

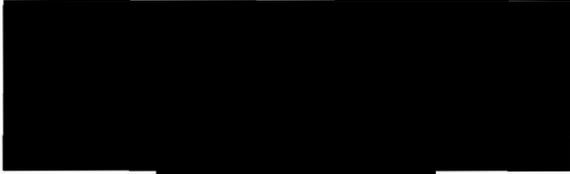


U.S. Citizenship  
and Immigration  
Services

B6

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

PUBLIC COPY



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: SEP 07 2006

WAC-03-091-50248

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:



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

**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 an individual and seeks to employ the beneficiary permanently in the United States as a home attendant (“nurse/caretaker”) in her private residence. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s January 20, 2005, denial, the case was denied based on the petitioner’s failure to demonstrate the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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, 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. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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 for processing by the relevant office within the DOL employment system on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$9.70 per hour, 40 hours

---

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

per week, for an annual salary of \$20,176 per year.<sup>2</sup> The labor certification was approved on November 27, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on January 27, 2003.

On May 27, 2004, the Service Center issued a Request for Additional Evidence ("RFE")<sup>3</sup> for the petitioner to submit a statement of monthly household expenses for the petitioner's family to include: housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, homeowner, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, clothing, gardner, house cleaner, and any other monthly recurring household expenses. Counsel submitted a brief three line monthly expense report prepared by the petitioner's daughter in response. The report included expenses listed for home care, payroll taxes and supplemental medical insurance.

On October 13, 2004, the Service Center issued a second RFE requesting further evidence of the petitioner's ability to pay, specifically, the petitioner's 2002 and 2003 Federal Tax Returns. The petitioner submitted these tax returns in response.

The director determined that the evidence submitted in response to the RFE was insufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage, and denied the case on January 20, 2005. The petitioner appealed and the matter is now before the AAO.

We will first examine the petitioner's ability to pay based on the evidence in the record, and then consider the petitioner's additional arguments on appeal. The evidence in the record of proceeding regarding the petitioner's ability to pay includes the petitioner's Form 1040 for the years 1998 through 2003, and the brief expense report prepared. On appeal, the petitioner submitted a letter from one bank account held, as well as a report regarding an account with an investment firm.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on January 9, 1998, the beneficiary did not list that she was employed with the petitioner. The petitioner has not claimed that she employed the beneficiary previously.

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. 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.*

---

<sup>2</sup> The ETA 750 Form originally listed \$425 per week, but was changed to \$9.70 per hour, and stamped as corrected by DOL prior to certification.

<sup>3</sup> On April 8, 2004, the Service Center denied the case for failure to respond to a RFE. The RFE had been sent to prior counsel who represented the petitioner with respect to completion of the labor certification, and present counsel, who took over representation and filed the I-140, filed a Motion to Reopen the case. The case was reopened and the Service Center issued the RFE to present counsel.

*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 an individual, and would be treated like a sole proprietor, 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 does not have any dependents, and would only need to demonstrate income to support herself in Granada Hills, California.<sup>4</sup> The tax returns reflect the following information for the following years:

<u>Tax Year</u>	<u>Adjusted Gross Income</u>
2003	\$1,962 <sup>5</sup>
2002	\$39,556 <sup>6</sup>
2001	\$8,480
2000	\$9,421
1999	\$14,097
1998	\$6,371

If we reduced the petitioner's adjusted gross income (AGI) by \$20,176, the proffered wage that the petitioner must demonstrate that it can pay, the individual petitioner would be left with negative income in each year, with the exception of 2002, where the petitioner would be left with \$19,380, an amount insufficient to meet the petitioner's estimated annual expenses.

---

<sup>4</sup> The petitioner's tax returns reflect an address in North Hollywood, California, although the I-140 petition filed reflects an address in Granada Hills, California. Based on the record, we are unable to determine whether the petitioner has moved, or whether the second address reflects that her mail is directed to another address in care of another person.

<sup>5</sup> We have subtracted out what appears to be the carryover net operating loss (NOL). The petitioner's tax return otherwise reflects an Adjusted Gross Income of -\$123,934 based on a NOL carryover.

<sup>6</sup> We have subtracted out the carryover net operating loss (NOL). The petitioner's tax return reflects an Adjusted Gross Income of -\$130,523 based on a NOL carryover.

On appeal, counsel for the petitioner contends that the CIS decision was “arbitrary and capricious” and further “was made in disregard of the financial capability of the petitioner to pay the proffered wage. The BCIS failed to recognize the information contained in the tax returns of the petitioner showing income investments, liquidating trust and personal savings representing the petitioner’s ability to pay the proffered wage.”

While the petitioner’s tax returns do exhibit that the petitioner earns dividend and interest income, any interest earned is reflected as income on the first page of the individual’s Form 1040. The petitioner’s interest and dividend income has varied depending on the year from a high of around \$10,000 in 1999 to a low of around \$1,650 in 2003. Further, the 2002 tax return shows that some investments have been liquidated already. Counsel refers to a “liquidating trust.” The tax returns refer to a [REDACTED] however, the 2000 tax return references that [REDACTED] has filed bankruptcy and is under investigation for fraud” and the petitioner declared a \$170,000 loss in the year 2001 as a result. Counsel has not provided any information related to how much revenue the liquidating trust would generate on an annual basis, whether the trust referred to represents a separate trust from the [REDACTED] or whether the funds have been recovered from the [REDACTED] trust to generate income.

On appeal, the petitioner has provided a statement from Washington Mutual bank where the petitioner maintains an account. The letter acknowledges that the petitioner has been a customer at the bank for over ten years. As of February 18, 2005, the bank account reflected a balance of \$67,630.54, and stated that she “maintains a monthly average of \$60,000 . . . and also has a checking account that receives a monthly deposit from social security of \$1,714.00.” The length of time that the petitioner has maintained the \$60,000 balance is unclear. While the letter acknowledges that the petitioner has maintained an account for ten years, the letter does not confirm or contain enough information to determine whether the petitioner had a balance large enough to pay the proffered wage for the entire time period from 1998 to the present. The account would appear to be sufficient for 2005. Counsel additionally provided a second statement from an investment bank, dated February 3, 2005, showing that the petitioner held \$42,166.41 in her account. However, this was the only statement provided, and while again it may confirm funds sufficient to pay the proffered wage in 2005, no information was provided so that we could make an assessment regarding whether the petitioner held funds sufficient to pay the proffered wage in prior years.

On the ETA 750, the petitioner indicates that the beneficiary will receive free room and board and reside on the premises in a four bedroom house with three other adults in the house. No information was provided either in the underlying record, or on appeal, as to whether the petitioner owns her home, rents a home, or resides with other people. Further, the monthly statement does not account for any housing expenses, food, or utilities. Whether the petitioner does not have any monthly housing expenses, food expenses, or has not included any housing expenses is unclear.

The monthly statement lists homecare, payroll taxes, and supplemental medical insurance for a total of \$2,264.97 per month, for an annual total of \$27,179.64. Her tax returns reflect at a minimum \$27,000 in medical and dental care annually, so that the monthly total of expenses would appear to be on the low end of any estimate. Counsel asserts on appeal that the petitioner has been paying for long term care expenses in the amount of \$24,600 per year, which is less than the proffered wage. While the tax returns do reflect these payments, it is unclear whether any or all of these long term care expenses would still be required if the beneficiary worked for the petitioner. Counsel has not asserted that the petitioner would not need to pay the other previously paid long term care expenses if the beneficiary worked for the petitioner.

Further, counsel asserts that “in this situation where family members are willing to assist the petitioner and also because family members usually have a moral obligation to help each other, it would be appropriate to

consider the ability pay [sic] issue in the context involving the care of an aging parent who wishes to liver [sic] in her own home for as long as possible.” If counsel seeks to assert that other family members have assets, which may be used to asset the petitioner’s expenses, documentation would need to be supplied. No affidavit, individual, or sources of funds have been identified to evidence this claim.

Based on a review of all the information contained in the records, we cannot conclude that the petitioner has demonstrated the ability to pay the beneficiary the proffered wage from 1998 to 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.