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U.S. Citizenship
and Immigration
Services



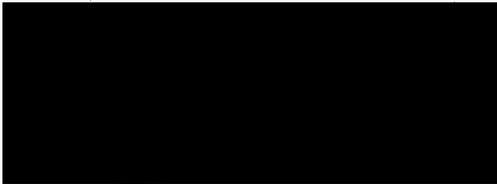
FILE: WAC 01 239 59405 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

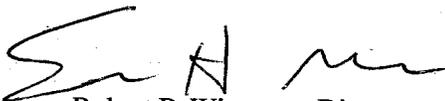


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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 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 an unskilled worker. The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a household domestic worker/uncertified nurse assistant. 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, the petitioner, through her representative, submits additional evidence in support of its ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) provides 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. . . . 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 [CIS].

Eligibility in this case rests, in part, 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 February 5, 1996. The beneficiary's salary as stated on the labor certification is \$1,254.93 per month or \$15,059.16 annually, based on a 40-hour week. The record indicates that the petitioner is organized as a sole proprietorship.

As evidence of its ability to pay the beneficiary's wage offer, the petitioner initially submitted copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1998, 1999 and 2000. The 1998 tax return shows that the sole proprietor filed a joint tax return with her spouse and declared three dependents. Her adjusted gross income was \$4,087. This included a business income of -\$2,323. The 1999 tax return shows the adjusted gross income at \$22,056, including a business income of \$395. The declared adjusted gross income on the 2000 return is \$20,303, including a business income of \$993. In 1999, the sole proprietor filed jointly and declared three dependents. In 2000, she filed jointly and declared four dependents. Schedule C, Profit or Loss from Business, which reflects the business income, indicates that the sole proprietor's business is located at the same address as the petitioning business, but was called "Aquino Care Home" in the tax returns.

The record shows that the director requested additional evidence from the petitioner on October 28, 2001 and on July 2, 2002. Both requests instructed the petitioner to submit evidence of the beneficiary's prior employment experience required by the position and to submit evidence of the petitioner's continuing ability to pay the proffered wage from February 5, 1996 to the present, consisting of federal tax returns, audited financial statements, or annual reports.

In response, the petitioner submitted verification of the beneficiary's prior relevant employment experience, as well as more complete copies of her 1998, 1999, and 2000 individual income tax returns. She failed to submit any financial information relevant to 1996 and 1997.

The director issued a notice of intent to deny the petition. The director noted that the evidence failed to establish the relationship between the petitioning business and the Aquino Care Home. The director also found that the evidence failed to establish that the sole proprietor could pay the proffered wage as well as provide enough income to support her household. The director's notice provided an additional thirty days for the petitioner to submit a summary of her monthly living expenses, evidence of the relationship between the petitioning business and the Aquino Care Home, and additional evidence showing her continuing ability to pay the proffered salary from February 5, 1996 to the present.

The director subsequently denied the petition, citing the petitioner's failure to respond to the notice of intent to deny. The AAO concurs with the director's decision to deny the petition and notes that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the application or petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner, through her representative, provides the sole proprietor's additional federal individual tax returns for 1996, 1997 and 2001. They reveal that she filed jointly with her spouse in all of these years. In 1996, she declared five dependents. Her adjusted gross income was \$10,977. This included a business income of -\$5,480. In 1997, she declared three dependents, and had an adjusted gross income of -\$11,968, including a business income of -\$3,286. In 2001, the sole proprietor declared four dependents and showed an adjusted gross income of \$7,833, including a business income of -\$15,990. The appeal includes a statement of monthly income and expenses as well as a statement from the sole proprietor confirming that the Aquino Care Home is the same entity as McHugh Care Home, but not providing any further clarification why she uses a different name on her tax returns as that submitted on the visa petition and the labor certification.

A sole proprietorship is not legally separate from its owner. As the petitioner is a sole proprietor, her income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses generated by the sole proprietor and her dependents must be reviewed when determining her continuing ability to pay the beneficiary's proposed annual salary of \$15,059.16. She must be able to demonstrate that she can sustain her individual living expenses as well as pay the beneficiary's proposed salary.

In the instant case, the documentation submitted on appeal reveals that although the sole proprietor has separate employment as reflected on a Wage and Tax Statement (W-2), her annual adjusted gross income as set forth on her tax returns does not establish the continuing ability to pay the proffered wage of \$15,059.16. Her statement of income and expenses, submitted on appeal, does not overcome the information presented on the tax returns and appears to combine business, as well as personal living expenses as well as omitting such obvious items as food, transportation, clothing, etc. The AAO finds that in 1996, 1997, 1998, and 2001, the sole proprietor's declared

adjusted gross income was substantially less than the proffered wage, even without considering any personal living expenses of the sole proprietor and her dependents. In 1999, the proffered wage represented 68% of the adjusted gross income. In 2000, it represented 74% of the adjusted gross income, suggesting that it would be implausible that the remaining funds could support the sole proprietor, her spouse and four dependents. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a 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. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage. (Emphasis added.) In this case, that continuing ability has not been demonstrated by the information provided.

Accordingly, based on a review of the evidence submitted, 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.