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U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 145 52115 Office: CALIFORNIA SERVICE CENTER Date: JUL 26 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: SELF-REPRESENTED

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 sustained.

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 that the petitioner had not established that the beneficiary met the experience requirements as stated on the Form ETA 750. The director denied the petition accordingly.

On appeal, the petitioner submits 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 May 7, 1998. The proffered wage as stated on the Form ETA 750 is \$1,913.60 per month or \$22,963.20 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted copies of the first two pages of the owner's 1998 and 1999 Forms 1040, U.S. Individual Income Tax Return. There was no initial evidence of the beneficiary's experience. The petitioner's 1998 tax return reflected an adjusted gross income of \$152,607. The petitioner's 1999 tax return reflected an adjusted gross income of \$156,396.

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 July 18, 2002, the director requested additional evidence pertinent to that ability and requested additional evidence pertinent to the beneficiary's experience. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide

copies of annual reports, the original signed federal tax returns with all appropriate schedules, attachments, and statements, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date of May 7, 1998 through 2001. The director also specifically requested that the petitioner provide copies of the beneficiary's forms W-2, Wage and Tax Statements, from 1998 to the present, and if the petitioner did not employ the beneficiary for any period between 1998 and 2001, to submit a letter explaining this fact. With regard to the beneficiary's experience, the director requested that the petitioner submit evidence that the beneficiary met the three-month experience requirement as stated on the Form ETA 750. The petitioner was informed that the evidence must be in letterform on the previous employer's letterhead showing the name and title of the person verifying the information. The verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

In response, the petitioner submitted complete copies of its 1998 through 2001 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business, copies of the beneficiary's 1998 through 2001 Forms W-2, Wage and Tax Statements, and letters of experience from the petitioner and three previous employers. The 1998 tax return reflected an adjusted gross income of \$152,607, and Schedule C reflected gross receipts of \$67,948, wages paid of \$9,685, and a net profit of \$161. The 1999 tax return reflected an adjusted gross income of \$156,396. Schedule C for the petitioner was not included. The 2000 tax return reflected an adjusted gross income of \$74,150, and Schedule C reflected gross receipts of \$67,696, wages paid of \$10,749, and a net profit of -\$187. The 2001 tax return reflected an adjusted gross income of \$171,777, and Schedule C reflected gross receipts of \$70,036, wages paid of \$11,096, and a net profit of \$493. The beneficiary's 1998 through 2001 forms W-2 reflected wages earned of \$6,847, \$10,604, \$10,604, and \$11,148, respectively. The letters of employment/experience indicates that the beneficiary was employed by [REDACTED] Clinic from January 1995 through December 1995 (40 hours per week), by [REDACTED] from January 2, 1996 through June 15, 1997 (50 hours per week), by [REDACTED] from January 1997 through May 1997 (40 hours per week), by [REDACTED] from June 1997 through January 1998 (40 hours per week), and by the petitioner from May 1, 1998 to the present (40 hours per week).

On December 9, 2002, the director issued a notice of intent to deny (NOID) informing the petitioner that the employment letters provided contained discrepancies and that the petitioner needed to provide further proof of its ability to pay the proffered wage. The director informed the petitioner that the most notable discrepancy pertained to the signed letters of employment verification and the signed amendment to the ETA 750B (In one statement of previous employment, the beneficiary claims to have been working in the Philippines from June 1997 to January 1998. However, the work history amendment shows that the beneficiary was working in California from July of 1997 to December of 1997). Another discrepancy indicated that the beneficiary worked forty hours a week for one employer in the Philippines from January of 1997 to May 1997 and for fifty hours per week for another employer from January of 1996 to June of 1997. The director pointed out that acceptable confirmation of the petitioner's ability to pay would be in the form of original computer printouts from the Internal Revenue Service (IRS), date stamped by the IRS, of tax returns for 1998 through 2001 filed with the IRS by the petitioner. IRS certified copies of the petitioner's federal income taxes (with appropriate signature(s)) for 1998 through 2001 would also be acceptable.

In response to the NOID, the petitioner submitted additional copies of the previously submitted tax returns and additional letters from the beneficiary's prior employers. The letter from Antonette Miranda stated that

the beneficiary worked fifty hours a week (16 to 17 hours per day) on Monday, Tuesday, and Wednesday from January 1997 to May 1997. The letter from [REDACTED] stated that the beneficiary worked thirty-nine to forty hours a week (13 hours per day) on Thursday, Friday, and Saturday from January 1997 to May 1997. The letter from [REDACTED] stated that the beneficiary worked for [REDACTED] forty hours a week from June 1, 1997 to July 15, 1997 and from December 17, 1997 to January 1998.

The director determined that the evidence was insufficient to establish the ability to pay the proffered wage or to establish that the beneficiary met the experience requirements as of the priority date of May 7, 1998, and, on April 10, 2003, he denied the petition accordingly.

On appeal, the petitioner submits original computer printouts from the Internal Revenue Service (IRS), date stamped by the IRS, of tax returns for 1999 through 2001 filed with the IRS by the petitioner that confirm the data on the previously submitted tax returns, and new original letters from the beneficiary's prior employers that confirm the information as stated on the previous letters.

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 has not established that he employed the beneficiary at a salary equal to or greater than the proffered wage in 1998 through 2001. In fact, the beneficiary earned \$6,847, \$10,604, \$10,604, and \$11,148, respectively during those years.

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. 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 petitioner supported a family of two. In 1998, after paying the beneficiary's salary, the petitioner would have had \$136,490.80 remaining to support a family of two (\$152,607 adjusted gross income - \$16,116.20 difference between proffered wage (\$22,963.20) and wage paid (\$6,847) = \$136,490.80). In 1999, after paying the beneficiary's salary, the petitioner would have had \$144,036.80 to support a family of two (\$156,396 adjusted gross income - \$12,359.20 difference between proffered wage (\$22,963.20) and wage paid (\$10,604) = \$144,036.80). In 2000, after paying the beneficiary's salary, the petitioner would have had \$61,790.80 to support a family of two (\$74,150 adjusted gross income - \$12,359.20 difference between proffered wage (\$22,963.20) and wage paid (\$10,604) = \$61,790.80). In 2001, after paying the beneficiary's salary, the petitioner would have had \$159,961.80 to support a family of two (\$171,777 adjusted gross income - \$11,815.20 difference between proffered wage (\$22,963.20) and wage paid (\$11,148) = \$159,961.80). With these remaining amounts, the petitioner could have paid the proffered wage and supported a family of two. The petitioner has established its ability to pay the proffered wage from the priority date of May 7, 1998 and continuing.

The remaining issue in this case is whether the beneficiary meets the experience requirements as stated on the Form ETA-750.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation* – (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(D) *Other workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is May 7, 1998.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education	College Degree Required	
4 yrs. High School	Blank	
Experience Job Offered	Related Occupation	Related Occupation
3 Mos.		

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of nurse assistant must have three months of experience as a nurse assistant.

On appeal, the petitioner provides new original letters from the beneficiary's prior employers to establish that the beneficiary met the experience requirements as listed on the ETA 750. These new letters confirm the documentation found in the previous letters written on the beneficiary's behalf.

Even though there is a discrepancy between the amended ETA 750B and one of the letters, the letters have been consistent in describing the beneficiary's employment and duties. Therefore, the AAO sees no reason to assume the letters are false. The petitioner has established that the beneficiary met the requirements of the ETA 750 as of the priority date of May 7, 1998.

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. The petitioner has met that burden.

ORDER: The appeal is sustained.