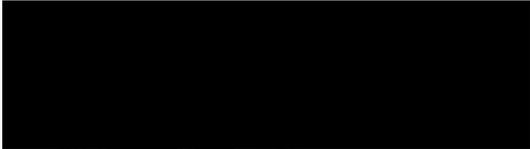




U.S. Citizenship  
and Immigration  
Services

BW



FILE: WAC-02-246-52953 Office: CALIFORNIA SERVICE CENTER Date: **OCT 26 2004**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

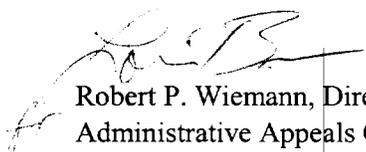
PETITION: Immigrant Petition for Alien Worker as Other Worker Pursuant to Section 203(b)(3) of the  
Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

Identifying data deleted to  
prevent disclosure of information  
unwarranted

**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 petition will be approved.

The petitioner is a trucking company. It seeks to employ the beneficiary permanently in the United States as a diesel 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.

On appeal, the petitioner asserts that he will have the ability to pay the proffered wage by reducing operational costs if the beneficiary is hired.

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 unskilled labor, 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 8 C.F.R. § 204.5(d). The petition's priority date in this instance is June 29, 1998. The beneficiary's salary as stated on the labor certification is \$11.50 per hour or \$23,920 per year.

With the petition, the petitioner submitted a copy of the sole proprietor's 2000 and 2001 Form 1040 U.S. Individual Income Tax Return. The sole proprietor's 2000 Form 1040 reflected an adjusted gross income of \$51,414. The sole proprietor's 2001 Form 1040 reflected an adjusted gross income of \$43,682.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 11, 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 the years 1998, 1999, 2000, and 2001. The director further requested that the petitioner submit a statement of monthly expenses.

The petitioner stated that he used sub-contractors to conduct his business and therefore, had no employees on the payroll. The petitioner further stated that he did not have any tax documents for 1998 and 1999, that he had requested copies of his 1998 and 1999 taxes from the Internal Revenue Service, and that he would submit said documentation as soon as he received it.

The petitioner submitted a schedule of monthly expenses to support his family indicating that he required, at a minimum, \$2,422 to meet monthly expenses.

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

On appeal, the petitioner states that on Schedule C of his 2000 income tax return, he spent \$16,243 in maintenance and repairs. He also indicated that he paid \$18,548 in wages for a combined total of \$34,971, which is sufficient to pay the proffered wage. The petitioner states that for 2001 repairs were \$24,020 and wages were \$11,240. The petitioner states that, if he had a mechanic on the premises, he would save the cost of maintenance and repairs, giving him a greater net profit. The petitioner indicates that by eliminating repair costs he has the ability to pay the proffered wage.

The petitioner asserts that consideration of the beneficiary's potential to eliminate repair costs and increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has provided evidence for the evaluation of such earnings for 2000 and 2001. The petitioner's tax returns for 2000 reflect repair costs of \$16,243. For 2001, the tax return reflects repair costs of \$24,020. There is no evidence of repair costs for 1998 or 1999.

In determining the petitioner's ability to pay the proffered wage, the 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 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) and 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. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

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 return 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. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents.

The petitioner has submitted IRS tax summaries for the years 1998 and 1999. The tax summary for 1998 reflects an adjusted gross income of \$56,817 and the tax summary for 1999 reflects an adjusted gross income of \$63,217. When the petitioner's annualized monthly expenses of \$29,064 are subtracted from the adjusted gross incomes, the remainder is \$27,753 and \$34,153, respectively. The sole proprietor's Form 1040 for calendar year 2000 shows an adjusted gross income of \$51,414. When the petitioner's annualized monthly expenses of \$29,064 are subtracted from the adjusted gross income, the remainder is \$22,350. The petitioner's Form 1040 for calendar year 2001 shows an adjusted gross income of \$43,682. When the petitioner's annualized monthly expenses of \$29,064 are subtracted from the adjusted gross income, the remainder is \$14,618. The petitioner could probably pay the proffered salary of \$23,950 for out of these figures when the repair costs for 2000 and 2001 are factored into those years.

After a review of the federal tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.