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FILE: [REDACTED]  
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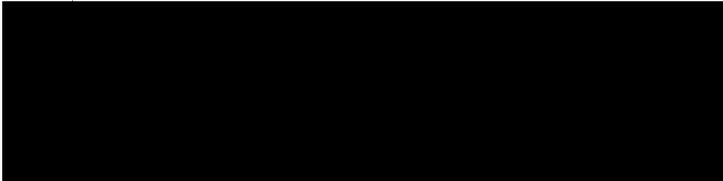
Office: CALIFORNIA SERVICE CENTER

Date: **MAR 17 2005**

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

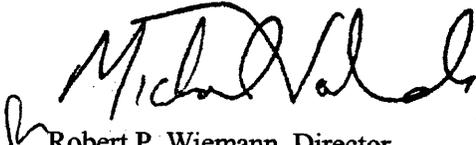
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The 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 dismissed.

The petitioner is an importer-wholesaler of fine diamonds. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 he 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 asserts the director erred in determining that the petitioner had not established his ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 22, 2001. The proffered wage as stated on the Form ETA 750 is \$30.66 per hour, which amounts to \$63,776.80 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a Form G-28; a certified Form ETA 750; the petitioner's letter of support; the petitioner's 2001 Form 1040 tax return; state tax board's retailer's license; second-quarter 2001 employer's state quarterly tax return; the beneficiary's Bachelor of Science degree diploma in Commerce with an accounting major; a former employer of the beneficiary confirming her qualifications; recent pay stubs from the beneficiary's recent employment with the petitioner; the beneficiary's passport with a Form I-94; and retail brochures and catalogues of the petitioner.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on March 3, 2003, requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested annual reports, federal tax returns or audited financial statements, with Forms W-2 for 2001 and 2002; a statement of the petitioner's household living expenses for housing, food, motor vehicles, utilities, credit cards, student loans, clothing, child care, home maintenance, gardener and any other

recurring expenses; and the most recent four quarters accepted by the state of California of the petitioner's employer's state quarterly wage reports. Additionally, the director asked for information about the beneficiary's qualifying experience and education.

In response, on May 22, 2003, counsel submitted, another copy of the petitioner's 2001 Form 1040 tax return; a filed extension for the petitioner's 2002 Form 1040 tax return; the petitioner's monthly bank statements for commercial activities for the period from January 2001 to January 2003; the petitioner's three-year business plan for business expansion predicting the beneficiary would help increase company revenues; the petitioner's monthly household expenses; the beneficiary's 2002 tax returns and 2002 IRS Form W-2s; and the petitioner's last four quarterly wage reports listing workers. He did not submit all of the quarterly wage reports requested.

The submitted tax returns reflect the following information:

Tax Year:	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$94,289	\$107,035
Petitioner's gross receipts or sales (Schedule C)	1,724,365	1,379,476
Petitioner's wages paid (Schedule C)	9,515	5,740
Petitioner's net profit from business (Schedule C)	91,150	104,047

On June 23, 2003, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and denied the petition. The director found that:

- The petitioner's bank balances had dipped into negative figures in June 2002 and August 2002, and had a notice of insufficient funds, returned check fees and overdraft fees.
- The cash deficit remaining after reducing the petitioner's \$94,289 in adjusted gross income for 2001 by the \$85,932.36 in annualized household expenses showed the petitioner unable to pay the proffered wage of \$63,772.80.
- The submitted pay stubs did nothing to establish ability to pay.

On appeal, counsel submitted the petitioner's 2002 Form 1040 tax return; a redacted copy of an unrelated AAO decision dated January 11, 2002; the petitioner's commercial account bank statement showing ending monthly cash balances for 2001 and 2002 that consistently exceeded the proffered wage if pro-rated into monthly payments.

In his brief counsel asserts the director erred in that:

- The evidence was sufficient to find ability to pay;
- Prior AAO decisions used bank statements similar to those submitted to establish ability to pay;
- The petitioner has met the preponderance standard of *Matter of E-M*, 20 I&N Dec.77, Interim Decision (BIA1989) 3113;
- Hiring the beneficiary would add to the petitioner's ability and help with the planned expansion;

- The dismissal of the appeal would cause hardship to the petitioner, who asserts he has not been able to find a similarly qualified U.S. worker.
- The AAO should not deduct petitioner's household expenses from adjusted gross income; and,
- The petitioner's end-of-month bank balances for 2001 and 2002 establish his ability to pay.

Counsel's citation of a non-precedent decision of the AAO is unpersuasive. Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel failed to show the similarity in the facts of the each case.

Further, as to the likelihood of hiring the beneficiary generating more income, counsel has given no detail or documentation to explain how the beneficiary's employment as an accountant would significantly increase profits in a jewelry business. This hypothesis without more does not outweigh the evidence on ability to pay that is present in the petitioner's tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary \$5,740 in 2002 and \$5,330 in 2003. Since the proffered wage is \$63,772.80, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$58,032 in 2002 and \$58,032 in 2003. The petitioner's income, however, does not establish its ability to pay either amount much less the proffered wage for 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record includes the petitioner's last-quarter state quarterly return for 2002 showing the \$5,740 in wages paid the beneficiary, and \$5,330 in more wages paid in the report of for the first quarterly return for 2003. If annualized, this would equal \$22,000 and still fail to cover the deficit evident from the following calculations.

Thus, calculations taken from the petitioner's Form 1040 tax returns for 2001 and 2002 show the following:

Proffered Wage	\$63,773
<u>Annualized Expenses</u>	<u>\$85,932</u>
Proffered Wage + Expenses	\$149,705

<u>2001</u>		<u>2002</u>	
Wages Paid	\$5,740	Wage Paid	\$5,330
<u>Adjusted Gross Income (AGI)</u>	<u>\$94,289</u>	<u>Adjusted Gross Income (AGI)</u>	<u>\$107,035</u>
Paid Wage + AGI	\$100,029	Paid Wage + AGI	\$112,365
Proffered Wage + Expenses	\$149,705	Proffered Wage + Expenses	\$149,705
<u>Paid Wage + AGI</u>	<u>\$100,029</u>	<u>Paid Wage + AGI</u>	<u>\$112,365</u>
Difference	\$49,676	Difference	\$37,340

It is apparent for both 2001 and 2002, that when adding the wages paid the beneficiary to the petitioner's net income, the petitioner would fall short – covering the proffered wage plus the petitioner's monthly household expenses – by tens of thousands of dollars. Thus, the income analysis does not establish the petitioner's ability to pay.

Counsel asserts that household expenses should not reduce the petitioner's adjusted gross income in determining ability to pay. The petitioner, with a family of four to support, could rely upon his wife's bank accounts to cover the couple's household expenses, he asserts. Counsel, however, provides no information from the wife's bank statements or her W-2 Forms. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, saying monthly household expenses should not reduce adjusted gross income as a source of revenue likewise ignores the realities of 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 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. In addition, they 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 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

On appeal counsel has submitted bank statements from the petitioner's checking accounts covering the period January 2001 through December 2002, with ending cash balances that range \$5,590.65 in June 2002 to \$153,629.87 in March 2002, each exceeding the proffered wage if broken into a monthly salary of \$4,650.

In general, bank statements do not establish ability to pay. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

A third reason bank statements general do not establish ability to pay is that, contrary to counsel's assertion, funds shown on a petitioner's bank statements do not necessarily reflect additional available funds that were not represented on its tax returns. If the balances in the petitioner's accounts consistently had exceeded the petitioner's annual gross receipts or had surpassed the total of the proffered wage and annualized expenses, and/or if the statement indicated that an account was relatively inactive, this office might be persuaded that the funds would not be consumed in the ordinary course of business by the petitioner's expenses and thus represent additional assets of the petitioner. However, in this case the account is a "Basic Business Checking Account" and is listed in the name of [REDACTED]. The title of the account, the amounts in the account during the months for which statements were submitted, and the activity of the account are entirely consistent with the use of that account as a depository for the petitioner's receipts and a fund from which to draw checks to pay expenses. Therefore, the amounts in the petitioner's account have not been shown to represent any additional funds apart from those shown on the line for gross receipts and or other pertinent lines on Schedule C which are in turn factored into the calculation of the petitioner's adjusted gross income.

The petitioner has thus not demonstrated his ability to pay the proffered wage during 2001 and 2002 to establish a continuing ability to pay the proffered wage beginning on the priority date.

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. The petition is denied.