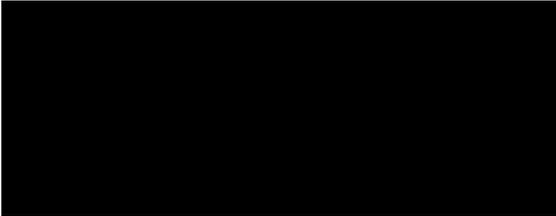


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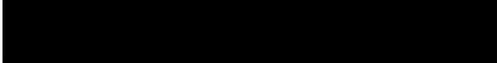


U.S. Citizenship
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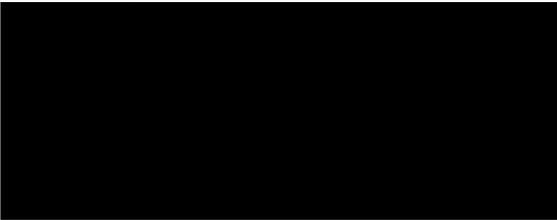
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FILE: WAC 02 157 53105 Office: CALIFORNIA SERVICE CENTER Date: **APR 08 2004**

IN RE: Petitioner: 
Beneficiary: 

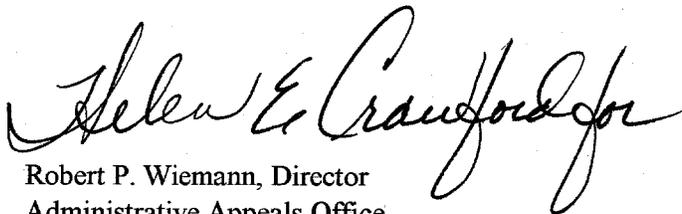
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a service station. It seeks to employ the beneficiary permanently in the United States as an automotive mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated that it has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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) provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . 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 the [CIS].

The sole issue on appeal is whether the petitioner has established its continuing financial ability to pay the beneficiary's offered wage. Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is January 12, 1998. The beneficiary's salary as stated on the labor certification is \$18.36 per hour or \$38,188.80 annually.

In this case, the evidence contained in the record indicates that the petitioner is a successor-in-interest to the original petitioner who operated the petitioning business as a sole proprietorship. The corporate evidence suggests that the petitioner incorporated on December 18, 2000 and acquired the assets and liabilities of the original petitioner in January 2001. As evidence of the petitioner's ability to pay the proffered wage, it submitted copies of Form 1040, U.S. Individual Income Tax Return filed by the original sole proprietor for the year(s) 1998 through 2000, including Schedule C, Profit or Loss From Business. The tax returns reflect that the sole proprietor filed jointly with his spouse and claimed one dependent. The tax returns contained the following information:

Year	Business Income	Adjusted Gross Income
1998	(not shown)	\$ 263,403 (amended return)
1999	\$-3,532	38,245
2000	\$19,247	101,029

These figures appear to suggest the original petitioner's adjusted gross income may have been sufficient to cover the beneficiary's proffered wage during the period covered by the sole proprietor's 1998 and 2000 tax returns, although it is noted that the proffered wage represents about 38% of the sole proprietor's adjusted gross income in 2000. In 1999, however, the proffered wage represented 99% of the sole proprietor's declared gross income. In *Ubeda v. Palmer, infra*, the court concluded that it was highly unlikely that a petitioner 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 about 30% of the petitioner's gross income. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* financial ability to pay the proffered wage through its federal tax returns, audited financial statements, or annual reports. (Emphasis added.) Here, the sole proprietor's tax return data did not support his ability to pay the proposed wage offer.

The petitioner also submitted its own Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. It reflects that the petitioner claimed \$2,688,861 in gross receipts or sales, \$26,000 as officer compensation, \$29,835 in salaries and wages, and an ordinary income of \$33,204. Schedule L indicates that the petitioner had \$73,604 in net current assets. The petitioner's net current assets for this period were sufficient to meet the beneficiary's offered salary.

In denying the petition, the director concluded that a deduction of reasonable living expenses did not leave a sufficient sum to meet the beneficiary's proffered wage during the relevant years covered by the former petitioner's individual tax returns.

On appeal, counsel resubmits copies of the tax returns along with copies of the former sole proprietor's W-2s and asserts that the former petitioner's available funds were sufficient to establish that the sole proprietor had the ability to cover the beneficiary's proffered wage. Counsel maintains that the depreciation and amortization expenses taken on the 1999 tax return should be added back to the calculation of the sole proprietor's income in 1999 as well as the other relevant years. Counsel cites no authority for this proposal. It is noted that in looking at a petitioner's ability to pay the proffered wage, the CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel also asserts that the addition of the beneficiary's services will generate extra income but offers no persuasive basis with which to objectively calculate such an increase. It is further noted that the record indicates that the petitioner actually employed the beneficiary during the quarter ending June 30, 2002,

however no evidence has been offered to establish what additional income and/or expenses the beneficiary generated other than the \$270 reflected in the petitioner's state quarterly wage reports.

In view of the foregoing, and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

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.