U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

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

CC: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 landscaping and gardening business. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, counsel submits a brief and additional evidence.

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 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 June 15, 1999. The proffered salary as stated on the labor certification is $10.42 per hour or $21,673.60 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return. The return reflected an adjusted gross income of $31,085. This documentation was considered insufficient by the director, and, on February 3, 2003, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of copies of annual reports, signed federal tax returns, or audited financial statements from 1999 to the present. The director specifically requested copies of the petitioner's Form DE-6, Employment Development Department Quarterly Wage Reports, for the last four quarters that were accepted by the State of California and copies of the petitioner's current valid business licenses for city, county, state, and federal.

In response, counsel submitted copies of the petitioner's current valid business licenses and a signed copy of the petitioner's 2001 Form 1040. Counsel also submitted copies of computer printouts of tax returns for the

years 1999 through 2001 that had been dated and stamped by the Internal Revenue Service (IRS). The 1999 tax return reflected an adjusted gross income of $32,424; the 2000 tax return reflected an adjusted gross income of $29,623; and the 2001 tax return reflected an adjusted gross income of $31,085.

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 May 12, 2003, denied the petition.

On appeal, the petitioner provides a copy of its 2002 Form 1040, U.S. Individual Income Tax Return, which reflects an adjusted gross income of $33,640 and states:

> I am submitting my 2002 taxes that demonstrate my ability to pay a prospective employee the proffered wage from the Application for Labor Certification filed on his behalf. In addition, the adjusted gross income is just that, adjusted. It has been adjusted to reflect not only 5 exemptions, but all business expenses such as depreciation that do not accurately reflect the actual cash I have left in my pocket to support my family. The adjusted gross [income] would allow me to pay the salary of an employee, thereby expanding my business and making more money per year.

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 provide evidence that it employed the beneficiary from 1999 to the present or that the beneficiary was compensated at a salary equal to or greater than the proffered wage in those years.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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. 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 CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

The 1999 through 2002 tax returns reflect adjusted gross incomes of $32,424, $29,623, $31,085, and $33,640, respectively. We note that adjusted gross income appears on lines 35 and 36 on Form 1040, prior to additional adjustments for personal deductions (line 38) and exemptions (line 40).

The petitioner is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. Although the petitioner's adjusted gross income for all four years was greater than the proffered wage, after subtracting the proffered wage from the adjusted gross income, the amount left would only be $10,750.40, $7,949.40, $9,411.40, and 11,966.40, respectively, to pay the expenses of the petitioner and his four dependents. No evidence was provided that the petitioner possessed other resources, such as bank accounts, CD's, etc., with which to pay the proffered wage.

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.