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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] WAC-02-132-55788 Office: CALIFORNIA SERVICE CENTER Date: JUL 9 2004

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant 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

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 meat and food market. It seeks to employ the beneficiary permanently in the United States as a butcher. 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 denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage.

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.

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 April 24, 2001. The beneficiary's salary as stated on the labor certification is $24,856 per year.

With the initial petition, counsel submitted a Form 1120S U.S. Income Tax return for an S Corporation for the period October 1, 2001 through December 31, 2001. The return indicated an ordinary income of - $3,469.00. Schedule L of the return indicated current assets of $9,866.00; current liabilities of $1,830.00; and net current assets of $8,036.00. Counsel submitted the sole proprietor's 2001 Form 1040 U.S. Individual Income Tax Return with Schedule C. Schedule C of the return reflected gross receipts of $442,933.00; gross profits of $90,746; liabilities of $60,705; and a net profit of $30,041.00; and an adjusted gross income of $36,499.

In a request for evidence (RFE), dated August 5, 2002, the director required additional evidence 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 response to the RFE, counsel stated that the petitioner incorporated his business on June 2001 and submits evidence to that effect. Counsel resubmitted the petitioner's 2001 Form 1120S and the sole proprietor's Form 1040 and submitted copies of the petitioner's 2001 Form W-2 Wage and Tax Statements for its employees.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director noted (apparently based only on the Form 1120S) that the petitioner's

net income for 2001 was - $3,469.00 and its net current assets were $8,036.00. The director therefore, determined that the petitioner's assets were insufficient to pay the proffered wage.

On appeal, counsel states that the director erred in considering only the Form 1120S and not considering the Form 1040, the combination of which reflected the entire year 2001. Counsel points out that the Form 1120S only covered the last quarter of 2001. Counsel submits the petitioner's bank statements for the period December 31, through October 31, 2002.

In determining the petitioner's ability to pay the proffered wage, 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 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 the 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 the CIS should have considered income before expenses were paid rather than net income.

The petitioner was structured as a sole proprietor for most of 2001. Unlike a corporation, a sole proprietorship is not a 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 business on their individual (Form 1040) federal tax return each year. The business related income and expenses are reported on Schedule C and a re carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. III. 1982), *aff'd*, 703 F2d. 571 (7th Cir. 1983), the court concluded that it was highly unlikely that the petitioner 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 about 30% of the petitioner's gross income.

The proffered wage in this case is $24,856.00 per year. The evidence of record indicates that the petitioner was incorporated in June 2001 and, therefore, filed two separate tax returns. While the petitioner was structured as a sole proprietorship, its proprietor's Form 1040 reflects an adjusted gross income of $36,499. The Form 1120S for the last calendar quarter of 2001 reflects a loss of $3,469 and net current assets of $8,036.00.

Since the petitioner's corporate tax returns only cover a three-month period, October through December, the petitioner must illustrate an ability to pay the proffered wage for the nine months it was structured as a sole proprietorship. Nine months of the $24,856 proffered wage is $18,642. Reducing the sole proprietor's adjusted gross income of $36,499 by $18,642 leaves $17,857. It is highly unlikely that the petitioner could sustain a family of six (6) on the remaining $17,857.

Moreover, the petitioner must also illustrate an ability to pay the proffered wage for the three months it was structured as a corporation. Three months of the $24,856 proffered wage is $6,214. The petitioner suffered a loss in 2001 and its net current assets were $8,036. While the net current assets at the end of 2001 reflect an ability to pay the proffered wage for three months, we cannot conclude that fact establishes the petitioner's ability to pay the proffered wage on an annual basis. More specifically, net current assets are a "snapshot" figure representing the petitioner's situation on a given date (December 31, 2001) as opposed to being an indicator of income or growth over a given period of time. In other words, while figures that normally appear on an income/loss statement relating to a period of time might, on a case by case basis, be extrapolated over a longer period of

time, the existence of certain assets on the balance sheet portion of a tax return that happens to cover only three months is no indication that had the tax return covered 12 months, those assets would have been four times as great (i.e., sufficient to cover the annual proffered wage).

After a review of the evidence it is concluded that the petitioner has not 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 not met that burden.

ORDER: The appeal is dismissed.