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U.S. Citizenship
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Services

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[redacted]

FILE: [redacted] WAC 03 081 54291 Office: CALIFORNIA SERVICE CENTER Date: APR 0 5 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, 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 is a CPA firm. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day 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). Here, the request for labor certification was accepted on December 29, 1997. The proffered salary as stated on the labor certification is $2,002 per month or $24,024 per year.

With the petition, counsel submitted copies of the petitioner's 1997 through 2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and copies of the petitioner's 1997 and 1998 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business. The 1997 Form 1040 reflected an adjusted gross income of -$71,252, and Schedule C reflected gross receipts of $230,026, wages of $51,700, and a net profit of $21,618. A second 1997 Schedule C reflected a net profit of $28,802. The Form 1997 1120S reflected an ordinary income of -$118,984 and net current assets of -$38,900. The 1998 Form 1040 reflected an adjusted gross income of -$922, and Schedule C reflected gross receipts of $227,717, wages of $54,156, and a net profit of $32,436. The 1998 Form 1120S reflected an ordinary income of $11,870 and net current assets of -$53,476. The 1999 Form 1120S reflected an ordinary income of $4,047 and net current assets of -$61,416. The 2000 Form 1120S reflected an ordinary income of $30,631 and net current assets of -$50,395. The 2001 Form 1120S reflected an ordinary income of $50,428 and net current assets of -$35,338. The director considered this documentation insufficient and on March 5, 2003 and June 10, 2003, he requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date of December 29, 1997 and continuing to the present. The petitioner was informed that the evidence must be either in the form of copies of annual reports, federal tax returns with appropriate signatures, or audited financial statements. The director specifically requested evidence that the petitioner was run as a sole proprietorship for a portion of the years 1997 and 1998 and as an S Corporation for the other portion of 1997 and 1998. The director also requested that the petitioner provide evidence that, despite the deductions taken in 1997 and 1998, the petitioner had funds that could easily be converted to ready cash for the purpose of paying the proffered wage.

In response, counsel submitted copies of the petitioner's 1997 and 1998 Forms 1040 and Forms 1120S and copies of the petitioner's 1997 and 1998 accounts receivable ledger. The accounts receivable ledger reflected totals of $480,369.49 in 1997 and $290,240.70 in 1998. The second 1998 Form 1120S reflected an ordinary income of $7,767 in contrast to the $11,870 of the previously submitted Form 1120S.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on November 18, 2003, denied the petition.

On appeal, counsel submits a statement of the petitioner's financial worth as of December 31, 1997, copies of three property appraisals, and a summary of the petitioner's 1999 accounts receivable. Counsel states:

> The sole issue in this matter is whether the Petitioner, Sy Accountancy Corporation, has the ability to pay the proffered wage of $24,024.00 annually from 1997 to the present. The Service concedes in its decision that the Petitioner has fulfilled the requirement for the years 2000 and 2001. The Petitioner asserts that it as well fulfills the ability to pay requirement for the years 1997, 1998 and 1999.
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> For the year 1997, the Form 1120S reflects gross receipts of $247,958 and net income of -$118,984. The negative net income was due to the significant writing-off of leasehold improvements in the amount of $104,967, as shown on Form 4797, and depreciation of $6,857, as shown on line 14c of the 1120S. As the writing-off of leasehold improvements and depreciation is artificial and not an actual cash outlay, the adjusted corporate income for 1997 is -$7,160 (-$118,984 + ($6,857 + $104,967)).
>
> Additionally, it is erroneous for the Service to render its conclusion based on the adjusted gross income of -$71,252 shown on the 1997 Form 1040. The Form 1040 includes the -$118,984 net loss of the corporation as a Form K-1 to its sole shareholder, Victor Sy, which once again includes the written-off leasehold improvements and depreciation. Rather, the more appropriate figure to consider is the business income shown on Schedule C amounting to $21,618 plus the depreciation of $6,373 as this is again not an actual cash outlay. This would provide actual income of $27,991. When combined with the corporate loss, the actual funds available for satisfaction of the ability to pay requirement is $20,831.
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> Furthermore, the Petitioner has submitted documentation establishing that it maintained Accounts Receivables for 1997 in the amount of $480,369.49. Since the Petitioner uses the cash basis of accounting, it is not required to state the Accounts Receivables as a current asset

on the tax return. Petitioner also notes that the current liability listed was for accounts payable to vendors wherein the accounts were current and not past due.

Finally, with respect to 1997, Petitioner herein submits a personal financial statement and real estate appraisal as Exhibit 1 and 2, respectively. Since the business operated as a sole proprietorship during the last six months of 1997, it is appropriate to consider the personal assets of the sole proprietor. As shown on the financial statement, [redacted] maintained personal net worth in the amount of $1,063,700 at the end of 1997 that could be used to more than fulfill the ability to pay requirement.

For the year 1998, the Service has conceded that the Petitioner has demonstrated the ability to pay the proffered wage for the time it operated as a sole proprietorship, namely January 1, 1998 to June 30, 1998 (note that the dates on the decision are erroneously in reverse). However, the Service has concluded that the Petitioner has failed to demonstrate ability to pay during the time the business operated as a corporation, or July 1, 1998 to December 31, 1998.

The ordinary income shown on the Form 1120S is $7,767 (not $11,870 as stated on the decision). This, however, includes depreciation in the amount of $10,148 as shown on line 14c. Accordingly, the net cash income is $17,915 as a corporation from July 1, 1998 to December 31, 1998. This amount is therefore more than half of the proffered wage and proves that the Petitioner has fulfilled the ability to pay during the six months it operated as a corporation.

Finally, Petitioner argues that it maintained the ability to pay the proffered wage for 1999. The ordinary income shown on the Petitioner's Form 1120S reflects an amount of $4,047. However, this includes depreciation in the amount of $11,206. Accordingly, the net cash income is $15,252. Additionally, submitted herein as Exhibit 3, is a summary of the Accounts Receivable for 1999 in the amount of $227,595.85, which could have been immediately converted to cash and used for payment of the proffered wage.

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 employed the beneficiary from 1997 through 2001 at a salary equal to or greater than the proffered wage.

As an alternative 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 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 CIS 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 also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during 1997 through 2001 were -$38,900, -$53,476, -$61,416, -$50,395, and -$35,338, respectively. The petitioner could not have paid the proffered wage from 1997 through 2001 from its net current assets.

It appears that the petitioner revoked its election as an S Corporation in the last half of 1997 and the first half of 1998 and operated as a sole proprietorship. Generally, a petitioner must wait five years before the business can again become an S Corporation unless the IRS grants permission. The record of proceeding contains no evidence that the petitioner notified the IRS that it was revoking its status as an S Corporation in 1997 or that it obtained permission to resume operating as an S Corporation in 1998. Nevertheless, a sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets 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 out of their adjusted gross income or

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

other available funds. In addition, sole proprietors must show that they can sustain themselves and their 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.

In the instant case, the sole proprietor supported a family of three in 1997 and a family of two in 1998. In 1997 and 1998, the owner's adjusted gross income was considerably less than the proffered wage. The petitioner could not pay the proffered wage and sustain himself and his dependents from his adjusted gross income.

On appeal, counsel points to a statement of the petitioner's net worth as of December 31, 1997. However, the record of proceeding contains no evidence to corroborate this statement. 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).

Counsel also provides copies of real estate appraisals and indicates that these appraisals should be considered when determining the petitioner's ability to pay the proffered wage. However, personal residences and other real property are considered to be long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary. The unambiguous language of the regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases" CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record. In any event, counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. *See* 8 C.F.R. § 103.9(a).

Counsel asserts that since the petitioner uses the cash basis of accounting, it is not required to state the Accounts Receivables as a current asset on its tax return. Counsel also states the petitioner had $480,369.49 in Accounts Receivable in 1997, $290,240.70 in Accounts Receivable in 1998, and $227,595.85 in Accounts Receivable in 1999. However, these statements by counsel are not corroborated by evidence, and these statements differ with the evidence in the record, specifically the tax returns. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, the petitioner has submitted two 1997 Schedule Cs reflecting different net profits and two 1998 Forms 1120S reflecting different ordinary incomes without explaining this discrepancy. It is unclear which forms were actually submitted with the Internal Revenue Service. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.
>
> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The 1997 Form 1120S reflects an ordinary income of -$118,984 and net current assets of -$38,900. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 1997. In addition, the 1997 Form 1040 reflects an adjusted gross income of -$71,252. The petitioner could not have paid the proffered wage from its adjusted gross income in 1997.

The 1998 Form 1040 reflects an adjusted gross income of -$922. The petitioner could not have paid the proffered wage from its adjusted gross income in 1998. In addition the 1998 Form 1120s reflects an ordinary income of either $7,767 or $11,870 and net current assets of -$53,476. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 1998.

The 1999 Form 1120S reflects an ordinary income of $4,047 and net current assets of -$61,416. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 1999.

The 2000 Form 1120S reflects an ordinary income of $30,631 and net current assets of -$50,395. The petitioner could have paid the proffered wage from its ordinary income in 2000.

The 2001 Form 1120S reflects an ordinary income of $50,428 and net current assets of -$35,338. The petitioner could have paid the proffered wage from its ordinary income in 2001.

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.