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U.S. Citizenship and Immigration Services

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[redacted]

DEC 17 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 047 50117

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:

[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 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, the petitioner submits a brief and previously submitted documentation.

Section 203(b)(3)(A)(i) of 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 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 March 6, 2000. The proffered salary as stated on the labor certification is $10.42 per hour or $21,673.60 per year.

With the petition, counsel failed to submit any evidence of the petitioner's ability to pay the proffered wage. On January 27, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director also requested a statement of the monthly expenses for the petitioning owner and his family and evidence of the beneficiary's prior experience.

In response, counsel provided copies of the petitioner's 2000 and 2001 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, copies of the beneficiary's 1999 through 2001 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, copies of the beneficiary's 1999 through 2001 Forms 1099, Miscellaneous Income, a letter and a certified copy of a Fictitious Business Name Statement, a letter from Grandview Landscaping

Company with regard to the beneficiary's prior experience, a letter from the petitioner explaining the beneficiary's current employment, and a statement of the petitioning owner's monthly household expenses. The petitioning owner's 2000 and 2001 federal tax return reflected an adjusted gross income of $35,728 and $40,262, respectively. The beneficiary's 1999 through 2001 Forms 1099 reflected wages earned of $25,012, $6,412, and $30,400, respectively. The petitioning owner's monthly household expenses were $4,450 or $53,400 per year. The letter from Grandview Landscaping Company states that the beneficiary worked at that place of business from 1993 until December 1995. The letter from the petitioner indicates that the beneficiary was employed by Mike's Landscaping from 1993 through 2001 and by Timberline from 2001 to the present. It is noted that Mike's Landscaping and Timberline are the same company, although the fictitious name of Timberline is currently used.

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 1, 2003, denied the petition. The director noted that the petitioner's ability to pay the proffered wage was not established and that the validity of the beneficiary's prior experience is in question.

On appeal, previous counsel asserts:

> To establish ability to pay 2000 through 2001, the petitioner provided his U.S. Individual Income Tax Returns (Form 1040) filed for those years as well as copies of beneficiary's Form 1099 for 2000 and 2001. The Service found that even when the Service subtracts payments for business expenses which has already been figured into the petitioner's adjusted gross income, the petitioner's personal expenses exceeded his adjusted gross income. As such, the petitioner could not have had the ability to pay the beneficiary the proffered wage for the two years based on his adjusted gross income.
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> First, the Service has misread the petitioner's Income Tax Returns for 2000 and 2001. The Service correctly points out that the petitioner's business expenses have already been calculated into his adjusted gross income. However, what the Service has failed to consider is that payments for the beneficiary's salary were also figured into the adjusted gross income as his business expenses. This cost is reflected under "Cost of Labor" #37 in Part III Cost of Goods Sold in Schedule C for years 2000 and 2001. This is further evidenced by copies of Form 1099 for 2000 and 2001 that the petitioner submitted to the Service.
>
> The petitioner who is engages in gardening and landscaping has employed independent contractors only. The beneficiary has also worked for the petitioner as a full-time independent contractor. Therefore, to establish his ability to pay, the petitioner submitted his Income Tax Returns and copies of the beneficiary's Form 1099 for 2000 and 2001, instead of W-2, payroll stubs and/or wage reports. Form 1099 is typically used to show wages paid to an independent contractor. . . .

In 2001, the petitioner's adjusted gross income was $40,262. The petitioner's gross sales was $241,120. The petitioner's Cost of Good [sic] Sold was $145,930 of which $114,160 was expended on labor cost. Labor cost includes payment of wages paid to full-time independent contractors, including the beneficiary. . . .

For 2000, the petitioner's adjusted gross income was $35,728. The petitioner's gross sales was $216,220. The petitioner's cost of goods sold was $121,277 of which $91,300 was expended on labor cost including the beneficiary's proffered wage. . . .

In short, the petitioner's adjusted gross income reflects discretionary salary he paid to himself after all other expenditure had been expended, including the beneficiary's proffered wage. The fact that the petitioner's personal expenses exceeded what he took home at the end of the month may have a bearing on the petitioner's ability to provide for his family, *but not the beneficiary.*

Secondly, the petitioner has in fact paid Mr. the proffered wage. Although employer is not required to pay the offered wage until after permanent residence is granted, 20 C.F.R. § 626.209(c)(2), so long as the employer was actually paying the proffered wage when priority date is established, then the case should not be denied for lack of financial ability to pay.

* * *

With exception of year 2000, the year in which the beneficiary worked part-time, the petitioner has continually paid the beneficiary salary above the proffered wage. Since the petitioner has continued to meet the requirement to pay the offered wage irrespective of his income, per the petitioner has established his ability to pay for all those years. In light of this finding, the petitioner would have paid the proffered wage in 2000 had the beneficiary worked full-time.

In conclusion, does the petitioner have the ability to pay the proffered wage? The answer is yes. The petitioner has established the ability to pay because 1) his adjusted gross income was discretionary income and thus, the fact that his personal expenses exceeds his adjusted gross income has no bearing on his ability to provide the offered wage; 2) the petitioner has in fact paid and was actually paying the beneficiary in 2001; and 3) the petitioner had the funds to pay in 2000.

* * *

The following is the accurate account of the beneficiary's work experience: The beneficiary worked for Greenview Landscapes from 1993 to 1995 for approximately 40 hours a week. Thereafter, the beneficiary has worked for the petitioner approximately 40 hours a week from 1996 to the present with the exception of 1996 and 2000. In

> 1996, the beneficiary began working for the petitioner but worked very minimal hours. Therefore, there is no Form 1099 for 1996 and the beneficiary did not file an Income Tax return for 1996. As discussed above under section I, in 2000, the beneficiary worked only minimal hours and only earned $6,412.
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> . . . The petitioner's letter stating that the beneficiary worked from 1993 to the present was an error made by the petitioner. The error was unintentional. It was an inadvertent mistake. The petitioner did not knowingly make this mistake. The misstatement was in no way an attempt on the part of the petitioner to deceive or defraud the government. Attached please find an affidavit of the petitioner, Exhibit 9.
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> Furthermore, Application for Alien Employment Certification (ETA 750) was filled out with the help of Hispanic American Legal Services (HALS) at [redacted] The form indicated that the beneficiary was "unemployed from 1998 to the present." The beneficiary was not "unemployed" in 1998. This was an error. In fact, he was working for the petitioner as evidenced by a copy of Form 1099 which states $24,500 for 1998. This is not to say that the petitioner does not take responsibility for the error that has occurred and shifts the blame entirely on HALS. However, neither the petitioner nor the beneficiary knowingly make [sic] this mistake. Nor did they attempt to deceive or defraud the government with false information. Please see attached affidavits, Exhibit 10. The petitioner's supporting documents evidence and are consistent with the fact that the beneficiary has worked for the petitioner since 1996 through the present day.

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 the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2000.

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 2000, and 2001 tax returns reflect adjusted gross incomes of $35,728 and $40,262, respectively.

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 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. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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.

Counsel cites a non-precedent decision to support his assertion that the petitioner has established its ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a).

Counsel advises that the beneficiary will replace independent contractors currently used by the petitioner. However, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The visa petition, as well as the petitioner's documents submitted to the record, suggests that the petitioner employed more than one contractor. The record contains no evidence directly relating the tax return figures for contract labor to landscape gardening services the beneficiary may have performed.

Moreover, there is no evidence that the position of the other independent contractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those contractors performed other kinds of work, then the beneficiary could not replace them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972).

While the petitioner has established its ability to pay the proffered wage in 2001, it has not established its ability to pay the proffered wage in 2000, at the time of the priority date. The 2000 tax return reflects an adjusted gross income of $35,728. The petitioner's owner could not pay his household expenses of approximately $53,400 and the remainder of the beneficiary's salary, $15,261.60, from his adjusted gross

income. Again, there is no evidence the petitioner possesses other resources, such as personal bank accounts, CD's, etc., with which to pay the proffered wage.

The second issue in these proceedings is the validity of the beneficiary's prior experience. Counsel has provided affidavits from both the petitioning owner and the beneficiary admitting to the mistake made with regard to the beneficiary's employment dates. Both the petitioning owner and the beneficiary state that the mistake was made unknowingly and without the intent to deceive or defraud the government. Counsel provided copies of the beneficiary's 1997 through 2002 Forms 1099, Miscellaneous Income, that establish that the beneficiary worked for the petitioner for those years. Since the prior employer, Greenview Landscaping Company, specifically states that the beneficiary only worked for it from 1993 to December 1995 and since the Forms 1099 clearly show that the beneficiary has been working for the petitioner from 1997 to the present, there is no reason to assume that the current petitioner did not simply misstate the beneficiary's dates of employment on his original letter. The validity of the beneficiary's prior experience has been established.

In summary, the beneficiary's prior experience has been established. However, the petitioner has not established its ability to pay the proffered wage in 2000.

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.