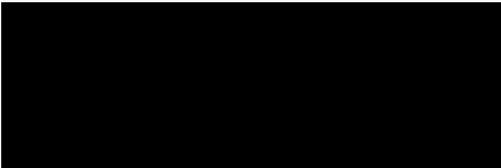




U.S. Citizenship
and Immigration
Services

B6



FILE: WAC-03-036-53579 Office: CALIFORNIA SERVICE CENTER Date: **AUG 10 2004**

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.


fc

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

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 laundry. It seeks to employ the beneficiary permanently in the United States as a laundry-machine mechanic. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed 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. On appeal counsel states that the petitioner has sufficient income 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 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].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification 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 petition's priority date in this instance is August 14, 2001. The beneficiary's salary as stated on the labor certification is \$20.94 per hour or \$43,555.20 per year.

The evidence submitted initially and in response to a request for evidence issued by the director consists of the following: a copy of a San Francisco Business Registration Certificate dated October 22, 2001; a copy of a San Francisco License Certificate for the petitioner dated December 7, 2001; copies of Form 1040 U.S. individual income tax joint returns for the petitioner's owner and his wife for 2001 and 2002; a copy of the Form W-2 Wage and Tax Statement of the petitioner's owner for 2001; a statement of monthly expenses for the petitioner's owner and his family; a declaration by the petitioner's owner dated October 25, 2002; and letters and related documents from three former employers of the beneficiary in Hong Kong.

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 evidence consisting of the following: a letter dated August 26, 2003 from a certified public accountant with an attached financial analysis of the petitioner for 2001 and 2002; and an additional copy of the declaration of the petitioner's owner dated October 25, 2002 which had been submitted previously.

Counsel states on appeal that the director erred in considering only the adjusted gross income of the petitioner's owner and states that the owner's business and rental income and the owner's overall financial situation establish the petitioner's ability to pay the proffered wage.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had previously employed the beneficiary.

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, 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 in the record 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 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.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1120S U.S. Income Tax Return for an S Corporation. In the instant petition, the petitioner's tax returns show the following amounts for adjusted gross income: \$31,418.00 for 2001; and \$57,053.00 for 2002. The figure for 2001 is less than the proffered wage of \$43,555.20, therefore it fails to establish the ability of the petitioner to pay the proffered wage in that year, which is the year of the priority date. The figure for adjusted gross income for 2002 is greater than the proffered wage, but by an amount of only \$13,497.80. The petitioner's owner submitted a statement showing monthly household expenses of \$2,285.00 per month, which is equivalent to \$27,420.00 per year. The amount remaining to the petitioner's owner after paying the proffered wage in 2002 would have been insufficient to pay the household expenses of the petitioner's owner. Therefore the petitioner's adjusted gross income for 2002 also fails to establish the petitioner's ability to pay the proffered wage in that year.

A declaration in the record from the petitioner's owner states that employing the beneficiary will create savings in the petitioner's maintenance costs and will also allow for expansion of the business. The owner states that in 2001 he devoted a significant amount of his own time to repairs and maintenance of the petitioner's equipment. He states also that in that year the business had expenses of \$9,883.00 for repairs and maintenance which the owner could not perform himself, expenses which would not have been necessary if the beneficiary had been working for the petitioner as a laundry-machine mechanic. The owner estimates the cost of his own time and of the expenses for repairs and maintenance in 2001 as totaling about \$40,000, a figure he describes as roughly equal to the proffered wage. The owner also states that the possibilities of expansion of the business and the owner's personal financial resources are sufficient to establish the petitioner's ability to pay the proffered wage.

In evaluating a petitioner's ability to pay the proffered wage, CIS will consider a petitioner's overall financial situation where sufficient evidence on that issue is submitted. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant petition, however, the evidence on the petitioner's overall financial situation fails to establish the petitioner's ability to pay the proffered wage. The Schedules C support repair and maintenance costs of \$9,883.00 in 2001 and \$11,330.00 in 2002. Although the estimates of the petitioner's owner on the unreported financial value of his own time spent on repairs and maintenance may be reasonable, the evidence fails to show that if the beneficiary had been working for the petitioner the income of the business would have been likely to increase by an amount sufficient to allow the petitioner to pay him the proffered wage. The record also lacks sufficient evidence concerning the owner's assets and liabilities during the relevant time period. For these reasons, the financial evidence in the record as a whole, including the tax returns, is insufficient 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 and his wife for 2001 and 2002 and correctly found that those amounts were insufficient to pay the proffered wage and the reasonable household expenses of the petitioner's owner and his family during those years. The director's decision to deny the petition was therefore correct, based on the record before the director.

On appeal counsel submits new evidence consisting of a letter dated August 26, 2003 from a certified public accountant with an attached financial analysis of the petitioner for 2002. In his letter the accountant offers his professional opinion that the petitioner has the ability to pay the proffered wage to the beneficiary. The accountant states that his opinion is based in part on his own professional training in efficiency studies. In this

regard the accountant is speaking not in his role as an accountant, but as a business adviser. The accountant states that if the beneficiary had been employed by the petitioner, the increased income from lower equipment down-time and the cost savings in repairs, equipment rental and outside services would have increased the net income of the business from \$25,731.00 to \$74,548.00 in 2001 and from \$50,647.00 to \$102,470.00 in 2002. The financial analysis attached to the accountant's letter consists of two one-page spreadsheets for each of the years 2001 and 2002 showing various line items of actual income and expenses in one column and revised hypothetical income and expenses in a second column, assuming the presence of an in-house mechanic. Some line items reference brief notes which give the accountant's justifications for the revised hypothetical figures. No further documentation supports the financial analysis.

The financial analysis attached to the accountant's letter is not an audited financial statement. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

The letter from the accountant and the attached financial analysis lack sufficient detail to establish the petitioner's ability to pay the proffered wage during the years 2001 and 2002. The absence of any supporting documentation to justify the accountant's hypothetical increases in income and reductions in expenses from hiring an in-house mechanic prevents any meaningful evaluation of the accountant's conclusions. The evidence submitted for the first time on appeal therefore fails to overcome the decision of the director.

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.