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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 128 50121 Office: CALIFORNIA SERVICE CENTER Date: MAR 29 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petitioner is a service station/mini-market. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, current counsel submits additional evidence and asserts that the petitioner has demonstrated its ability to pay the proffered wage.

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) provides in pertinent part:

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [CIS].

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date 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). Here, the petition's priority date is March 22, 1996. The beneficiary's salary as stated on the labor certification is $12.48 per hour or $29,958.40 annually.

The petitioner initially submitted evidence of its ability to pay the proffered wage in the form of a copy of a Form 1040 U.S. Individual Income Tax Return for the year 2000. This tax return indicates that the petitioner's owner claimed an adjusted gross income of -$57,905 including a business income of $21,880 as set forth on Schedule C.

On May 1, 2002, the director requested additional evidence to support the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). In response, the petitioner submitted partial portions of Form 1040 U.S. Individual Income Tax Return for the years 1996 through 2000. These extracts consisted of Schedule C Profit or Loss From Business. They indicated that the sole proprietor's business income was $14,505 for 1996; -$669 for 1997; -$22,420 for 1998, and $21,087 for 1999.

In denying the petition, the director noted that the business net income could not meet the beneficiary's proffered

wage. More importantly, the AAO notes that the sole proprietor's negative adjusted gross income for 2000 was insufficient to cover the offered wage of $25,958.40 for that year. A sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's other expenses and sources of income are also considered as reflected on page 1 of the Form 1040. Pursuant to the regulatory requirements of 8 C.F.R. § 204.5(g)(2), the petitioner must show its ability to pay the offered wage as of priority date and continuing until the beneficiary obtains lawful permanent residence status.

On appeal, current counsel resubmits copies of the petitioner's Form 1040 Schedule C for the years 1996 through 2000. Counsel also provides copies of IRS printouts containing the sole proprietor's tax return data for the years 1997 through 2000. We note that no additional tax return information was provided for the year 1996 other than the portions containing Schedule C as noted above. According to these documents, the petitioner's sole proprietor owner showed -$44,418 and -$72,974 as his adjusted gross income for 1998 and 1999, respectively. The IRS printout provided for the year 1997 did not clearly designate the owner's adjusted gross income and counsel submitted no clarification. It is clear, however, that the sole proprietor's negative adjusted gross income figures for the years 1998, 1999 and 2000 failed to demonstrate a continuing ability to meet the beneficiary's wage of $25,958.40.

Counsel contends that the petitioner's depreciation and substantial gross revenues for the years 1996 through 2000, as set forth on the Form(s) 1040 Schedule C, should not be ignored. The gross receipts/sales figures range from three to five million dollars. This represents, however, only a portion of the determination. The business' gross income also generated expenses that must be considered. Similarly, in other contexts, CIS examines the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. There is no precedent that would allow the petitioner to add depreciation back to net income. *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); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). As noted previously, the business net income is carried forward and included in the calculation of the sole proprietor's adjusted gross income as shown on the IRS printouts.

Finally, counsel submits an affidavit from the sole proprietor owner. The owner states that there will be additional revenue available to pay the beneficiary's salary by replacing existing employees. He states that he will consult with his accountant to explore new ways to allocate depreciation expenses and will create a job description for the beneficiary that will realize savings by directing him to perform duties that are presently outsourced. The AAO notes that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after a beneficiary becomes eligible under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). As noted above, the petitioner's ability to pay must be established as of the priority date, March 22, 1996. The financial information provided does not support the petitioner's ability to pay the proffered wage as of that date and continuing until the present. Additionally, the evidence does not indicate specifically the amounts that the beneficiary would eliminate by performing the same service. The owner's affidavit does not discuss whether such changes would affect any other expenses. The ability to pay the proffered wage is not established by the owner's speculative projections of growth or decrease in expenses.

In view of the foregoing, the AAO cannot conclude that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the present.

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.