U.S. Department of Homeland Security
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Washington, DC 20529

B-6

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-092-50747 Office: CALIFORNIA SERVICE CENTER Date: JUL 21 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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.

for 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 dismissed.

The petitioner is a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is November 27, 1995. The beneficiary's salary as stated on the labor certification is $2,470 per month or $29,640 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 19, 2002, the director required additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing. The director specifically requested evidence pursuant to 8 C.F.R. § 204.5(g)(2), quoted above, as well as payroll documentation of the beneficiary's employment for the petitioner, as claimed on the Form ETA 750B.

Counsel submitted the petitioner's 1995 through 1999 Form 1040 U.S. Individual Income Tax Return. The federal tax return reflected an adjusted gross income of $73,224 for 1995, $72,316 for 1996, $16,735 for 1997, $73,837 for 1998 and $80,430 for 1999. Counsel did not submit the requested payroll documentation, asserting that the beneficiary had returned to his native country upon the expiration of his nonimmigrant visa.

In a second request for evidence (RFE) dated July 17, 2002, the director required additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing. The director sought evidence of the petitioner's quarterly wage report and completion of omitted items on the petition.

Counsel submitted the petitioner's 2000 and 2001 Form 1040 U.S. Individual Income Tax Return and EDD Quarterly Wage and Withholding Reports for the year 2001. The federal tax return for 2000 reflected an adjusted gross income of $30,195. The return for 2001 reflected an adjusted gross income of $66,494. Counsel also submitted the petitioner's California Form EDD Quarterly Wage and Withholding Report for the year 2001. The beneficiary is not named as an employee of the petitioner's on this report.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director emphasized that the petitioner had failed to establish it's ability to pay the proffered wage during 1997 and 2000, noting that with 2 dependents there would not be sufficient funds left over to support them if the proffered wage was paid.

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. On appeal, counsel states that during the years disputed by the director the beneficiary was working for petitioner and that his wages had already been paid before the adjusted gross income was determined. The record, however, contains no evidence that the beneficiary was employed by the petitioner during the years 1997 and 2000. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We note that the initial RFE specifically requested evidence of the beneficiary's employment for the petitioner. Thus, the petitioner was on notice that such documentation was required. As such, the future submission of such documentation as part of a subsequent motion would not be considered. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

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).

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she 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.

The petitioner's 1997 Form 1040 reveals an adjusted gross income of $16,735 and a net profit from business (Schedule C) of $13,850. The petitioner could not pay the proffered wage from these amounts. The petitioner's 2000 Form 1040 reveals an adjusted gross income of $30,195 and a net profit from business of $30,655. It is questionable that the petitioner could pay the proffered wage of $29,640 and support three dependents from these amounts.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to 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.