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U.S. Citizenship
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FILE: WAC 02 226 50149 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2005

IN RE: Petitioner: [Redacted]
Beneficiary [Redacted]

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

ON BEHALF OF PETITIONER:



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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. 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, the petitioner submits a brief and additional evidence.

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 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) 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 March 15, 1999. The proffered salary as stated on the labor certification is \$1,648.40 per month or \$19,780.80 per year.

With the petition, the petitioner failed to submit evidence of its ability to pay the proffered wage as of the priority date and continuing to present. On August 26, 2002, the director requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of copies of annual reports, federal tax returns, or audited financial statements from 1999 to 2001.

In response, the petitioner submitted copies of its 1999 through 2001 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business. The tax return for 1999 reflected an adjusted gross income of \$16,036.00, gross receipts of \$149,500, net profit of -\$2,849, and wages paid (under Part V - Other Expenses) of \$15,250. The 2000 tax return reflected an adjusted gross income of \$31,650, gross receipts of \$102,500, net profit of \$4,898, and wages paid (under Part V - Other Expenses) of \$14,400. The 2001 tax return reflected an adjusted gross income of \$59,414, gross receipts of \$89,200, net profit of \$5,727, and wages paid (under Part V - Other Expenses) of \$9,750.

On April 7, 2003, the director requested evidence of all of the petitioning owner's monthly living expenses to include such items as mortgage, insurance, utilities, food, car payments, credit cards, etc.

In response, the petitioning owner stated that she lived on the premises of the petitioner during 1999 and 2000, and, therefore, there were no mortgage expenses for those years. The petitioning owner's living expenses were listed as \$1,155 per month or \$13,860 per year for 1999, \$1,155 per month or \$13,860 for 2000, and \$2,410 per month or \$28,920 per year for 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 June 10, 2003, denied the petition.

On appeal, the petitioner provides previously submitted documentation, copies of Forms 1065, U.S. Return of Partnership Income, for 2000 and 2001 for Loomis Senior Care Villa, LLC (another business supposedly owned by the petitioner), and a copy of a bank statement for [REDACTED] the month ending May 7, 2003. The Forms 1065 do not show that the petitioning owner received any payments from [REDACTED] nor does it show whom the partners are. The bank statement reflects an ending balance of \$18,035.23 that includes both a checking and savings account. The petitioner states:

According to the letter that you sent to me, I observed that there was a confusion, misinterpretation and misrepresentation between the business gross income and my personal income.

Form 1040 always states the personal gross income of an individual. 'Form 1065 U.S. Return of Partnership Income' and 'Profit and Loss From Business – Schedule C' always states the business gross income.

In conclusion of all the information that I've already provided, I would like to review the petitioner's business gross income and personal gross income amounts:

- a) **Year of 1999:** From the tax return of Profit and Loss From Business – Schedule C for the year 1999 reveals a business gross income of \$149,500. From the tax return of Form 1040 for the year 1999 reveals a personal gross income of \$16,036. Georgeta Negoii's salary expense was subtracted from the business gross income of \$149,500.
- b) **Year of 2000:** From the tax return of Profit and Loss From Business – Schedule C for the year 2000 reveals a business gross income of \$102,500. From the tax return from Form 1065 – U.S. Return of Partnership of Income for the year 2000 reveals a business gross income of \$506,000. From the tax return of Form 1040 for the year 2000 reveals a personal gross income of \$37,489. Georgeta Negoii's salary expense was subtracted from the total business gross income of \$608,500.
- c) **Year of 2001:** From the tax return of Profit and Loss From Business – Schedule C for the year 2001 reveals a business gross income of \$89,200. From the tax return

from Form 1065 – U.S. Return of Partnership of Income for the year 2001 reveals a business gross income of \$745,000. From the tax return of Form 1040 for the year 2001 reveals a personal gross income of \$67,138. Georgeta Negoi's salary expense was subtracted from the total business gross income of \$834,200.

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 1999 to the present at a salary equal to or greater than the proffered wage. No Forms W-2, Wage and Tax Statement, or Forms 1099, Miscellaneous Income, were provided for the record.

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 adjusted gross incomes for the petitioner were \$16,036, \$31,650, and \$59,414 in 1999, 2000, and 2001, 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 petitioner's 1999 adjusted gross income was \$16,036 or \$3,744.80 less than the proffered wage and when adding the petitioner's living expenses of \$13,860, the total would be \$17,604.80 less than the proffered wage. The petitioner's 2000 adjusted gross income was \$31,650 or \$11,869.20 more than the proffered wage. However, the \$11,869.20 does not cover the petitioner's living expenses of \$13,860. The petitioner's 2001 adjusted gross income was \$59,414 or \$39,633.20 more than the proffered wage. The petitioner could pay the proffered wage and its living expenses in 2001.

The petitioning owner provides evidence of another business that she owns, [REDACTED]. Ordinarily, the owner may include income from other businesses; however, in this case, there is no evidence that the owner received any income from this business. In addition, [REDACTED] is a limited liability corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). While the AAO acknowledges that the petitioner is structured as a limited liability corporation (LLC), the same principles concerning distinct legal identities and responsibilities between a business entity and shareholders and owners apply.

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.