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U.S. Citizenship  
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FEB 12 2007

FILE: WAC 04 233 53731 Office: CALIFORNIA SERVICE CENTER Date:

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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

CC:



**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The petitioner appealed. The appeal will be dismissed.

The petitioner<sup>1</sup> operates a residential care home. The petitioner seeks to employ the beneficiary permanently in the United States as a household domestic worker/caregiver. 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, and, that the petitioner had not established that the beneficiary has the minimum requirements for education and experience as stated on the labor certification petition. The director denied the petition accordingly.

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 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 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).

Here, the Form ETA 750 was accepted on December 11, 2000. The proffered wage as stated on the Form ETA 750 is \$1,272.27 per month (\$15,267.24 per year).<sup>2</sup> The Form ETA 750 states that the position requires three months of experience.

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<sup>1</sup>As the petitioner is a sole proprietor, all references to petitioner in this discussion indicate [REDACTED]

<sup>2</sup> It has been six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A,

On appeal, the petitioner submits 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 (“USDOL”) with related correspondence; and, an employment contract dated July 20, 2004.

Because the director determined, among other things, that 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 March 16, 2005, pertinent evidence of the petitioner’s ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements from 2001, to present.

The director also requested additional evidence of the beneficiary’s education/training as stated on the labor certification and the beneficiary’s prior job experience. The director requested a job verification from the beneficiary’s prior employers on their letterhead with the beneficiary’s job title, duties, dates of employment and number of hours worked.

In response to the above requests, the petitioner submitted two letters dated June 3, 2005, of the beneficiary’s prior job experience as well as the petitioner’s U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2001, 2002, 2003 and 2004. W-2 Wage and Tax statements were attached to the returns, but none for the beneficiary.

The director denied the petition on June 22, 2005, finding, *inter alia*, that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

#### Ability to Pay the Proffered Wage

The tax returns demonstrated the following financial information concerning the petitioner’s ability to pay the proffered wage of \$15,267.24 per year from the priority date of December 11, 2000:

- In 2001, the Form 1040 stated adjusted gross income of \$22,269.00.
- In 2002, the Form 1040 stated adjusted gross income of \$21,709.00.
- In 2003, the Form 1040 stated adjusted gross income of \$44,288.00.
- In 2004, the Form 1040 stated adjusted gross income of \$50,632.00.

Therefore in tax years 2001, 2002, 2003 and 2004, the petitioner adjusted gross income was sufficient to pay the proffered wage of \$15,267.24 per year but for the petitioner’s personal expenses that must also be considered for all years as discussed below.

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Section 23 b., states “The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.”

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. No evidence was submitted to show that the petitioner employed the beneficiary.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. 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).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports herself. Together with the above mentioned tax returns, the petitioner has submitted Schedule A that is a partial statement<sup>3</sup> of the petitioner's total yearly personal expense that in this case are medical and dental expenses, taxes paid during the year and home mortgage payments and points. In 2001, 2002, 2003 and 2004, the petitioner's itemized deductions were \$20,636.00, \$39,415.00, \$59,890.00 and \$103,874.00 respectively. The sole proprietorship's adjusted gross incomes of \$22,269.00, \$21,709.00, \$44,288.00, and \$50,632.00 were insufficient to pay the proffered wage of \$15,267.24 per year together with personal yearly expenses disclosed on the petitioner's personal tax return except in year 2001. However, the Schedule A statement does not indicate all of the petitioner's household living expenses that credibly would be greater than those items allowed as deductions on the U.S. federal tax returns.<sup>4</sup>

On appeal, the petitioner states that that she has the ability to pay the proffered wage.

As additional evidence on the above issue, the petitioner has submitted copies of the following documents: a statement of the petitioner's personal assets dated July 21, 2005; a quarterly personal portfolio statement for the petitioner's Roth IRA account, period April 1, 2003 to June 30, 2003, with an ending balance of \$4,486.24; and, a quarterly statement of the same petitioner's Roth IRA account for the period April 1, 2005 to June 30, 2005 with an ending balance of \$5,801.37; the petitioner's checking and savings account statement as of June 28, 2005 with an ending balance of \$42,016.53; a business checking account for Frevedel

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<sup>3</sup> The I-140 petitioner's business is a sole proprietorship. The director did not request petitioner submit a statement of recurring household expenses for the petitioner's family to determine the ability of the petitioner to pay the proffered wage and meet her living costs. This statement should indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

<sup>4</sup> See generally <http://www.irs.gov/irs-pdf/i1040sa-2003.pdf>. - Schedule A instructions.

Home Care dated June 1, 2005 to June 30, 2005; a non-audited financial statement; and, a personal “family’s financial security” group accidental death coverage certificate.

Since the priority date in this matter is December 11, 2000, it is not clear why the petitioner has submitted financial information<sup>5</sup> primarily for year 2005 to prove the petitioner’s continuing ability to pay the proffered wage from year 2000, or the relevancy of a accidental death life insurance policy that would only be payable in the event of the petitioner’s death.<sup>6</sup> A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Since the petitioner’s has not submitted financial proof such as U.S. federal tax returns with signatures and dates or audited financial statements for year 2005, we have no ability to ascertain, if in light of the petitioner’s finances in 2005, the proof offered for 2005 would evidence the petitioner’s ability to pay the proffered wage. Likewise, no evidence was submitted of the petitioner’s personal assets from the priority date to April 1, 2003 so we are unable to determine if the petitioner could have paid the proffered wage from her personal assets.

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 cannot be concluded to outweigh the evidence presented in the tax returns for 2001, 2002, 2003 and 2004 as submitted by petitioner that show 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.

#### The Beneficiary’s Qualifications for the Job

A second issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. 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).

The regulation 8 C.F.R § 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.

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<sup>5</sup> The petitioner included in the “Petitioner’s Personal Assets” real estate valued at \$1.3 million. There is no substantiation given for this valuation, or even the identity of the property(s). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

<sup>6</sup> It is unclear why the petitioner submitted the petitioner’s accidental death policy as evidence of the ability to pay the proffered wage since the redemption value of that policy, \$1,000.00, according to the petitioner, is a nominal sum relative to the proffered wage obligation.

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(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 determine whether a beneficiary is eligible for an employment based immigrant visa. Citizenship & Immigration Services (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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of household domestic worker/caregiver.

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

14.	Education .....	
	Grade School	Blank
	High School	4
	College	Blank
	College Degree Required	no
	Major Field of Study	Blank
	Training	Blank
	Experience .....	
	Job Offered - Years/Mos.	0 / 3 [months]
	Related Occupation	Blank
	Years/Mos.	Blank

According to a memo from the Assessment Manager, Alien Labor Certification Office, acknowledged February 14, 2001, Item 15, entitled "Other Special Requirements" was amended to read:

- If hired can speak, read and write English;
- Know food nutrition, food preparation, food storage, menu planning
- Will obtain First aid, CPR, Health Screening report issued by the state of California Health and Welfare Agency.
- Willing to be fingerprinted to be submitted to the Department of Justice.

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience for the position of household domestic worker/caregiver:

15. WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

Nurse assistant/Caregiver

DATE STARTED

Month – March Year 2004

DATE LEFT

Month – August Year 2004

KIND OF BUSINESS

Residential Care Home

DESCRIBE IN DETAIL DUTIES...

Assists the elderly with shower, ambulating, giving exercise ....

NO. OF HOURS PER WEEK

40

According to the labor certification the beneficiary is a high school graduate that had received a diploma in 1969.

The director denied the petition on June 22, 2005, finding, *inter alia*, that the petitioner had not established that the beneficiary has the minimum requirements for education and experience as stated on the labor certification petition.

On appeal, the petitioner states that that the beneficiary has met the minimum education, training and experience.

Prior to the appeal, a review of the record of proceeding reveals that the petitioner submitted copies of the following documents as evidence of the beneficiary's minimum requirements for the education and experience stated on the labor certification: a certificate from the Red cross that the beneficiary has completed the First aid basics course; a State of California Health Screening Report date May 31, 2005; a personnel clearance check; and a letter from the beneficiary dated June 6, 2005. Relative to the beneficiary's job experience, a letter was submitted from June 3, 2005, from the Fely-Mar Residential Care Home of San Pablo, California given by [REDACTED] the licensee and owner, that the beneficiary was employed at his facility as a caregiver from March 2004 to August 2004 working 40 hours per week and describes his duties similar to the job description found in the labor certification.

As additional evidence the petitioner submitted a copy of the beneficiary's high school diploma and an employment verification dated July 20, 2005 from the Fely-Mar Residential Care Home of San Pablo, California given by [REDACTED] its accountant, stating that the beneficiary was or is employed there at \$1,200.00 per month.

Further, the petitioner submitted a letter from the Mary Chiles Hospital, the Philippines, stating that the beneficiary worked there from July 28, 1998 to November 8, 1998 in the Geriatric Unit as a Nurse Caregiver describing the beneficiary's duties similar to the job description found in the labor certification. Included with this submission is a Certificate of Completion that the beneficiary had completed a course of instruction in "Live-In Caregiver Skills Development Program" at a training center at Quezon City, the Philippines

The evidence supports the petitioner's claims and it is conclusive of the petitioner's job experience as a live-in caregiver. The evidence submitted does demonstrate credibly that the beneficiary had the requisite three months of experience. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

However, as stated above, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 concerning the ability to pay the proffered wage.

**ORDER:** The appeal is dismissed.