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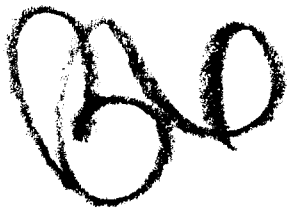
U.S. Citizenship and Immigration Services



[redacted]

JUN 15 2004

FILE: WAC-01-284-51432 Office: CALIFRONIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION Immigrant Petition for Alien 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.

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 nursing home. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. 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.

The director denied the petition as he determined the petitioner failed to establish its ability to pay the proffered wage.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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.

The petition's priority date in this instance is December 18, 1997. The beneficiary's salary as stated on the labor certification is $9.21 per hour or $19,157 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 4, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's federal income tax returns from 1997 to the present and evidence of wage payments to the beneficiary, if any.

Counsel submitted the petitioner's 1997 through 2001 Form 1040, U.S. Individual Income Tax Returns. The federal tax return for 1997 reflected adjusted gross income of $2,166. Schedule C reflected net profits from business of $2,331. The federal tax return for 1998 reflected adjusted gross income of -$11,986. Schedule C reflected a net loss of $12,083. The federal tax return for 1999 reflected adjusted gross income of -$110. Schedule C reflected a net loss from business of -$123. The federal tax return for 2000 reflected adjusted gross income of $4,768. Schedule C reflected net profits from business of $5,131. The federal tax return for 2001 reflected adjusted gross income of $$8,214. Schedule C reflected net profits from business of $8,839.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO will next examine the petitioner's net income figure as 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. Tex.

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.

On appeal, counsel states that the petitioner's business has dramatically improved as indicated in her five months unaudited income statement ending May 31, 2002. Counsel further states that the petitioner's 2001 federal income tax was to include additional income and expenses. Counsel submits the petitioner's 2001 corrected tax return indicating an adjusted gross income of $42,037. Schedule C reflected net profits from business of $44,143.

Counsel argues that consideration of the beneficiary's 2002 increased revenue is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. Further, while the petitioner's amended 2001 tax returns may indicate the petitioner's ability to pay the proffered wage during 2001, which would be dependent on an additional assessment of the petitioner's monthly expenses, the tax returns for 1997 through 2000 do not reflect the petitioner's ability to pay the proffered wage of $19,157 during each of those years.

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 until the beneficiary obtains lawful permanent residence.

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.