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: WAC 02 197 53204 Office: CALIFORNIA SERVICE CENTER Date: SEP 16 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:

[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.

for

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 an auto repair business. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 November 28, 1995. The proffered salary as stated on the labor certification is $17.61 per hour or $36,628.80 per year.

With the petition, counsel submitted copies of the petitioner's 1995, 1997, and 1998 Forms 1040, U.S. Individual Income Tax Return including Schedule C, Profit or Loss From Business. Counsel also submitted copies of computer printouts of the petitioner's 1999 and 2000 Forms 1040, U.S. Individual Income Tax Return. Counsel did not provide any documentation for the year 1996. The returns reflected adjusted gross incomes of $19,968, $11,555, $218,449, $18,801, and 17,832, respectively. This documentation was considered insufficient by the director, and, on August 30, 2002, 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 1995 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 Forms W-2, Wage and Tax Statements, for all employees from 1995 to present.

In response, counsel submitted copies of computer printouts of the petitioner's 1998 through 2001 Forms 1040, U.S. Individual Income Tax Return, copies of the previously submitted 1995 and 1997 returns, a copy of the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business, copies of bank statements for the period July 2002 through October 2002, copies of Forms DE-6 for the quarters ending March 31, 2000, June 30, 2000, September 30, 2000, December 31, 2000, December 31, 2001, March 31, 2002, and June 30, 2002, and copies of Forms W-2 for the petitioner's employees for the years 2000 and 2001. The tax return for 2001 reflected an adjusted gross income of $63,404. The 1998 computer printout reflected an adjusted gross income of $13,654 instead of the $218,449 reported on the previously submitted tax return. The Forms DE-6 and W-2 showed that the petitioner did not employ the beneficiary at any time from 1995 through 2001.

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 January 15, 2003, denied the petition.

On appeal, the petitioner provides previously submitted documentation and additional copies of bank statements from two banks for the time period January 31, 2001 through January 31, 2003. Those bank statements reflect balances ranging from a low of $121.86 to a high of $115,469.08. Counsel states:

> In 1995, Performance Auto Care generated gross sales/receipts in the total amount of $208,206.00 with a gross income of $110,290.00 after paying for the cost of goods sold. This is also the date given to the beneficiary as his priority date. While it is true that Performance adjusted net income for the year 1995 is only $21,486.00 the Immigration and Naturalization Service hereinafter referred to as the "Service" did not include in their consideration the company's depreciation in the amount of $11,746.00 nor the amount of $1,688.00 which was deducted as and for car and truck expenses. Said amounts although deductibles on the tax return are not funds paid out to any entity and are in actuality funds that can be utilized by the company (previously submitted to the Service). **Had the Service reviewed the tax returns since 1995 to 2001 and added said amounts and other deducted amounts, which in fact are available funds? It is a question. As a matter of fact it is clear that the company had and has a net usable income to pay the proffered wages.** Furthermore in year 2001 the business improved and petitioner has steadily shown signs of a brighter business ambiance in terms of sales and receipts. (Exhibit A 2001 IRS print out tax return) the adjusted gross income for year 2001 is $63,404.00.
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> Service also mentioned the 'poverty guideline for the year 2002". The poverty guideline (125%) for a family of one is $14,925.00. Beneficiary's wages is $36,629.00 per annum. Therefore by considering the cost of maintaining the petitioner's household it is reasonable to assume that the petitioner's household of one family member can live off the amount of income remaining after the beneficiary's proffered wage has been subtracted. The net income of the company is far higher than said amount.

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 1995 to the present.

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 1995, 1997, 1998, 1999, 2000, and 2001 tax returns reflect adjusted gross incomes of $19,968, $11,555, $13,654, $18,801, $17,832, and $63,404, 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. The only year that the petitioner's adjusted gross income was greater than the proffered wage was in 2001. No evidence was provided prior to 2001 that the petitioner possessed other resources, such as personal bank accounts, CD's, etc., with which to pay the proffered wage.

It is noted that the bank statements are from two different banks and show various addresses for the petitioner. The statements from Cal Fed Banking show the address for the petitioner as 19735 Sherman Way, Canoga Park, California 91306 in the months of January and February 2001, in May and June 2001, and January through April 2002. The Cal Fed statements also show the petitioner's address as 8845 West Olympic

Boulevard, Beverly Hills, California 90211 for the months of March and April 2001, July through December 2001, September through December 2002, and May 2002. The third address shown on the [redacted] statements is [redacted] and is for the months of October 2002 through January 2003 and for the months of June through August 2002. The statements from Washington Mutual Bank show addresses of [redacted], California [redacted] for the months of February 2001 through November 2001 and the address of [redacted], Beverly Hills, Californi[redacted] for the months of January 2002 through January 2003. The 1995 tax return shows the petitioner's address as [redacted], Californi[redacted] and the 1997 through 2001 tax returns show the petitioner's address as [redacted], California [redacted] Because of all the different addresses, it is unclear where the petitioner is located, where the beneficiary will work, or if there are more businesses. The petitioner has provided no information regarding a relocation of the business to one of these addresses.

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.