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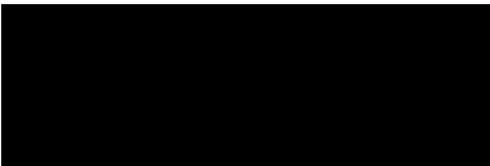
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAR 04 2005**
LIN-03-095-51117

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, Lincoln Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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.

On appeal, counsel states that the director failed to properly consider all of the evidence and that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period.

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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour, which amounts to \$30,160.00 annually. On the Form ETA 750B, signed by the beneficiary on April 3, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1980, to have a gross annual income of \$481,434.00, to have a net annual income of \$101,174.00, and to currently have two employees.

In support of the petition, the petitioner submitted a letter dated January 10, 2003 from the petitioner's owner; a letter dated August 2, 2002 from counsel to the Alaska Department of Labor and Workforce Development; a complete copy of the beneficiary's Korean passport; a copy of selected pages of the beneficiary's Korean passport; a copy of a family record of the beneficiary dated February 19, 2001, with certified English translation; a copy of a graduation certificate of the beneficiary dated January 11, 2001, with certified English translation; a copy of a career certificate of the beneficiary dated January 11, 2001 from a former employer of

the beneficiary in Seoul, Korea, showing the beneficiary's employment as a head cook, Chinese style, from February 3, 1997 to December 30, 1999; a copy of a Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and her husband for 2001; a copy of a Statement of Contract Agreement dated August 31, 2001 between the petitioner's prior owner and its current owner; a copy of an unaudited financial statement of the petitioning business dated September 30, 2002; a document information sheet dated January 22, 2003 and signed by counsel certifying that documents submitted are exact photocopies of the originals; and a letter dated January 28, 2003 from counsel to the Director, Nebraska Service Center.

The director issued a request for evidence (RFE) dated June 9, 2003 noting that the petitioner appeared to be a sole proprietorship, and requesting a copy of the owner's 2002 federal income tax return; a list of monthly recurring household expenses, including but not limited to mortgage or rent payments, automobile payments, installment loans, credit card payments and household expenses; and checking and savings account balances.

In response to the RFE counsel submitted a letter dated July 28, 2003 and the following evidence: a copy of Form 1040 U.S. Individual Income Tax Return for the petitioner's owner and her husband; an undated statement of monthly expenses of the petitioner's owner and her husband with an attached list of assets; an undated letter from the petitioner's owner; a letter dated February 3, 1999 from the State Recorder, Alaska Department of Natural Resources; a copy of a Deed of Reconveyance dated February 4, 1999 to the petitioner's owner and her husband from a title company as trustee; a copy of a letter dated July 16, 2001 from the Washington Mutual Bank; a copy of a Full Reconveyance deed dated April 12, 2001 to the petitioner's owner and her husband from an escrow services company as trustee; a copy of a Vehicle Certificate of Ownership dated June 20, 2000; a copy of a Vehicle Certificate of Ownership dated May 16, 2001; a copy of a residence insurance certificate dated May 29, 2003 issued by the Hartford Underwriters Insurance Company of Hartford, Connecticut; a copy of a bill dated May 28, 2003 from the Puget Sound Energy Company; a copy of a bill dated April 25, 2003 from the Verizon telephone company; a copy of a bill dated April 30, 2003 from the Mukilteo Water District; a copy of a bill dated April 16, 2003 from the Alderwood Water and Wastewater District; a copy of a bill dated February 28, 2003 from the PUD electric company; copies of property tax bills dated April 2002 and April 2003 from the Snohomish County Treasurer; and a copy of a bill dated June 1, 2003 from the OTZ Telephone Cooperative, Inc. Each of the bills submitted in evidence is in the name of the petitioner's owner or in the names of the petitioner's owner and her husband.

In a decision dated September 5, 2003 the director found that the income of the petitioner's owner and her husband as shown on their tax returns was insufficient to pay the proffered wage and also to pay the household expenses of the petitioner's owner and her husband. The director accordingly denied the petition.

On appeal, counsel submits a brief and the following additional evidence: printouts of reports showing used car consumer prices of a 2001 Lexus wagon and a 2000 BMW sedan, generated by an Internet Web site, www.3.nadaguides.com; a copy of Form 1040 U.S. Individual Income Tax Return for 2001 of the petitioner's prior owner and her husband; a copy of Form 540NR, California Nonresident or Part-Year Resident Income Tax Return for 2001 of the petitioner's prior owner and her husband; a copy of Form I-864 Attachment Poverty Guidelines for 2001; and a copy of a statement of Well Fargo Bank Alaska, N.A. dated July 31, 2001 for two accounts of the petitioner's prior owner.

Counsel states on appeal that the director improperly evaluated the tax return of the petitioner's owner for 2001 by failing to note that the current owner purchased the petitioner on August 31, 2001. Counsel also states that the director failed to consider the evidence in the record of the assets of the petitioner's owner and her husband.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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 present matter, however, the petitioner did not establish that it had previously employed the beneficiary.

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. 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 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the evidence submitted prior to the director's decision included a Statement of Contract Agreement stating that the present owner purchased the petitioning business on August 31, 2001. The terms of that agreement appear sufficient to establish that the current owner is a successor in interest to the petitioner's prior owner. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). However, the record before the director contained no financial information about the prior owner. Therefore, even if the current owner's adjusted gross income were sufficient to pay the entire proffered wage in 2001, along with the owner's household expenses, the evidence would still be insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date of April 16, 2001, since the current owner had no ownership interest in the petitioning business as of the priority date.

Nonetheless, even assuming that the current owner's income in 2001 is relevant to the petitioner's ability to pay the proffered wage prior to August 31, 2001, that income is insufficient to establish the petitioner's ability to pay the proffered wage in 2001.

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. In the instant petition, the owner's tax returns show the following amounts for adjusted gross income: \$39,459.00 for 2001; and \$70,439.00 for 2002. The petitioner's evidence included a statement of monthly and twice-yearly expenses for the household of the petitioner's owner. The list of statements includes property tax bills for 2002 and for 2003. For purposes of calculated the owner's annual household expenses, only the figure for the property tax bill for 2002 will be considered, which is the lower amount of the two bills. On an annual basis, the petitioner's household expenses amount to \$25,043.48. Deducting that figure from the owner's adjusted gross income of \$39,459.00 for 2001 leaves a balance of \$14,415.72. That amount is insufficient to pay the proffered wage of \$30,116.00.

For the year 2002, deducting the petitioner's annual household expenses from the owner's adjusted gross income of \$70,439.00 leaves a balance of \$45,395.72, which is greater than the proffered wage of \$30,116.00. Therefore the owner's adjusted gross income in 2002 was sufficient to pay the proffered wage in that year.

The record before the director also included a copy of an unaudited financial statement of the petitioning business dated September 30, 2002. The unaudited financial statement is not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Moreover, the financial statement in the record covers only the nine-month period ending September 30, 2002, therefore it fails to provide any information about the year 2001, which is the year of the priority date. As noted above, the information on the tax return of the petitioner's owner and her husband for 2001 is insufficient to establish the petitioner's ability to pay the proffered wage during that year.

The financial statement contains information only about the petitioning business, and lacks any information about the owner's financial matters apart from the petitioning business. However, since the petitioner is a sole proprietorship, all of the owner's financial matters are relevant to the instant petition. Most notably, the assets and liabilities portion of the financial statement does not include the total assets and total liabilities of the petitioner's owner. Aside from its limited scope, the financial statement contains at least one significant internal error.

The financial statement lists current assets of cash in banks of \$25,778.01, cash on hand of \$716.35, and inventory of \$25,500.00, for total current assets of \$51,994.36. That total is calculated accurately on the statement. The statement also lists fixed assets of building at \$180,000.00, land at \$41,000.00, fixtures and equipment of \$5,000.00, "non to compete" at \$45,000.000, and goodwill of \$300,000.00, less accumulated depreciation of -\$35,694.00. The valuations for fixtures and equipment, "non to compete" and goodwill appear to have been derived from the August 31, 2001 contract of sale, which set a total price of \$350,000.00 for those portions of the business.

The financial statement gives the total of the fixed assets as \$314,306.00. However, the actual total for those items is \$535,306.00, an amount \$221,000.00 higher than the total given on the statement. It appears that the figures for a building at \$180,000.00 and for land at \$41,000.00 were omitted in calculating the total fixed assets.

This error was continued in following entries on the statement, so that the figures for total assets, for owner's equity, and for total liabilities and owner's equity are each understated by the amount of \$221,000.00.

Errors of this magnitude indicate that the petitioner's financial figures are highly unreliable.

The petitioner's financial statement also appears to be inconsistent with the other evidence of the petitioner. One of the operating expense line items is for "auto/truck" in the amount of \$5,102.04. The only liabilities listed on the financial statement are sales tax payable of \$2,870.40 and payroll taxes of \$1,364.56. Long-term liabilities are stated to be zero. In an undated letter which appears in the record immediately below the owner's statement of monthly expenses, the owner states, "As for cars, I pay only about 1000 dollars a month for three Toyota Tacoma trucks." The owner's list of assets on the previous page of the record, however, includes no Toyota Tacoma trucks. The only motor vehicles listed are a 2000 BMW and a 2001 Lexus. A monthly expense of about \$1,000.00 for three Toyota Tacoma trucks would amount to about \$9,000.00 for the nine-month period covered by the financial statement, significantly more than the \$5,102.04 for the "auto/truck" line on that statement.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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." The record contains no explanation for the inconsistencies in the evidence noted above.

The record contains a copy of a Vehicle Certificate of Ownership dated June 20, 2000, for a 2000 BMW 3234D. The named owner of the vehicle is the husband of the petitioner's owner. The record also contains a copy of a Vehicle Certificate of Ownership dated May 16, 2001, for a 2001 Lexus RX300. The named owners of that vehicle are the petitioner's owner and her husband. Both vehicle ownership certificates were issued by the State of Washington, and give the same address for the vehicles' owners, an address on [REDACTED] WA. The vehicle certificates of ownership show no liens against either vehicle.

The record before the director also contained evidence about the owner's real property assets, consisting of a copy of a Deed of Reconveyance dated February 4, 1999 to the petitioner's owner and her husband from a title company as trustee; a copy of a letter dated July 16, 2001 from the Washington Mutual Bank; and a copy of a Full Reconveyance deed dated April 12, 2001 to the petitioner's owner and her husband from an escrow services company as trustee.

The February 4, 1999 Deed of Reconveyance pertains to a property in Kotzebue, Alaska, apparently the premises where the petitioning business is located. The property is described as Lot 27, Block 5, of the Friends Mission Subdivision, though no street address is identified on the deed. The letter dated July 16, 2001 from the Washington Mutual Bank and the Full Reconveyance deed dated April 12, 2001 pertain to a property at the address on [REDACTED]. The street address of that property is identified on the April 12, 2001 deed. It is the same address which also appears on the vehicle certificates of ownership. The list of assets submitted by the petitioner's owner states only two real properties, one which is described as "Property in Mukilteo, Washington, and the other which is described as "Uutuku Restaurant and house in Kotzebue, Alaska."

The address of the petitioner's owner and her husband as stated on their Form 1040 federal income tax returns is a post office box in Kotzebue, Alaska. No copies of their state income tax returns were submitted for the record, and no other evidence in the record indicates whether they claim residence for tax purposes in the state

of Alaska or in the state of Washington. Nearly all of the utility and other bills submitted as evidence of the petitioner's household expenses pertain to their property in Mukilteo, Washington.

The Deed of Reconveyance dated February 4, 1999 for the Kotzebue, Alaska, property shows that the petitioner's current owner of the petitioner and her husband already owned the premises of the petitioning business as of that date. A check of the public Internet Web site of the Alaska Department of Natural Resources shows that the petitioner's owner and her husband acquired the property in May of 1997. See Alaska Department of Natural Resources, *Alaska Recorder, Recorder's Office Search*, <http://www.dnr.state.ak.us/ssd/recoff/search.cfm> (accessed February 28, 2005). The petitioner's current owner and her husband therefore acquired that real property more than four years before they purchased the petitioning business on August 31, 2001.

The record in the instant petition contains no information on the business relationship between the petitioner's current owner and the previous owner prior to August 31, 2001. The Statement of Contract Agreement in the record dated August 31, 2001 describes a sale of the business to the current owner, including equipment and inventory, for a total of \$350,000.00, plus inventory of \$40,183.38. No reference is made to a transfer of the real property where the business was located, which the Alaska Recorder's Office records show was already owned as of that date by the petitioner's current owner and her husband, as noted above. The Form 1040 individual income tax return of the current owner and her husband for 2001, Schedule E, shows \$17,600.00 in rental income from "Commercial Real Estate," with a location of the property as a post office box in Kotzebue, Alaska. This item presumably refers to rental income for the property where the petitioning business operates.

The Statement of Contract Agreement states that payment of the total of \$350,000.00 purchase price for the business will be a down payment of \$200,000.00 plus \$40,183.31, with the balance of \$150,000.00 to be paid in equal payments of \$37,500.00 each by February 28, 2002, August 31, 2002, February 28, 2003 and August 31, 2003. The record in the instant petition contains no information indicating whether any of those amounts were actually paid. The petitioner's unaudited financial statement dated September 30, 2002 shows no liabilities other than sales tax payable of \$2,870.40 and payroll taxes of \$1,364.56.

The petitioner's evidence before the director showed that no liens existed on any of the real and personal properties of the petitioner's owner and her husband, namely, the real property in Mukilteo, Washington, the real property in Kotzebue, Alaska, and a 2001Lexus RX300, properties owned by the petitioner's owner and her husband, and a 2000 BMW 3234D, owned by the husband alone. However, the petitioner's evidence indicates that the petitioner's owner had substantial liabilities, mainly as a result of her purchase of the petitioning business on August 31, 2001. Because the record lacks complete and audited reports about the finances of the petitioner's current owner, the evidence in the record concerning the assets of the current owner fails to establish the petitioner's ability to pay the proffered wage in 2001 or in 2002.

In his decision, the director made some errors in analysis. The director understated the owner's household expenses on an annual basis, using a figure of \$17,280.00 per year. The method used by the director to calculate that figure is not clear from the director's decision. Also, in evaluating the petitioner's net income, the director used the figure for owner's total income, from line 22 of the Form 1040, an amount of \$41,420.00, rather than owner's adjusted gross income, from line 33 of the Form 1040, an amount of \$39,459.00. Furthermore, the director added business depreciation expenses of \$2,088.00 to the owner's total income income, to produce a figure for the owner's net income of \$43,508.00. However, when evaluating an owner's tax returns, CIS considers all expenses, including depreciation expenses. Therefore it was error for the director to add the owner's business depreciation expenses to the owner's income when evaluating the petitioner's ability to pay the proffered

wage. See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. Despite these errors in analysis, the director correctly concluded that the evidence failed to establish the petitioner's ability to pay the proffered wage during 2001, while also allowing sufficient funds for the owner's household expenses. The decision of the director to deny the petition was therefore correct.

In his brief on appeal, counsel asserts that the director erred in failing to limit his analysis of the current owner's ability pay the proffered wage to the last four months of 2001, since the statement of contract agreement in the record dated August 31, 2001 shows that the current owner purchased the petitioning business effective that date. Although it may sometimes be reasonable to consider separately the financial situations of different owners when a change in the ownership of a petitioner has occurred, the record before the director in the instant petition lacked any financial evidence pertaining to the prior owner. Therefore even if the director had limited his evaluation of the present owner's financial situation to the last four months of 2001, the evidence would still have compelled a denial of the petition, since the record lacked any other evidence of the petitioner's ability to pay the proffered wage as of the April 16, 2001 priority date.

In his decision, the director also stated that the petitioner had filed a second I-140 petition, at the same annual proffered wage of \$30,160.00, for a total of \$60,320.00. Although the director mentioned the second petition, he did not base his analysis on the petitioner's ability to pay total proffered wages of \$60,320.00, but only on the proffered wage of \$30,160.00 in the instant petition. Counsel asserts in his brief that the director should have approved at least one of the petitions. However, as shown above, the evidence before the director failed to establish the petitioner's ability to pay the proffered wage of \$30,160.00 during the relevant period. For this reason it is not necessary to evaluate the petitioner's ability to pay an additional proffered wage under any other I-140 petition filed by the same petitioner.

The assertions of counsel in his brief therefore fail to overcome the decision of the director, based on the evidence in the record before the director.

On appeal, counsel submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I&N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

The evidence submitted for the first time on appeal consists of printouts of reports showing used car consumer prices of a 2001 Lexus wagon and a 2000 BMW sedan, generated by an Internet Web site, www3.nadaguides.com; a copy of Form 1040 U.S. Individual Income Tax Return for 2001 of the petitioner's former owner and her husband; a copy of Form 540NR, California Nonresident or Part-Year Resident Income Tax Return for 2001 of the petitioner's former owner and her husband; a copy of Form I-864 Attachment, Poverty Guidelines for 2001; and a copy of a statement of Well Fargo Bank Alaska, N.A. dated July 31, 2001 for two accounts of the petitioner's former owner.

The printouts of used car prices for the vehicles owned by the petitioner's current owner and her husband contain no significant information which would change the analysis above concerning their finances. The evidence submitted prior to the director's decision lacked an audited financial statement showing the assets and liabilities of the petitioner's current owner. The additional evidence concerning the market value of the vehicles owned by the petitioner's current owner and her husband does not remedy the lack of an audited financial statement.

The evidence concerning the finances of the petitioner's prior owner, however, requires a close analysis, since no evidence about the prior owner was submitted previously.

The Form 1040 U.S. Individual Income Tax Return of the prior owner and her husband for 2001 indicates that prior to the sale of the petitioning business on August 31, 2001 the business was a sole proprietorship, as it was after that sale. The relevant figure for net income of the prior owner therefore is the figure for the adjusted gross income of the prior owner and her husband, which appears on their Form 1040 tax return on line 33, and which is stated as \$67,442.00. That amount is greater than the proffered wage of \$30,160.00 by the amount of \$37,202.00. Since the priority date is April 16, 2001, the prior owner would have been responsible for paying only a portion of the proffered wage during the year 2001, which would leave an even greater balance remaining from the adjusted gross income for the prior owner's personal household expenses. Nonetheless, a close examination of the 2001 tax return of the prior owner and her husband shows that nearly all of their income was derived from the sale of the petitioning business to the current owner. Gains from that sale are shown as capital gains on line 13 of the Form 1040 of \$29,800 and as other gains on line 14 of the Form 1040 of \$53,240. The other income items on that Form 1040 total only \$5,024. Against the income items, business losses from the petitioning business are stated as \$20,622.00. Therefore, during the first eight months of 2001, until the prior owner sold the business on August 31, 2001, the prior owner lost \$20,622.00 operating the petitioning business. For this reason, the net income of the prior owner during 2001 is found to be insufficient to establish the petitioner's ability to pay the proffered wage during the portion of 2001 preceding August 31, 2001.

Concerning the assets of the prior owner, the petitioner submits on appeal a copy of a statement from Wells Fargo Bank, Alaska, N.A., dated July 31, 2001 for two accounts of the petitioner's prior owner. Bank 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. While that 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's prior owner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

The Wells Fargo Bank statement submitted on appeal contains information on two accounts. One account is a business checking account in the name of the prior owner doing business as the petitioner. The other account is a personal checking account in the name of the prior owner and her husband. The business checking account shows an opening balance on June 30 of \$46,063.42, total deposits and credits of \$58,503.99, total withdrawals and debits of -\$56,141.45, and an ending balance on July 31 of \$48,425.96.

In the business checking account portion of the statement, some of the deposit entries on the fax copy of the statement in the record are illegible. The legible entries show deposits to the business checking account ranging from a low of \$1,224.83 to a high of \$3,354.63, with deposits on fourteen days during the month, including some days with multiple deposits, and with no deposits on some days.

The personal checking account shows an opening balance on June 22 of \$31,202.44, deposits of \$49,925.00, withdrawals of -\$20,952.57, and a balance on July 12 of \$60,174.87, apparently reflecting the last transaction in the monthly reporting period.

The deposits to the personal checking account show a very different pattern than the deposits to the business checking account. The \$49,925.00 in total deposits to the regular checking account consisted exclusively in five wire transfers from the Korea First Bank, each in the amount of \$9,985.00. Four of those wire transfers were made on July 9, 2001 and one of those wire transfers was made on July 10, 2001. The withdrawals from that account during the period covered by the statement totaled \$20,853.00. Of the withdrawals, \$19,970.00 were made by two wire transfers on July 12, 2001 in the amount of \$9,985.00 each, one to the Chase Manhattan Bank and one to Citibank, N.A. The fact that the amounts of the incoming and outgoing wire transfers were each slightly under \$10,000.00 suggests that the amounts may have been intended to avoid triggering regulatory reporting requirements, some of which have a \$10,000.00 threshold. *See, e.g., Internal Revenue Service, Publication 593, Tax Highlights for U.S. Citizens and Residents Going Abroad, (April 2003), at 4, available at <http://www.irs.gov/pub/irs-pdf/p593.pdf> (accessed March 1, 2005).*

Although the bank statement for the petitioner's prior owner shows substantial closing balances in July 2001 for each of the two accounts listed, that evidence is insufficient to establish the prior owner's ability to pay the proffered wage as of the priority date of April 16, 2001 and for the following months until the sale of the business on August 31, 2001. The bank balance information reflects only a single month. Moreover, no evidence was submitted concerning the liabilities of the prior owner. As noted above, the Schedule C attached to the Form 1040 federal income tax return of the prior owner and her husband shows a loss of \$20,622.00 for the petitioning business during 2001, a fact which suggests that the prior owner may have incurred significant liabilities. Since the record lacks evidence on the prior owner's liabilities, the evidence of the prior owner's assets in the form of bank account balances in July 2001 is insufficient to establish the prior owner's ability to pay the proffered wage during the period from April 16, 2001 until the sale of the business on August 31, 2001.

For the foregoing reasons, the evidence submitted on appeal would fail to overcome the decision of the director, even if that evidence were properly before the AAO.

Beyond the decision of the director, the evidence in this petition raises an issue concerning the nature of the petitioning business. On the Form ETA 750 and on I-140 petition the name of the petitioner is "Utuku Restaurant." However, on the Statement of Contract Agreement in the record dated August 31, 2001 the name of the petitioner is [REDACTED]. The Schedule C's attached to the Form 1040 tax returns of the petitioner's owner and her husband give the business name as "Utuku Store," and describe the principal business as "Retail, Grocery and Foods." (Forms 1040 for 2001 & 2002, Schedule C's, Items A, C). The record contains no evidence explaining the inconsistent references in the record to the petitioner as a "restaurant" and as a "store."

A letter in the record dated August 2, 2002 from counsel to the Alaska Department of Labor and Workforce Development states that the evidence submitted to that agency in support of the Form ETA 750 labor certification application included photographs of the petitioner. However, copies of photographs of the petitioning business were not included among the documents submitted for the record in the instant I-140 petition.

The City of Kotzebue's official Web site contains photographs of the business in the city, including a photograph of the petitioning business, which is identified as "Uutuku Store and delivery fast food." City of Kotzebue, *Photographs of Kotzebue II*, <http://kotzpdweb.tripod.com/city/> (accessed February 28, 2005). The building shown is a modest wooden building, mainly one story, but with a two-story portion at one end. Parking spaces for three vehicles are in front of the building. The list of the petitioner's assets in the record of the instant petition describes the petitioner's premises as [REDACTED] and house in Kotzebue, Alaska." The small size of the building shown on the photograph mentioned above would not appear sufficient to contain both a house and a restaurant. The property records discussed above indicate that the premises of the petitioner is the only real property owned by the petitioner's owner in Kotzebue.

The petitioner's evidence and the public information on the official Web site of the City of Kotzebue discussed above indicate that the petitioner is not a restaurant, but rather is a small grocery store with a fast food delivery service.

The Form ETA 750 supporting the instant petition states the nature of the employer's business as "Restaurant, Chinese and American," and the name of the job title as "Cook, Specialty, Foreign Food." The description of the job to be performed includes the following duties: "Serves food to waiters on order. . . . Selects and develops Chinese recipes for the restaurant. Supervises other workers engaged in preparing, cooking and serving Chinese and American dishes."

The analysis above indicates that the Form ETA 750 states a different employment capacity than the one in which the petitioner intends to employ the beneficiary. The petitioner therefore has not established that the employment will be in accordance with the terms of the ETA 750. The beneficiary must engage in the profession relevant to the Form ETA 750 and applicable to this Immigrant Petition for Alien Worker (I-140). See *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966); *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966).

In summary, the evidence submitted prior to the director's decision was insufficient in failing to include evidence pertaining to the petitioner's prior owner, who owned the petitioner on the priority date, and for failing to establish that the current owner had the ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence. Furthermore, the evidence submitted on appeal fails to establish that the prior owner had the ability to pay the proffered wage for the portion of 2001 when she owned the petitioner.

Finally, the evidence indicates that the petitioner intends to employ the beneficiary in a capacity other than that stated on the Form ETA 750.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.