 2, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition. The director found that the evidence established the petitioner's ability to pay the proffered wage for the years 1997 through 2001, but that the evidence failed to establish the petitioner's ability to pay the proffered wage in 2002.

On appeal, counsel submits a letter dated July 28, 2004 and additional evidence. Counsel states on appeal that an expert opinion letter and a letter from the petitioner's owner, both submitted for the first time on appeal, establish the petitioner's ability to pay the proffered wage in 2002.

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). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on December 16, 1997, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 1997, 1998, 1999, 2000, and 2001 and copies of Internal Revenue Service transcripts of the Form 1040 tax returns of the petitioner's owner for 2000, 2001 and 2002. The record before the director closed on May 14, 2004 with the receipt by the director of the petitioner's submissions in response to the fifth RFE. As of that date the petitioner's federal tax return for 2003 should have been available, but it was not submitted. The director's fifth RFE, dated February 20, 2004 had requested original computer printouts from the IRS of the petitioner's tax returns. Evidence in the record indicates that in early 2004 the IRS was requiring from four to five weeks to provide computer copies of tax returns and that the petitioner had requested such copies on April 4, 2004, a date on which the petitioner's tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 appears to be the most recent year for which an IRS transcript was available when the record before the director closed.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing

business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns and IRS tax transcripts show the following amounts for adjusted gross income:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
1997	\$81,067.00	not provided	\$71,830.00*	\$9,237.30
1998	\$93,171.00	not provided	\$71,830.00*	\$21,341.00
1999	\$111,553.00	not provided	\$71,830.00*	\$39,723.00
2000	\$120,178.00	not provided	\$71,830.00*	\$48,348.00
2001	\$98,859.00	not provided	\$71,830.00*	\$27,029.00
2002	\$68,680.00	not provided	\$71,830.00*	-\$3,150.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The petitioner's tax returns are joint returns for the petitioner's owner and his wife. The dependents shown on each return are as follows: two children in 1997, one child in 1998, and one child and one mother in each of the years 1999, 2000 and 2001. The household size in the years 1997 through 2001 was four persons in 1997, three persons in 1998, and four persons in each of the years 1999, 2000, and 2001. The IRS transcript for 2002 shows a total of four exemptions, suggesting that the household size remained at four persons in 2002.

The petitioner's owner did not submit any statements of monthly household expenses. The figures in the table above indicate that after paying the beneficiary the proffered wage, the amounts remaining would have been insufficient for the reasonable household expenses of the petitioner's owner in 1997 (\$9,237.00 for a four-person household) and in 2002 (-\$3,150.00 for a four-person household).

The record also contains evidence relevant only to the year 2002, submitted for the first time on appeal. That evidence addresses the director's finding that the evidence previously submitted failed to establish the petitioner's ability to pay the proffered wage in the year 2002. In a written statement dated July 27, 2004, the petitioner's owner states that the beneficiary is to perform services which in 2002 were among the duties performed by two employees of the petitioner that year. The owner states that the proportions of the salaries of those two employees attributable to such duties totaled \$31,791.00 in 2002.

The record also contains a letter dated July 29, 2004 from an individual who describes himself as an expert in financial matters. The letter provides no title of this individual, but the letter indicates that the individual is a financial advisor. The financial advisor states that in his opinion, the petitioner had sufficient resources in 2002 to pay the proffered wage to the beneficiary.

Letters from financial advisors are not among the types of acceptable evidence listed in the regulation at 8 C.F.R. § 204.5(g)(2). Moreover the letter contains no additional evidence beyond the other evidence in the record, but rather the letter is an analysis of other evidence also submitted for the record. Concerning the available income, the financial advisor concludes that if the petitioner is given credit in the amount of \$31,791.00 toward the beneficiary's salary, based on portions of the salaries paid to two existing employees as described above, the petitioner would have had \$28,641.00 remaining in 2002 after paying the proffered wage.

The record also contains copies of two bank statements and one brokerage account statement. One bank statement is in the name of the petitioner's owner. The other bank statement is in the name of the petitioner. The brokerage account statement is in the name of the petitioner's owner and his wife. Since the petitioner is a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, assets held in the name of the petitioner's owner are relevant to the issue of the petitioner's ability to pay the proffered wage, as are assets held in the name under which the petitioner does business.

Bank statements and brokerage account statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, evidence such as bank statements may be considered as supplemental evidence to the types of evidence required by the regulation. Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120S corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns.

In the instant case, one bank statement in the record is dated January 15, 2003 and shows a deposit balance of \$16,016.54. A second bank statement, for a different account, is dated December 31, 2002 and shows an ending balance of \$18,313.98. The brokerage statement is marked by hand with the date January 31, 2003. The printed dates on that statement are somewhat illegible, but the date given for the previous statement appears to read December 31, 2001. Therefore the correct date of the brokerage statement appears January 31, 2002, not January 31, 2003. The portfolio value as of January 31, 2002 is stated as \$30,189.54.

The record also contains a copy of a line of credit statement dated November 25, 2002 in the name of the petitioner's owner and his wife. That statement shows an approved home equity line of credit in the amount of \$250,000.00, of which \$46,000.00 is stated to be credit in use, with available credit of \$204,000.00.

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).

Nonetheless, in the instant case, the line of credit is shown on the statement to be a home equity line of credit. That fact indicates that the line of credit is a secured line of credit, based on the equity value of the petitioner's owner and his wife in their home. For this reason, the line of credit statement is indirect evidence that the petitioner's owner and his wife had at least \$204,000.00 in equity in their home as of November 25, 2002, an asset which they could draw upon as needed through use of the line of credit.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage.

The evidence submitted on appeal shows substantial assets held by the petitioner's owner and his wife in 2002. Moreover, the written statement dated July 27, 2004 from the petitioner's owner indicates the owner's intention to assign the beneficiary to certain duties performed in 2002 by two employees of the petitioner. The evidence submitted on appeal is sufficient to establish the petitioner's ability to pay the proffered wage in the year 2002.

As noted above, the net income of the petitioner's owner and his wife in the year 1997 was \$81,067.00. If the petitioner had paid the beneficiary the proffered wage of \$71,830.00 out of that amount, only \$9,327.30 would have remained for the household expenses of the petitioner's owner and his wife. If the year 1997 were the only year for which the record contained evidence, the evidence would be insufficient to establish the petitioner's ability to pay the proffered wage that year. However, since the record contains financial evidence about the petitioner over a period of six years, the record provides a basis for evaluating the totality of the petitioner's circumstances over a longer period of time.

In addition to the evidence discussed above, it is also relevant to consider the stability of the main source of income of the petitioner's owner and his wife, namely the business income from the petitioning business, shown on the Schedule C's attached to the Form 1040 tax returns of the petitioner's owner and his wife. The Schedule C's state information on gross receipts, gross income and net profit as shown in the table below. For the years 1997 through 2001 the record contains copies of the petitioner's Schedule C. For the year 2002 the record contains only a copy of an IRS tax transcript, which does not state figures for gross income or net profit. However, other figures on that transcript provide the information needed to calculate the gross income and net profit figures for 2002 which appear in the table below.

Schedule C's of the petitioning business

Year	Gross receipts or sales	Gross Income	Net Profit
1997	\$493,728.00	\$291,402.00	\$82,584.30
1998	\$528,503.00	\$319,347.00	\$83,875.00
1999	\$510,707.00	\$317,329.00	\$96,000.00
2000	\$529,826.00	\$306,470.00	\$125,293.00
2001	\$563,055.00	\$326,213.00	\$81,239.00
2002	\$489,644.00	\$331,476.00	\$57,419.00

The above figures show that the petitioning business had stable finances during the period relevant to the instant petition. Therefore, based on the totality of the circumstances, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage for each of the years at issue in the instant petition, including for 1997, the year of the priority date. The evidence therefore establishes that the petitioner's job offer to the beneficiary remained a realistic one during each of the years at issue in the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In his decision, the director failed to consider the household expenses of the petitioner's owner. Where a petitioner is a sole proprietorship, however, it is necessary to consider such expenses in any analysis of the petitioner's ability to pay the proffered wage. *Ubeda v. Palmer*, 539 F. Supp. at 650. Therefore the analysis of the director was incomplete. The director found that the evidence was sufficient to establish the petitioner's

ability to pay the proffered wage for the years 1997 through 2001, but that the evidence failed to establish the petitioner's ability to pay the proffered wage in 2002.

As noted above, the record before the director lacked certain evidence concerning the year 2002 which was submitted for the first time on appeal. The decision of the director to deny the petition was correct, based on the evidence then in the record. Nonetheless, for the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.