U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

B-6

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[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 irrigation firm. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage during the relevant time period. On appeal counsel asserts that the evidence in the record did establish the ability of the petitioner 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.

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

Eligibility in this matter turns, in part, 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is September 19, 1997. The beneficiary's salary as stated on the labor certification is $12.66 per hour or $26,332.80 per year.

The evidence relevant to the petitioner's ability to pay the proffered wage which was submitted initially and in response to a request for evidence (RFE) issued by the director consisted of the following: copies of Form 1040 U.S. individual income tax joint returns for the petitioner's owner and his wife for 1997 through 2001, with attached schedules; and copies of Form 540, California resident income tax joint returns for the petitioner's owner and his wife for 1997 through 2001.

The director found that the adjusted gross income as shown on the tax returns of the petitioner's owner and his wife was insufficient to establish the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence.

On appeal counsel states that the director should have looked to the income of the business rather than to the owner's adjusted gross income in evaluating the petitioner's ability to pay the proffered wage. Counsel also

states that the director should have considered the additional income which would likely be generated for the petitioner by hiring the beneficiary.

Since no additional evidence was submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

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 previously employed the beneficiary.

As another 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 the Immigration and Naturalization Service, now 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 the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record indicates that 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 .

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.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner. The joint tax returns of the petitioner's owner and his wife show the following amounts for adjusted gross income: $47,041.00 for 1997; $33,234.00 for 1998; $49,586.00 for 1999; $39,931.00 for 2000; and $45,528.00 for 2001. After paying the proffered wage of $26,332.80 in each of those years, the following amounts would have remained for the owner's household expenses: $20,708.20 for 1997; $6,901.20 for 1998; $23,253.20 for 1999; $13,598.20 for 2000; and

$19,195.20 for 2001. The owner's household size was four persons in each of those years, according to the corresponding tax returns.

No statement of the monthly household expenses of the petitioner's owner was submitted, nor does the record contain any evidence of financial resources available to the petitioner's owner to pay his household expenses other than those shown as adjusted gross income on the tax returns of the petitioner's owner and his wife. In the absence of such evidence, the amounts shown above which would have remained to the petitioner's owner after paying the proffered wage to the beneficiary are found insufficient to pay the reasonable household expenses of the owner during those years. Accordingly, the adjusted gross income figures of the petitioner's owner and his wife fail to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision the director correctly stated the adjusted gross income of the petitioner's owner and his wife as shown on their tax returns. The director also correctly calculated the amounts which would have remained for the owner's household expenses after paying the proffered wage in 1998 and 2000. The director correctly found that the amounts of $6,901.20 for 1998 and $13,598.20 for 2000 were insufficient to pay the reasonable household expenses of the petitioner's owner during those years. The director correctly stated that adjusted gross income of the petitioner's owner and his wife was the more appropriate measure of the petitioner's ability to pay the proffered wage than the gross business income of the petitioner, since the petitioner is a sole proprietorship.

Counsel asserts that the director erred in treating the petitioning business and its owner as a single legal entity. Counsel asserts, "Under the corporate veil standard, an individual's assets will not be targeted for losses incurred by the company so long as the individual and business appear as two separate entities." (Brief, page 7). Notwithstanding counsel's assertion, nothing in the record indicates that the petitioner is a corporation. Rather, the tax returns in the record, including Schedule C's showing the petitioning business, indicate that the petitioner is a sole proprietorship. Therefore the director was correct in treating the petitioner and the petitioner's owner as a single legal entity.

Counsel also asserts that the beneficiary's employment at the onset of the instant petition would have increased the petitioner's income by an amount greater than the proffered wage. Counsel relies on *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of that decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Furthermore, in the instant petition no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase the petitioner's income. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns.

Concerning the beneficiary's qualifications, the director's decision states, "It is additionally noted that the experience letter submitted conflicts with other Service records that indicate the beneficiary was not residing in Oaxaca, Mexico during the period in question." In his brief counsel states that he is ready to respond to that allegation if given a proper opportunity to do so though a notice of action.

The director made no finding on the issue of the beneficiary's experience. After noting the conflict in applicant's evidence on his residence with other Service records (now CIS records) the director made a finding that the evidence failed to establish the petitioner's ability to pay the proffered wage and said that therefore the petition was denied.

In his reference to CIS records on the applicant's residence, the director apparently was referring to information on an I-589 application for asylum, filed by the beneficiary on October 18, 1995. On that application the beneficiary states that his last address before entering the United States was in Mejicanos, El Salvador. He also states that he entered the United States without inspection on May 15, 1988, and that he lived at an address on Telton Avenue, in Rubidoux, California, during the period "5/88 – Present," and at an address on Radwell Rd. , Moreno Valley, California, during the period "1/92 – Present."

On the Form ETA 750B, signed by the beneficiary on March 27, 1998, the beneficiary states that he worked as a landscape gardener from May 1985 to July 1988 in Oaxaca, Mexico. A letter in the record from his purported former employer in Oaxaca, Mexico, states that the beneficiary worked in Oaxaca from September 1985 to September 1988.

The information on the ETA 750B and in the letter from the purported former employer is inconsistent with the information on the I-589 application for asylum concerning the beneficiary's location in 1988.

The I-589 application also contains other information which is inconsistent with evidence related to the instant petition. On the I-589 application the beneficiary states that he was born in El Salvador, that his father and mother are Salvadoran, and that their names are [redacted] with no last name given for the mother. A purported birth certificate from El Salvador contains the same information. But on the G-325 biographic information form supporting the beneficiary's I-485 application to adjust status, filed concurrently with the instant I-140 petition, the beneficiary states that he was born in Oaxaca, Mexico, that his father and mother were also born in Oaxaca, Mexico, and that their names are [redacted]

In *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), the Board of Immigration Appeals (BIA) states: "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." In *Ho,* the BIA further 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." 19 I&N Dec. at 591-592

The record in the instant case contains no explanation for the evidentiary inconsistencies concerning the beneficiary's nationality, his family relationships, and his work experience. Therefore the record fails to establish that the beneficiary had the required work experience as of the priority date.

The director erred in failing to make a finding concerning the beneficiary's work experience. That error, however, did not affect the director's decision to deny the petition, since the failure of the evidence to establish the petitioner's ability to pay the proffered wage during the relevant period was a sufficient ground to deny the petition.

For the reasons stated above, the director's finding that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence was correct, and the assertions of counsel on appeal fail to overcome the director's decision.

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.