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FILE: [REDACTED]
WAC 03 137 53435

Office: CALIFORNIA SERVICE CENTER

Date: JUL 26 2005

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail installer of motor vehicle audio equipment. It seeks to employ the beneficiary permanently in the United States as an electronic equipment service technician. 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 August 24, 2001. The proffered wage as stated on the Form ETA 750 is \$13.01 per hour, which amounts to \$27,060.80 annually. On the Form ETA 750B, signed by the beneficiary on August 17, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on March 26, 2003. On the petition, the petitioner claimed to have been established in July 1998, to currently have one employee, and for 2001 to have a gross annual income of \$197,398 and a net annual income of \$32,837.

In support of the petition, the petitioner submitted:

- The original Form ETA 750 labor certification application;
- Letters from two of the beneficiary's former employers, from one in California dated March 9, 2001, and the other, translated with translator's certificate, dated February 2001 from the Republic of Korea;

- Jae Hyun Oh's 2000 and 2001 Form 1040 return with the petitioner's income listed on schedule C;

In a request for evidence (RFE) dated June 10, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 also specifically requested the petitioner's financial information for 2002. Further, the RFE asked for a statement of [REDACTED] monthly expenses for the family's household living expenses.

In response to the RFE, the petitioner submitted, among other unrelated documents:

- The [REDACTED] joint Form 1040 return for 2002;
- A statement of Mr. [REDACTED] monthly family living expenses; and,
- A quarterly Form DE-6 employer's report for the second quarter of 2003, listing information about the petitioner's lone employee;

In a decision dated February 14, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

On appeal counsel states that the director erred in deciding the petitioner's ability to pay the proffered wage without considering the \$500,000 estimated cash value of the petitioner; the \$75,000 value of a same-named business in Porterville, California, the \$270,000 value of the petitioner's home and the \$1.3 million value of two income properties in Bakersfield; the \$34,000 value of his three motor vehicles; the \$92,000 value of his bank accounts; in all totaling nearly \$2.27 million.

Missing from counsel's listing of the [REDACTED] assets is any independent appraisal of the asserted value of those assets, or of any evidence that they are free of any encumbrances securing debt. Similarly, counsel's reliance on the amount of the petitioner's total assets to pay the proffered wage is misplaced. A petitioner's total assets are not readily available to pay the proffered wage because the owner will not ordinarily sell his real estate to raise cash, as is the case with the petitioner's current assets, which the owner is more likely to convert into cash within the coming year and may therefore be considered in deciding ability to pay. It is noted, however, that the petitioner has listed the value of some of those assets on his Form 1040s for 2000 and 2001.¹ Again, this documentation adds little without some proof of the net value of each.

Further, even the petitioner's current assets are not available to pay the proffered wage until reduced by the petitioner's current liabilities. The petitioner's current liabilities are those that the petitioner is expected to

¹ Among them are:	<u>2000</u>	<u>2001</u>
Schedule C:		
Year-end Audio Warehouse Inventory	\$21,400	\$22,310
Schedule E		
Comm. Bldg. 1207 K St., Bakersfield	no valuation	no valuation

pay within the coming year. The petitioner's current assets net of its current liabilities are its net current assets. The record makes no mention of Mr. [REDACTED] or the petitioner's current liabilities.

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, the beneficiary did not claim to have worked for the petitioner.

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

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, 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 \$20,000.00 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 adjusted gross income of \$37,585 adjusted gross income for 2001, and \$65,262 for 2002. Since each is less than the proffered wage, those figures fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements, submitted on appeal² but those statements are confined to the month of January 2004 and do not refer to the petitioner's cash balance from the priority date forward. As such they do not add to the picture of the petitioner's financial health on and after the priority date. 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. "In appropriate cases," the petitioner can go beyond the documentation specified at 8 C.F.R. § 204.5(g)(2) in attempting to present an accurate financial picture of the petitioner's business. While 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. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered 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.

² The petitioner's exhibit 16.