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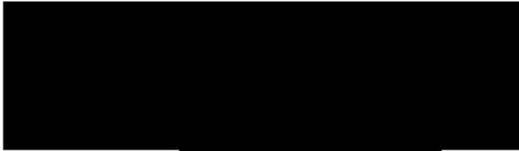
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 195 50859

Office: TEXAS SERVICE CENTER Date: OCT 27 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:
[REDACTED]

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 general contractor. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 proffered wage from the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original October 24, 2006 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of March 17, 2003.

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, 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 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 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 CFR § 204.5(d). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$29.00 per hour or \$60,320 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*,

NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief; Internal Revenue Service transcripts for the petitioner's owner for 2001 and 2002; a copy of the first page of the 2001 Form 1040, U.S. Individual Income Tax Return for the petitioner's owner; a copy of the first page of the petitioner's 2001 Schedule C, Profit or Loss From Business; copies of the petitioner's bank statements for the periods January 11, 2001, February 8, 2001, March 13, 2001, and April 11, 2001; a copy of an escrow account with Golden Escrow, Inc., dated December 20, 2000, stating that the escrow closed on December 20, 2000 with sale proceeds of \$38,511.43 (for the property at [REDACTED] Baldwin Park, CA 91706); a copy of a Short Form Deed of Trust made on May 1, 2000 through Bank of America for the property at [REDACTED] Baldwin Park, CA 91706; a 2000 Form 1090-S, Proceeds From Real Estate Transactions, in the amount of \$159,000, issued to [REDACTED]; a copy of the petitioner's business checking account for the period January 3, 2002 through January 31, 2002; copies of the petitioner's commercial mortgage loan account for the period July 15, 2002, September 16, 2002, and October 15, 2002; a copy of an escrow account with Golden Escrow, Inc., dated January 2, 2002, stating that the escrow closed on January 2, 2002 with sale proceeds of \$346,203.45 (for property located at [REDACTED], Rosemead, CA 91770); copies of the petitioner's 2002 business checking account; a copy of the first page of the petitioner's 2002 Form 1040; a copy of the first page of the petitioner's 2002 Schedule C; a copy of the petitioner's 2003 Form 1040, including Schedule C; a copy of a variable rate nondisclosable draw down line of credit loan to the petitioner in the amount of \$2,229,860 issued on November 13, 2003; and copies of the petitioner's 2004 and 2005 Forms 1120, U.S. Corporation Income Tax Returns. Other relevant evidence includes a letter, dated January 11, 2006, from Rancho Bank providing draw request including accompanying invoices/bills, copy of loan history, copy of initial cost breakdown and breakdown spread, and copies of preliminary notices; copies of the petitioner's January and February 2006 bank statements; a copy of the 2004 Form W-2, Wage and Tax Statement, issued by the petitioner on behalf of the beneficiary; copies of the petitioner's Forms DE-6, California Quarterly Wage and Withholding Report, for the quarters ending September and December 2004; copies of the petitioner's partial payroll records for 2004; and copies of unrelated Forms W-2 for the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2001 through 2003 Forms 1040 reflect adjusted gross incomes of \$53,157, \$54,533, and \$153,539, respectively.

The petitioner's 2004 and 2005 Forms 1120 reflect taxable income before net operating loss deduction and special deductions or net incomes of -\$9,678² and \$481,841, respectively. The 2004 and 2005 Forms 1120 also reflect net current assets of \$0, respectively.

The 2004 Form W-2, issued by the petitioner on behalf of the beneficiary, reflects wages paid to the beneficiary by the petitioner in 2004 of \$6,080.³

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in 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).

² The petitioner initially submitted a 2004 Form 1120 with the visa petition that reflected a net income of -\$358,703. However, the 2004 Form 1120 submitted on appeal was stamped by the Internal Revenue Service; and, therefore, the AAO will accept the Form 1120 submitted on appeal as the appropriate tax return.

The petitioner's 2004 Forms DE-6 show that the petitioner paid the beneficiary \$2,880 in the quarter ending September 30, 2004 and \$2,240 in the quarter ending December 31, 2004.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$60,320 based on its bank statements, the poverty guidelines, an investment CD, and its line of credit.

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 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 750, signed by the beneficiary on April 1, 2001, the beneficiary claims to have been employed by the petitioner from November 1994 to the present.⁴ However, counsel has submitted only the 2004 Form W-2, issued by the petitioner on behalf of the beneficiary. Therefore, the petitioner has established that it employed the beneficiary in 2004, but not in 2001 through 2003 or 2005. Thus, the petitioner is obligated to establish that it had sufficient funds to pay the entire proffered wage of \$60,320 in 2001 through 2003 and 2005. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$60,320 and the actual wages paid to the beneficiary of \$6,080 in 2004. That difference is \$54,240.

As an alternative 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, 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 federal case law. *See 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 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 CIS should have considered income before expenses were paid rather than net income. Finally, there is no

³ The AAO notes that although the beneficiary claims to have been employed by the petitioner from November 1994, the petitioner has not submitted any other evidence that corroborates its employment of the beneficiary in any year except 2004.

⁴ The AAO notes that on the visa petition (Form I-140), the petitioner stated that it was not established until 1999.

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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

In 2001 through 2003, the petitioner was structured as 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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of four in 2001 through 2003. In 2001 through 2003, the sole proprietor's adjusted gross incomes were \$53,157, \$54,533, and \$153,539, respectively. The sole proprietor's adjusted gross incomes in 2001 and 2002 were less than the proffered wage of \$60,320, suggesting that the sole proprietor did not have sufficient funds to pay the proffered wage and support a family of four. In 2003, it appears that the sole proprietor had sufficient funds to pay the proffered wage of \$60,320 and support a family of four. However, since the director failed to request and the petitioner failed to provide a list of the sole proprietor's personal monthly recurring expenses, the AAO is unable to make that determination.

In 2004 and 2005, the petitioner was structured as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2004 and 2005 were -\$9,678 and \$481,841, respectively. The petitioner could not have paid the difference of \$54,240 between the proffered wage of \$60,320 and the actual wages paid to the beneficiary of \$6,080 from its net income in 2004. In 2005, the petitioner could have paid the proffered wage of \$60,320 from its net income in 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that

period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2004 were \$0. The petitioner could not have paid the difference of \$54,240 between the proffered wage of \$60,320 and the actual wages paid to the beneficiary of \$6,080 from its net current assets in 2004.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$60,320 based on its bank statements, the poverty guidelines, an investment CD, and its line of credit.

The bank accounts provided by the petitioner represent the sole proprietor's business checking accounts. These funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Business checking account statements may only be utilized as part of a "totality of circumstances" analysis when determining the petitioner's ability to pay the proffered wage as a sole proprietor (2001 through 2003).

With regard to counsel's reference to the poverty guidelines, the AAO does not recognize the poverty guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses as they are not geographically specific, and, therefore, we will not consider them when determining the petitioner's ability to pay the proffered wage. Further, the poverty guidelines are used for administrative purposes — for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The only time CIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the Act as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding.

Counsel contends that the petitioner's line of credit should be considered when determining the petitioner's ability to pay the proffered wage of \$60,320. However, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income by adding in the sole proprietor'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

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 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 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).

With regard to the petitioner's investment CD, the AAO will consider a sole proprietor's investment CD when determining the petitioner's ability to pay the proffered wage. However, in the instant case (2001), the investment CD was only \$15,071.21 as of April 11, 2001 or \$45,248.79 less than the proffered wage of \$60,320.

With regard to the sole proprietor's personal checking accounts, the AAO will consider those accounts when determining the petitioner's ability to pay the proffered wage of \$60,320. However, in the instant case, the sole proprietor only submitted four statements for 2001 with balances ranging from a low of \$33.71 to a high of \$1,335.69. The sole proprietor would have needed a monthly balance of \$5,026.66 to pay the proffered wage to the beneficiary, far more than the highest monthly balance provided. The sole proprietor only submitted his business checking accounts for 2002.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the

petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 2003. The petitioner has provided tax returns for the years 2001 through 2005 with only one of those tax returns (2005)⁶ conclusively establishing the petitioner's ability to pay the proffered wage of \$60,320. There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons stated above, the petitioner has not established its ability to pay the proffered wage of \$60,320 from the priority date of April 26, 2001 and continuing to the present.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁶ It appears that the sole proprietor may have had sufficient funds to pay the proffered wage in 2003 from his adjusted gross income. However, without the sole proprietor's monthly recurring personal expenses, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the proffered wage of \$60,320 and support a family of four from its adjusted gross income in 2003.