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20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

Bo

[Redacted]

FILE: WAC-03-037-53606 Office: CALIFORNIA SERVICE CENTER Date: **JUL 22 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:
[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
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 general contracting firm. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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 present. In the proceedings before the director the petitioner was represented by counsel, but there is no evidence counsel participated in the preparation of the appeal. On appeal the petitioner states that he has always had the ability to pay his employees and that great demand now exists for construction services in Guam, where the petitioner does business.

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 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.

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 December 12, 1994. The beneficiary's salary as stated on the labor certification is \$9.48 per hour or \$19,718.40 per year.

Former counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The evidence relevant to the petitioner's ability to pay the proffered wage consisted of a copy of the petitioner's Form 1040 U.S. Individual Income Tax Return for 2001; copies of the petitioner's contractor's licenses issued June 21, 1994 and June 4, 2002 by the Government of Guam; and a copy of a Territory of Guam building permit dated February 22, 2001 issued to the petitioner.

In a request for evidence (RFE) dated April 7, 2003, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage and additional evidence to establish the beneficiary's experience.

In response to the RFE former counsel submitted the following: copies of the petitioner's Form 1040 U.S. individual income tax returns for the years 1995 through 2002; copies of ten construction contracts between the petitioner and various individuals and organizations, with the earliest dated January 10, 2003 and the latest dated May 9, 2003; copies of the petitioner's bank statements for April and May 2003 for a business checking account at First Hawaiian Bank; copies of the petitioner's quarterly wage reports for the first, second and fourth quarters

of 2002 and the first quarter of 2003; and a letter dated May 12, 2003 from a former employer of the beneficiary attesting to the beneficiary's work experience as a cement mason from February 1994 to June 2001.

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 present, and denied the petition.

On appeal the petitioner submits a brief and a copy of a check stub apparently indicating payment of the appeal fee, but submits no additional evidence.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director, based on the evidence submitted prior to the director's decision.

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 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 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 35, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return. The petitioner's tax returns show the following amounts for adjusted gross income: -\$32,761.00 for 1995, \$10,732.53 for 1996; -\$6,021.00 for 1997; -\$40,263.00 for 1998; -\$2,820.00 for 1999; -\$32,348.00 for 2000; \$17,495.00 for 2001; and \$12,152.00 for 2002. Since each of those figures is less than the proffered wage of \$19,718.40 the adjusted gross income figures fail to establish the ability of the petitioner to pay the proffered wage.

The petitioner asserts that he has always paid his employees, and that the demand for construction services in Guam is very high. CIS will consider a petitioner's unique business situation when sufficient evidence is submitted to permit such an evaluation. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant petition, however the petitioner's evidence apart from his tax returns consists of documents pertaining only to the years 2001, 2002 and 2003. Those documents fail to provide any evidence of the petitioner's ability to pay the proffered wage for the years 1994 through 2000. Therefore, the petitioner's statements in his brief about his business history are not corroborated by other documents in the record. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In the director's decision the director stated that the proffered wage in the instant petition is \$22,526.00. The director does not state how he arrived at that figure. An annual wage of \$22,526.00 would correspond to an hourly wage of \$10.83 per hour. But the hourly wage shown on the ETA 750 is \$9.48 per hour, which is equivalent to \$19,718.40, as stated above.

In his decision the director correctly stated the amounts shown on the petitioner's Form 1040 U.S. individual income tax returns for 1995 through 2002. The director found that those returns failed to establish the ability of the petitioner's ability to pay the proffered wage from the priority date up to the present. Although the director erred in basing his analysis on an incorrect proffered wage of \$22,526.00, that error did not affect the director's conclusion, since, as shown above, even when the correct figure of \$22,526.00 is used for analysis the petitioner's tax returns fail to establish the petitioner's ability to pay the proffered wage during the relevant time period. Therefore the director's decision to deny the petition was correct.

On appeal the petitioner submits no additional evidence. For the reasons stated above, the matters raised in the petitioner's brief fail to overcome the decision of the director.

It should be noted that CIS records indicate that the petitioner has filed two other I-140 petitions which were denied by the director at about the same time as the denial in the instant petition and which were then appealed to the AAO, in addition to an I-140 petition which was approved by the director at about the same time as those denials. In order to establish its ability to pay the proffered wage in the instant petition the petitioner would have to show its ability also to pay the proffered wage to each of the beneficiaries on whose behalf the petitioner has submitted an I-140 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 not met that burden.

ORDER: The appeal is dismissed.