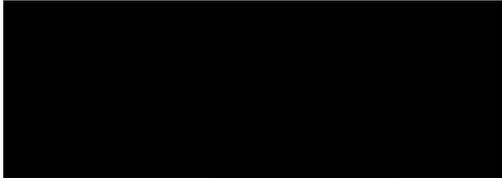


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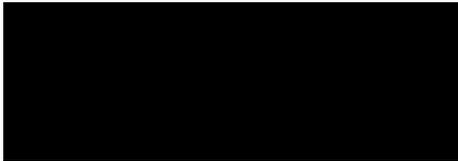
BG

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 16 2005
WAC-03-238-54616

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 sustained.

The petitioner is a talent management firm. It seeks to employ the beneficiary permanently in the United States as an art and media director. 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 December 17, 1998. The proffered wage as stated on the Form ETA 750 is \$16.37 per hour, which amounts to \$34,049.60 annually. On the Form ETA 750B, signed by the beneficiary on November 20, 1998, the beneficiary did not claim to have worked for the petitioner. The ETA 750B was certified by the Department of Labor on May 9, 2002.

The I-140 petition was submitted on August 16, 2003. On the petition, the petitioner claimed to have been established in 1993, to currently have one employee, to have a gross annual income of approximately \$132,000.00, and to have a net annual income of approximately \$58,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated December 17, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also requested additional evidence concerning the beneficiary's experience, the petitioner's business location, and the immigration status of the petitioner's owner.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on March 10, 2004.

In a decision dated April 5, 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.

Counsel states on appeal that the federal tax returns of the petitioner's owner in the record and other evidence, including copies of bank statements of the petitioner's owner, establish the petitioner's ability to pay the proffered wage during the relevant period. Counsel also states that documents submitted for the first time on appeal provides further evidence of the petitioner's ability to pay the proffered wage during the relevant period.

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).

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 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 750B, signed by the beneficiary on November 20, 1998, the beneficiary did not claim to have worked for the petitioner and no evidence in the record indicates that the beneficiary has worked for the petitioner.

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. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner’s owner for 1998, 1999, 2000, 2001, 2002 and 2003. The record before the director closed on March 10, 2004 with the receipt by the director of the petitioner’s submissions in response to the RFE. As of that date the federal tax return of the petitioner’s owner for 2003 was not yet due. However, a copy of that return has been submitted on appeal.

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.

In the instant petition, the petitioner’s owner has submitted a statement of monthly expenses for 2004 showing a total of \$1,996.02 in household expenses each month, equivalent to \$23,952.24 per year. Since no statements of household expenses have been submitted for any previous years, that figure will be considered as the household expenses of the petitioner’s owner for each of the years at issue in the instant petition.

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	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	\$93,406.00	\$23,952.24	\$34,049.60*	\$35,404.16
1999	\$83,562.00	\$23,952.24	\$34,049.60*	\$25,560.16
2000	\$96,065.00	\$23,952.24	\$34,049.60*	\$38,063.16
2001	\$27,404.00	\$23,952.24	\$34,049.60*	-\$30,597.84
2002	\$54,864.00	\$23,952.24	\$34,049.60*	-\$3,137.84
2003	\$114,823.00	\$23,952.24	\$34,049.60*	\$56,821.16

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 1998, 1999, 2000 and 2003, but is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage.

In the instant case, the tax returns of the petitioner's owner show additional financial resources available to the owner beyond the amounts shown as adjusted gross income. Notably, the Schedule D's attached to the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner show significant activity in sales of securities during the relevant period. The Schedule D, Capital Gains and Losses, of the petitioner's owner for 2001 shows sales of securities with proceeds totaling \$51,546.00. Similarly for 2002, the Schedule D of the petitioner's owner shows sales of securities with proceeds totaling \$26,559.00.

In the years 2001 and 2002 sales of securities produced no taxable income for the owner, since the sales were made at losses from the purchase prices of the securities. Those losses were not taken as deductions in those years, but were carried over to future years, since the owner already had capital losses carried forward from previous years. Schedule D part III indicates that the maximum net capital loss allowed annually for an individual taxpayer is \$3,000.00, which is the amount of loss claimed by the petitioner's owner on her tax returns for 2001 and 2002. The owner's additional capital losses in 2001 and 2002 were carried forward by the owner, along with additional capital losses carried forward from previous years. (See Schedule D's of the petitioner's owner for 2001, 2002 and 2003)

Although no taxable income resulted to the owner in 2001 or 2002 from the sale of securities, the proceeds of those sales resulted in additional financial resources available to the petitioner's owner during those years.

The results of adding the proceeds from the sale of securities to the petitioner's adjusted gross income in 2001 and 2002 are shown in the following table.

Tax year	AGI plus securities proceeds	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$78,950.00	\$23,952.24	\$34,049.60*	\$20,948.16
2002	\$81,423.00	\$23,952.24	\$34,049.60*	\$23,421.16

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The information on the Schedule D's attached to the tax returns of the petitioner's owner for 2001 and 2002 is therefore sufficient to establish the petitioner's ability to pay the proffered wage in those years.

The record contains copies of audited financial statements for the petitioner for the years 2001 and 2002, submitted for the first time on appeal. The audit reports cover only the petitioning business, not the entire financial situation of the petitioner's owner. The audit report states that the financial statements were prepared on the basis of accounting which the petitioner uses for income tax purposes. The financial statements in part contain information which appears on the Schedule C's attached to the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001 and 2002, but the audited financial statements also provide additional information to that found on the Schedule C's. It is not clear from the record whether all item categories shown on the audit report are based on the same accounting method used in the preparation of the tax returns of the petitioner's owner for those years. The audited financial statements show proceeds from the disposal of securities, in the amounts of \$26,672.00 in 2001 and \$40,402.00 in 2002,

amounts which differ from the proceeds as shown on the Schedule D's of the petitioner's owner for those years.

The record also contains an unaudited profit and loss statement for the period January 2003 through December 2003. 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.

The audited financial statements for the petitioning business for 2001 and 2002 are acceptable evidence and they provide some additional support for the petitioner's ability to pay the proffered wage in those years. However, since the audited financial statements pertain only to the petitioning business, and not to the entire financial situation of the petitioner's owner, they are entitled to less evidentiary weight than the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner.

The record also contains copies of bank statements and brokerage account statements in the name of the petitioner's owner, either in owner's name alone or jointly with one or more other persons. Since the petitioner is a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, assets held in the name of the petitioner's owner are relevant to the issue of the petitioner's ability to pay the proffered wage, as are assets held in the name under which the petitioner does business.

Bank statements and brokerage account 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. However, evidence such as bank statements may be considered as supplemental evidence to the types of evidence required by the regulation. Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns.

The record contains copies of the following statements:

Monthly statements

[REDACTED] 1/31/01 - 12/31/03

(in the name of the petitioner's owner dba the petitioner)

[REDACTED] WCMA account, business checking, 1/31/01 - 12/31/02

(in the name of the petitioner)

[REDACTED] CMA brokerage account, 12/31/01 - 12/31/02

(in the names of the petitioner's owner and three other persons, joint account holders)

Year-end statements

[REDACTED] annual tax summaries, 2001 & 2002

(in the names of the petitioner's owner and three other persons, joint account holders)

[REDACTED] WCMA fiscal statement 12/31/03

(in the name of the petitioner)

[REDACTED] retirement account, 12/31/01, 12/31/02 & 12/31/03

(in the name of the petitioner's owner)

Price Waterhouse portfolio, 12/31/02
 (in the name of the petitioner's owner and one other person, joint owners)

On the bank and brokerage statements in the record the ending balances are as follows:

	BOA checking	ML -WCMA	ML - CMA
2001:			
January	\$3,355.80	\$19,131.67	
February	\$2,564.77	\$20,486.27	
March	\$3,633.03	\$23,243.04	
April	\$2,678.03	\$9,296.21	
May	\$1,236.99	\$10,078.67	
June	\$4,374.08	\$5,783.93	
July	\$3,988.04	\$8,599.29	
August	\$3,063.35	\$8,076.13	
September	\$2,167.82	\$1,284.60	
October	\$2,709.92	\$4,066.70	
November	\$651.37	\$1,343.67	
December	\$495.81	\$1,168.55	\$100,464.92
2002:			
January	\$1,024.91	\$9,551.81	\$108,061.77
February	\$2,146.88	\$9,182.71	\$88,303.90
March	\$1,121.75	\$7,162.93	\$93,327.46
April	\$1,510.80	\$4,821.37	\$86,222.78
May	\$1,223.46	\$3,735.47	\$79,989.52
June	-\$150.44	\$1,653.26	\$53,830.17
July	\$1,694.32	\$2,571.00	\$47,863.87
August	\$801.63	\$5,378.65	\$50,175.60
September	\$2,156.64	\$8,500.01	\$34,828.01
October	\$3,050.17	\$12,188.01	\$52,105.23
November	\$2,030.16	\$15,503.89	\$69,775.63
December	\$1,961.01	\$8,012.79	\$55,494.02
2003:			
January	\$1,367.26		
February	\$1,118.85		
March	\$3,555.76		
April	\$3,097.89		
May	\$2,824.23		
June	\$6,274.27		
July	\$7,517.71		
August	\$8,346.15		
September	\$16,320.26		
October	\$8,230.44		
November	\$4,027.81		
December	\$8,028.69		

The Merrill Lynch tax reporting statements for 2001 and 2002 provide details on the securities transactions of the petitioner's owner and of three other persons whose names also appear on that same account. Those statements list many sales and purchases of securities, but they do not identify which individual among the four names on the account executed each transaction. Nor do those tax reporting statements indicate the total value of the account. Therefore the tax reporting statements provide no specific information about the financial situation of the petitioner's owner.

WCMA Fiscal Statement dated December 31, 2003 is in the name of the petitioning business, and shows a total account value of \$41,157.61 as of that date.

Retirement Account statements are in the name of the petitioner's owner and show total values of \$23,744.33 as of December 31, 2001; \$23,698.61 as of December 31, 2002; and \$32,341.16 as of December 31, 2003.

Account Statement dated December 31, 2002 is in the name of the petitioner's owner and one other person and shows the total portfolio value as of the previous statement ended September 30, 2002 to have been \$113,833.82, and as of the current period ended December 31, 2002 to be \$122,028.92.

The bank and brokerage accounts statements summarized above show that in 2001, 2002 and 2003 the petitioner's owner had significant financial assets, either owned individual or jointly with other persons. For example, the CMA mortgage account shows total portfolio value of \$100,464.92 at the end of 2001 and \$55,494.02 at the end of 2002.

The information on the bank and brokerage account statements in the record provides additional support to establish the petitioner's ability to pay the proffered wage in 2001, 2002 and 2003.

Considering all of the evidence summarized above, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the adjusted gross income of the petitioner's owner in the relevant years and correctly found that the owner's adjusted gross income in 2001 and 2002 was insufficient to pay the proffered wage while also allowing sufficient funds remaining for the household expenses of the petitioner's owner. The director failed to consider the information on the Schedule D's attached to the tax returns of the petitioner's owner, or to consider the bank account and brokerage account statements which were then in the record, and which have been supplemented on appeal by additional bank account and brokerage account statements.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal are sufficient to overcome the decision of the director.

In summary, the figures for the adjusted gross income of the petitioner's owner are sufficient to establish the petitioner's ability to pay the proffered wage in 1998, 1999, 2000 and 2003, but not in 2001 and 2002. However a consideration of all the evidence in the record, including evidence of proceeds from sales of securities shown on the Schedule D's attached to the tax returns of the petitioner's owner, audited financial statements for the petitioning business for 2001 and 2002, and copies of bank and brokerage statements of the petitioner's owner, either in the owner's name individually or jointly with one or more other persons, are

sufficient to establish the petitioner's ability to pay the proffered wage during all years at issue in the instant petition.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.