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**U.S. Citizenship
and Immigration
Services**

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PUBLIC COPY



FILE: WAC 04 114 50998 Office: CALIFORNIA SERVICE CENTER Date: JUN 05 2006

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

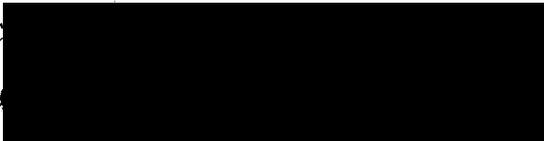
SELF-REPRESENTED

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, Chief
Administrative Appeals Office

CC



DISCUSSION: The preference 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 owns and operates a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a caregiver also known as a nurse assistant (uncertified). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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 has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

According to the petition, the business was established in 1994, and, it employs two individuals. Petitioner's business is organized as a limited liability company (LLC)¹ designated Parkview RCH I & II, LLC (i.e. Parkview Residential Care Home I & II). At the time of the filing of this petition, the owner and licensee operates five residential care homes, one of which is the petitioner, Parkview Residential Care Home II, which is organized as Parkview RCH I & II, LLC.

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 unavailable.

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 regulation at 8 CFR § 204.5(1)(3)(ii) states, in pertinent part:

(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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750

¹ The petitioner is [REDACTED] organized as a Limited Liability Company whose Articles of Organization, were filed September 20, 1999, in the Office of the Secretary of State of the State of California. The residential-elderly facility whose address is [REDACTED] the petitioner. Parkview [REDACTED] does business as Parkview [REDACTED]

Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 22, 2001. The proffered wage as stated on the Form ETA 750 is \$10.42 per hour (\$21,673.60 per year). The Form ETA 750 states that the position requires three-months experience.

On appeal, the petitioner submits a legal brief and additional evidence.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; and, copies of documentation concerning the beneficiary.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 23, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested the petitioner's annual reports, audited financial statements, and U.S. federal tax returns from 2001 to the present. Since the petitioner has multiple pending I-140 petitions, information was requested concerning the beneficiaries and their proffered wages. The director requested the California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The director stated that the forms should include the names, social security numbers and number of weeks worked for all employees. The director requested a company organizational chart listing employees and their positions, and a complete list of the petitioner's care homes.²

The director requested the beneficiary's W-2 Wage and Tax Statements for 2001, 2002 and 2003 if employed by the petitioner. The director requested evidence of the beneficiary's financial support from 2000 to the present, and her monthly family expenses. The director requested copies of the petitioner's business licenses, leases and other business expense indicia. The director requested the evidence of the beneficiary's date of birth, immigration status, education and training. Also the director requested proof of the beneficiary's employment history.

In response to the request for evidence the petitioner submitted copies of the following documents; U.S. federal tax returns for 2001, 2002 and 2003; records of the petitioner's personal assets; a list of the beneficiaries for which the petition had filed an employment based petition; an organizational chart; a form DE-6; and, three job verification letters from prior employers as well as other documents.

On September 21, 2004, the director issued an intent to deny the petition. The director stated that the three letters submitted by the petitioner to demonstrate the beneficiary's work experience were insufficient evidence and they did not meet the minimum requirements of the certified Alien Employment Application.

In response to the intent to deny the petition, the petitioner on October 19, 2004, submitted an undated explanatory statement; personal tax returns for 2001, 2002 and 2003 [REDACTED] both federal and state; W-2 statements for 2001, 2002 and 2003 for [REDACTED] and, a letter dated October 17, 2004 from the beneficiary as well as other documents.

² The director requested a statement of monthly expenses for the petitioner's family. It is unclear why this was requested since the petitioner is not personally responsible to pay the proffered wage.

The director denied the petition on December 8, 2004, finding 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, that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, the petitioner states the reason for the appeal is to demonstrate the employer's ability to pay the proffered wage and also to demonstrate the beneficiary's three months experience as a caregiver (also known as a nurse assistant, uncertified).

The petitioner has submitted the following documents to accompany the appeal statement: a letter [REDACTED] dated December 24, 2004; an affidavit from a prior employer dated December 29, 2004; and, a letter from a prior employer dated December 27, 2004

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary since January 1, 2001 to present (August 8, 2004). The petitioner's limited liability company (Parkview RCH I & II) paid the beneficiary \$14,333.60 in 2001; in 2002, Parkview III LLC paid the beneficiary \$13,774.84 and \$919.00, and, in 2003, \$10,548.00. According to an organization chart submitted showing five facilities and their personnel, one of which is Parkview RCH II, shows that the beneficiary works for that facility as: "Caregiver Reliever/on call" and for another entity Parkview RCH III as a "Caregiver full time."

According to the organization chart submitted by the [REDACTED] has five licensed facilities which [REDACTED] and [REDACTED] all located in separate locations. On appeal, the petitioner submitted a letter from a management and tax consultant dated December 24, 2004 that states that the [REDACTED] income and expenses jointly." The petitioner reports income jointly for the two subject two facilities as mentioned below.

The petitioner [REDACTED] business as [REDACTED] a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.⁴ An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

³ The biographic page [REDACTED] passport identifies her [REDACTED]

⁴ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns⁵ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,673.60 per year from the priority date of January 22, 2001:

- In 2001, the Form 1065 for Parkview RCH I &II stated taxable income of \$26,167.00.
- In 2002, the Form 1065 for Parkview RCH I &II stated taxable income of \$8,062.00.
- In 2003, the Form 1065 for Parkview RCH I &II stated taxable income of \$46,962.00.

The petitioner had insufficient income to pay the proffered wages of the pending petitions mentioned below filed [REDACTED]

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

- The petitioner's limited liability company [REDACTED] paid the beneficiary \$14,333.60 in 2001. In 2001, the Form 1065 for [REDACTED] stated taxable income of \$26,167.00. The sum of these figures is less than the proffered wages of the pending petitions mentioned below.

CIS electronic database records show that the petitioner filed I-140 petitions for her residential care homes for other beneficiaries at about the same time as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. According to the petitioner's response to its request for evidence, the owner of petitioner has five employment-based petitions pending. Of those five petitions,⁶ two pending petitions have been filed by the petitioner, [REDACTED]. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions

⁵ Tax returns submitted for other entities other than the petitioner, [REDACTED] is incorporated as [REDACTED] have no probative value to prove the petitioner's ability to pay the proffered wage.

⁶ The CIS identifier numbers are WAC 04 114 50998; WAC 03 111 54344; WAC 03 044 50544; WAC 03 044 50593; and, WAC 03 231 51007.

filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. The Schedules L submitted with the tax returns were submitted in blank so this determination cannot be calculated from the data submitted.⁷ In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence for the beneficiary and the other multiple beneficiaries for which employment based petitions are pending.

The petitioner has submitted evidence other than permitted by regulation,⁸ that is, copies of annual reports, federal tax returns, or audited financial statements which are the means by which petitioner's ability to pay is determined.

The petitioner has submitted tax returns for other entities, personal tax returns, personal wage statements, bank accountant statements and list of assets. Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The second issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

⁷ The U.S. Internal Revenue Service does not require the completion of Schedule L for taxpayers reporting income under a certain income amount threshold.

⁸ 8 C.F.R. § 204.5(g)(2).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of a nurse assistant (uncertified).

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	<u>4</u>
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank
	Training	Blank
	Experience	
	Years	<u>3 mos.</u>
	Training	Blank ⁹

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience as amended March 1, 2001 that an applicant listed for the position of nurse assistant (uncertified).

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER



NAME OF JOB

Caregiver

DATE STARTED

October, 2000

DATE LEFT

November 2000

KIND OF BUSINESS

Private Care Home

DESCRIBE IN DETAIL DUTIES

All kinds of care giving duties

NO. OF HOURS PER WEEK

40

15. WORK EXPERIENCE

⁹ Section 15 to ETA 750 A entitled "Other special requirements" has job requirements that are typed or written in cursive and stamped and written over during the review of the application for Alien Employment Certification by the U.S. Department of Labor and the responsible state agency. It appears that a requirement written in cursive handwriting is "On the job training will be provided by the employer." Other special requirements summarized there are an English fluency requirement, first aid and "CPR" competency, a health screening, compliance with California state law, and other requirements. Evidence was found in the record of proceeding that the beneficiary is certified in CPR and first aid.

b. NAME AND ADDRESS OF EMPLOYER

NAME OF JOB
Caregiver
DATE STARTED
November 2000
DATE LEFT
January 2001
KIND OF BUSINESS
Private Care Home
DESCRIBE IN DETAIL DUTIES...
All kinds of care giving duties
NO. OF HOURS PER WEEK
40

15. WORK EXPERIENCE

c. NAME AND ADDRESS OF EMPLOYER

NAME OF JOB
Care giver
DATE STARTED
April 1998
DATE LEFT
August 2000
KIND OF BUSINESS
Private Care Home
DESCRIBE IN DETAIL DUTIES...
All kinds of care giving duties
NO. OF HOURS PER WEEK
40

Along with the petition, the petitioner has submitted letters from prior employers evidencing her experience as a caregiver. The sister of the beneficiary, [REDACTED] of Pasay City, Philippines, stated in her letter dated July 26, 2004, that the beneficiary was employed as a care giver for her mother-in-law from April 6, 1998 to August 4, 2000. [REDACTED] stated that the beneficiary's duties included "... bathing, ambulating and shaving, providing healthcare (medications) and personal hygiene"

[REDACTED] Campbell, California, stated by her statement dated August 6, 2004, that the beneficiary was employed as a "Care/Giver Nurse Assistant" for her mother from November 2000 to January 2001.

[REDACTED] St. Charles, Illinois, in her letter dated August 5, 2004, stated that the beneficiary worked in her household as a domestic who also cared for her infant son during the months of October and November 2000.

¹⁰ Probably Pasay City, Philippines.

The beneficiary has submitted a letter dated October 17, 2004, stated that she cannot provided evidence that she was paid in the above positions since she was paid in cash, and that the positions were temporary and "on an as needed basis."

As further evidence of the beneficiary's experience, the petitioner has submitted on appeal further job experience verification for the beneficiary.

A statement was submitted that is dated December 29, 2004, from [REDACTED] of Our Blessed Mother Clinic and Lying-in, Isabela, Philippines. [REDACTED] stated that the beneficiary was employed there full time (i.e. 40 hours/weekly) as a nurse assistant from April 1997 to February 1998. Her duties were "... bathing, changing diaper, preparing and serving food, feeding, providing medications and personal hygiene"

A statement was submitted that is dated December 27, 2004, [REDACTED] of Isabela, Philippines. [REDACTED] stated that the beneficiary worked as a care giver [REDACTED] aged and infirmed mother. [REDACTED] stated that the beneficiary was employed there full time (i.e. 40 hours/weekly) from September 1996 to March 1997. He stated the beneficiary's duties were "... bathing, feeding, assisting in changing clothes and diaper"

Prior to the submission of the above two letters on appeal, there was a lack of supporting credible evidence of the occupation from prior employers. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

However with the submission of the two letters from [REDACTED] probative evidence establishes that the beneficiary has three months of experience as nurse assistant (uncertified).

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 established that the beneficiary has the requisite experience as stated on the labor certification petition. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position. The petitioner has that burden.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner's contentions and evidence cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor for the two beneficiaries for which the petitioner, [REDACTED] doing business [REDACTED] has petitions pending. 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 to prove its ability to pay the proffered wage from the priority date.

ORDER: The appeal is dismissed.