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**U.S. Citizenship
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Services**

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FILE: WAC 03 231 53128 Office: CALIFORNIA SERVICE CENTER Date: OCT 20 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:
[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, 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 a bookkeeping service. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 July 14, 1997. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which amounts to \$20,800 annually. On the Form ETA 750B, signed by the beneficiary on July 7, 1997, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on August 8, 2003. On the petition, the petitioner claimed to have been established in 1984, to currently have seven employees, to have a gross annual income of \$321,102, and to have a net annual income of \$13,699.

In support of the petition, the petitioner submitted:

- Counsel's G-28;
- An approved ETA 750;
- The petitioner's Form 1040 returns for 1997–1999;
- A letter dated April 15, 2002, in which Mexicali Tires Auto Repair, formerly Mexico Tires, states it has employed the beneficiary as a bookkeeper since July 1995.

The director determined that the evidence did not demonstrate the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Accordingly, in a decision dated May 13, 2004, he denied the petition.

The decision found that the petitioner's 1997 and 1998 Form 1040 returns showed that the petitioner's adjusted gross income exceeded the proffered wage, while for 1999, the petitioner's adjusted gross income had dropped below the proffered wage. Further, in 1997 and 1998, the petitioner claimed two daughters as dependents, leading the director to conclude the petitioner would not be able to support "the petitioner's household of 4 family members"¹ with his adjusted gross income, were he also to pay the proffered wage.

On appeal, counsel submits no brief and no additional evidence but states that the director erred in finding the evidence did not demonstrate the petitioner's ability to pay the proffered wage continuously from the priority date and until the beneficiary obtains permanent residence.

On the I-290B, signed by counsel on June 7, 2004, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. However, no further documents have been received by the AAO to date. On September 28, 2005, the AAO requested counsel by fax to submit the brief or additional evidence as promised. Counsel replied with a written acknowledgement of not having submitted a brief or more evidence since filing the appeal. Accordingly, this office will review the documents currently in the file as the complete record of proceedings.

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 examines 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 July 7, 1997, the beneficiary did not claim to have worked for the petitioner.

Accordingly, CIS next examines the petitioner's net income figure reflected on the petitioner's federal income tax return but 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

¹ The box for "married filing joint return" is checked on the petitioner's 1997 and 1998 returns but "single" is checked on his 1999 return. The 1997 and 1998 returns also list his two daughters as dependents but the 1999 return does not.

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 \$20,000.00 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 show the following amounts for adjusted gross income:

Tax Year	Net income	Wage increase needed To Pay Proffered Wage*	Surplus or (Deficit)
1997	\$23,678	\$20,800	\$2,878
1998	\$37,667	\$20,800	\$16,867
1999	\$11,532	\$20,800	-\$9,268

* The full proffered wage, since no wage payments were made to the beneficiary in 1997-1999.

The figures fail to demonstrate the ability of the petitioner to pay the proffered wage. The record of proceedings does not contain evidence of the petitioner's average household expenses for any of the three years, but the director is correct to conclude that he would not have sufficient income to cover his yearly household expenses, particularly to support the dependents he claims. It is improbable that the sole proprietor could support himself and his family of three or four on the dollar amounts listed above for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. This office also notes that the record of proceedings is devoid of evidence demonstrating the petitioner has other current assets that he could use to the ability to pay the proffered wage continuously from the priority date and until the beneficiary obtains permanent residence status.

The record also contains copies of the petitioner's self-prepared, unaudited financial statement of income and expenses for calendar year 2003, listing a net operating profit of \$52,114.58. Unaudited financial statements are 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 of its 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.

After a review of the federal tax returns, it is concluded that the petitioner has not established its ability to pay the proffered wages as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.