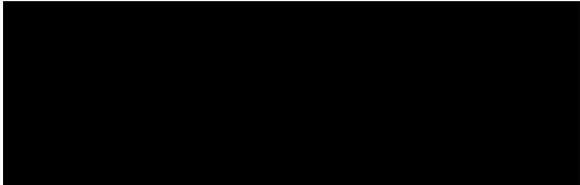




U.S. Citizenship
and Immigration
Services

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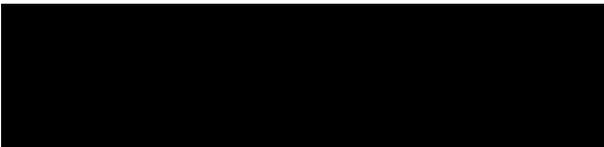
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FILE: WAC 01 296 52701 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2005

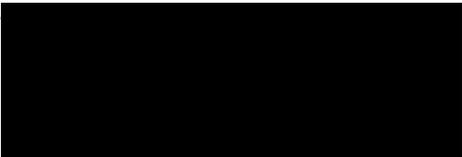
IN RE: Petitioner:



Beneficiary:

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 remanded for further consideration.

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, accompanied 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 and denied the petition accordingly.

On appeal, counsel 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 28, 1997. The proffered wage as stated on the Form ETA 750 is \$1,300 per month or \$15,600 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted a copy of the owner's 1998 through 2000 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business. The 1998 tax return reflected an adjusted gross income of \$11,651, and the 1998 Schedule C reflected gross receipts of \$46,924, wages paid of \$10,084, and net profit of \$11,762. The 1999 tax return reflected an adjusted gross income of \$7,853, and the 1999 Schedule C reflected gross receipts of \$34,572, wages paid of \$9,752, and net profit of \$7,609. The 2000 tax return reflected an adjusted gross income of \$10,253, and the 2000 Schedule C reflected gross receipts of \$47,997, wages paid of \$9,476, and net profit of \$10,873.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 19, 2001, the director requested

additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date for the years 1997 to the present. The director also specifically requested that the petitioner provide all schedules and tables that accompany the submitted tax return and a current audited financial statement. It is noted that the director failed to request the petitioner's household expenses, and since the petitioner is a sole proprietor, to inform the petitioner that she may provide additional evidence of the ability to pay the proffered wage to include bank statements, CD's, etc.

In response, the petitioner submitted a complete copy of the owner's 1997 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business. The 1997 tax return reflected an adjusted gross income of \$9,949, and the 1997 Schedule C reflected gross receipts of \$42,000, wages paid of \$2,100, and net profit of \$9,868.

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 May 7, 2002, denied the petition.

On appeal, the petitioner, through counsel, submits a brief, a copy of the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business, a copy of the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the quarter ended December 31, 2001, copies of the beneficiary's 1997 through 2001 Forms W-2, Wage and Tax Statements, copies of the beneficiary's 1997 through 2001 Forms 1040 EZ, Income Tax Return for Single and Joint Filers with No Dependents, a letter from a tax accountant, and pictures of the beneficiary caring for the petitioner's clients. The 2001 tax return reflects an adjusted gross income of \$14,590, and the 2001 Schedule C reflects gross receipts of \$57,403, wages paid of \$11,913, and net profit of \$15,699. The beneficiary's 1997 through 2001 Forms W-2 and tax returns reflect wages earned of \$2,100, \$10,084, \$9,752, \$9,476, and \$12,900, respectively. The letter from [REDACTED] tax accountant states:

Although it may have seem that the net profit for the business are as follows:

1997	\$ 9,868.00	net profit after expenses & wages
1998	\$11,762.00	net profit after expenses & wages
1999	\$ 7,609.00	net profit after expenses & wages
2000	\$10,873.00	net profit after expenses & wages
2001	\$15,699.00	net profit after expenses & wages

There are the depreciation expenses of assets (expense incurred in acquisition of assets divided in its useful life) that are not necessarily actual expense on the same year it was reported. In this case an amount of \$6,285.00 for 7 yrs are being deducted from their actual income.

And the above-mentioned net income for each corresponding year is transposed to line 12 of the 1040 form and any interest income will derive to as total adjusted gross income.

Therefore, the profit of [REDACTED] Care Home should be looked at as:

<u>Year</u>	<u>Depreciation</u>	<u>Wages</u>	<u>Net Profit</u>	<u>Total Net Profit</u>
1997	\$ 6,752.00	\$ 2,100.00	\$ 9,868.00	\$18,720.00
1998	\$ 6,285.00	\$10,084.00	\$11,762.00	\$28,131.00
1999	\$ 6,285.00	\$ 9,752.00	\$ 7,609.00	\$23,646.00
2000	\$ 6,285.00	\$ 9,476.00	\$10,873.00	\$26,634.00
2001	\$ 6,285.00	\$11,913.00	\$15,699.00	\$33,897.00

The petitioner states:

In year 2001, I have a net profit of \$15,699.00 (Ref. Schedule C Tax Return 2001), which means the additional funds available for the business after deducting all expenses including the salary paid to her of \$12,900.00 or a gross profit of \$28,599.00 (NP \$15,699.00 + 12,900.00) versus the prevailing wage of \$15,600 per annum. In addition, she was provided free board and lodging.

She was certified from Labor on August 2001. From the 4th [sic] quarter of year 2001 up to the present I paid her the prevailing wage of \$1,300 a month (Reference to EDD – quarterly wage and withholding report Form 941 – Employer’s quarterly federal tax return). Plus free board and lodging. I followed all the regulations since 1997.

Wages paid from 1998 – up to the 3rd quarter of 2001 were included in determining the net profits per year. Net profits are additional funds available to the business after deducting all expenses including wages.

In December 1997, IRS issued her Tax Identification Number (ITIN – Refer to IRS letter) which was used to reporting the wages for tax purposes, and she was on the payroll for the 4th [sic] quarter of 1997 which I paid her based on minimum wage plus free board and lodging.

Furthermore the business is already in operation for almost 7 years and it is already well established. We have already acquired goodwill, so I’m positive that I can pay her the prevailing wage of \$1,300 a month or \$15,600.00 per annum continuously up to the time she gets her permanent residency. And being a good citizen of our country, I firmly guarantee and swear that I can pay the required prevailing rate.

In determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a

salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary \$2,100 in 1997, \$10,084 in 1998, \$9,752 in 1999, \$9,476 in 2000, and \$12,900 in 2001. Since the proffered wage is \$15,600, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$13,500 in 1997, \$5,516 in 1998, \$5,848 in 1999, \$6,124 in 2000, and \$2,700 in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Contrary to the assertions of counsel, 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship 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 approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of two in 1997 through 2001. In 1997, the sole proprietorship's adjusted gross income did not cover the remaining amount needed to pay the proffered wage. In 1998 the adjusted gross income covered the remaining amount needed to pay the proffered wage by only \$6,135; in 1999 by only \$2,005; in 2000 by only \$4,129; and in 2001 by only \$11,890. As the petitioner failed to provide a statement of monthly expenses for the years 1997 through 2001 (again, it is noted that the director failed to request this information), the AAO cannot determine if the petitioner was able to pay the proffered wage and her household expenses with the remaining incomes.

The petitioner states that the beneficiary was given free room and board. However, there is no evidence in the record that reflects the value of the room and board or that the Department of Labor agreed that room and board could be subtracted from the beneficiary's wages. Room and board are forms of compensation that are not clearly appropriate, according to the regulation at 20 C.F.R. § 626.20(c)(3).

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage from 1997 through 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of its household expenses, other sources of income, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's May 7, 2002 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.