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FILE: WAC-02-127-50220 Office: CALIFORNIA SERVICE CENTER Date: **MAY 20 2004**

IN RE: Petitioner: 
Beneficiary

PETITION: Immigrant 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 firm that rebuilds automobile engines. It seeks to employ the beneficiary permanently in the United States as a production supervisor. 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.

On appeal, counsel argues that the petitioner has the ability 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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 hinges 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. The petition's priority date in this instance is January 12, 1998. The beneficiary's salary as stated on the labor certification is \$3,747 per month or \$44,964 per year.

With the petition, counsel submitted copies of the petitioner's 1999 and 2000 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss From Business Statement. Schedule C for 1999 reflected gross receipts of \$1,285,944; gross profit of \$466,092; wages of \$0; and a net profit of \$34,512. Schedule C for 2000 reflected gross receipts of \$871,925; gross profit of \$289,951; wages paid of \$0; and a net profit of \$28,054.

In a request for evidence (RFE) dated April 9, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 1998 through 2001, as well as Wage and Tax Statements (Forms W-2) or Form 1099 for the beneficiary.

Counsel submitted the petitioner's 1998 through 2001 Form 1040 U.S. Individual Income Tax Return as well as copies of the petitioner's Schedule C, Profit and Loss From Business Statement for each year. Schedule C for 1999 and 2000 have already been addressed. Schedule C for 1998 reflected gross receipts of \$1,023,756;

gross profit of \$513,665; wages of \$0; and a net profit of \$14,536. Schedule C for 2001 reflected gross receipts of \$786,371; gross profit of \$264,589; wages paid of \$0; and a net profit of \$22,214.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the petitioner during 1998, 1999 and 2000 had gross receipts and gross profits sufficient to pay the proffered wage. Counsel states that CIS failed to consider the petitioner's gross receipts and that its positive cash flow provided sufficient funds to pay the proffered wage of \$44,964.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, 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. Texas 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. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's Form 1040 for calendar years 1998, 1999, 2000, and 2001 show an adjusted gross income of \$13,509; \$32,074; \$26,072; and, \$20,644, respectively. The petitioner could not pay a proffered salary of \$44,964 out of these figures. Further, contrary to counsel's assertion, net profits of \$14,536; \$34,512; \$28,054; and, \$22,214 for those same years do not reflect the petitioner has sufficient assets to pay the proffered wage.

A sole proprietorship is not legally separate from its owner. Therefore, the sole proprietor's income, personal assets and liabilities may be considered when trying to determine whether the sole proprietorship can pay the beneficiary's proffered wage. However, in the instant case, no evidence of additional assets has been submitted.

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.