U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 179 53079 Office: CALIFORNIA SERVICE CENTER Date: APR 14 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker Pursuant to Section 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: Evelyn Sineneng-Smith
1022 West Taylor Street
San Jose, CA 95126

**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. It seeks to employ the beneficiary permanently in the United States as a household domestic worker/caregiver. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 denied the petition accordingly.

On appeal, the petitioner submits additional evidence and asserts that it has the financial ability to pay the certified wage.

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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 18, 1999. The proffered wage as stated on the Form ETA 750 is $1,213.33 per month, which amounts to $14,559.96 per year. On Part B of the ETA 750, as amended by the beneficiary on March 21, 2000, the beneficiary claims to have worked for the petitioner since October 1999.

On Part 5 of the preference petition, filed on May 28, 2003, the petitioner claims to have been established on July 1, 1997, to have $249,400 in gross annual income, $60,000 in annual net income and to currently employ six workers.

As the petitioner submitted no evidence of its ability to pay the proffered wage or other documentation verifying the beneficiary's prior qualifying employment, the director issued a request for additional evidence on April 5, 2004. He instructed the petitioner to provide evidence of its ability to pay the proffered wage of $14,559.96 in the form of federal tax returns, annual reports, or audited financial statements covering the years from 1999 through 2003. The director also instructed the petitioner to provide the beneficiary's Wage and Tax Statements (W-2s) from the start of her employment with the petitioner to 2003. The director further requested that the petitioner provide copies of its last four state quarterly wage reports, as well as evidence of that the beneficiary had accrued three months of qualifying experience as a household domestic

worker/caregiver as of the priority date, as required by the terms of the labor certification. Finally, the director requested the petitioner to submit evidence establishing that [redacted] who had submitted a Notice of Entry of Appearance as Attorney or Representative (Form G-28), was authorized to represent the petitioner as an accredited representative. Ms. [redacted] G-28, dated May 19, 2003, designates her representation on Part 4, "Others," as a "Bonded Immigration Consultant, Juris Doctor Bond #WMI1211877." A copy of this bond, labeled as a "Surety Bond Immigration Consultants," had been offered with the initial filing of the visa petition. It contains a stamp indicating that it had been filed with the relevant state office and that the premium for the two-year bond was $1,750.

In response to this request for evidence, Ms. [redacted] submitted a letter discussing her right to represent the petitioner. It was accompanied by a copy of an updated bond similar to that initially submitted, but omitting the proof of filing with the state. Ms. [redacted] letter asserts that while she is not an authorized representative recognized by the Board of Immigration Appeals (BIA), she claims that she is governed by the state of California regulations requiring her to file a $50,000 bond as an immigration consultant. She requests to be recognized under this category.

Regarding the petitioner's ability to pay the proffered salary, the petitioner submitted copies of federal tax returns for 1999, 2000, 2001, and 2002. For 1999 the petitioner submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return. It shows that the sole proprietor filed jointly with her spouse and claimed two dependents. This tax return contains the following information:

| | 1999 |
|---|---|
| Gross income (Schedule C) | $ 118,438 |
| Total Expenses (Schedule C) | $ 138,063 |
| Business Net Profit (Schedule C & Form 1040, line12) | -$ 19,625 |
| Wages, salaries, and tips | $ 43,776 |
| Adjusted Gross Income (Form 1040, line 33) | $ 29,874 |

For 2000, the petitioner provided a copy of its Form 1120, U.S. Corporation Income Tax Return. It shows that the petitioner incorporated on July 1, 2000 and that its tax return covers its financial information from July 1, 2000 to December 31, 2000. This tax return contains the following:

| | 7/1/00 to 12/31/00 |
|---|---|
| Taxable income before net operating loss (NOL) deduction | $7,087 |
| Current Assets (Sched. L) | $7,020 |
| Current Liabilities (Sched. L) | $1,863 |
| Net Current Assets | $5,157 |

As noted on Schedule L of this corporate tax return, net current assets are the difference between a petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage.[1] Besides net income, Citizenship and Immigration Services (CIS) will review a corporate

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid

petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets for the period under review.

The petitioner also submitted a partial copy of petitioner's owner's individual tax return for 2001 and a copy of her individual tax return for 2002. It is noted that the petitioner's name and employer's identification number given on the preference petition appears to correspond to the information on the corporate return filed for 2000, although the address does not match.

With the response, the petitioner offered copies of the beneficiary's W-2s for 1999 through 2002. The 1999 and 2000 W-2s indicate that the beneficiary was paid $2,000 and $4,900, respectively. No explanation is provided to clarify the tax identification numbers claimed on these W-2s, which do not correspond to the petitioner's 2000 corporate return and are not listed on the sole proprietor's 1999 individual tax return. In 2001, the corporate petitioner paid the beneficiary $10,800. In 2002, the beneficiary received $11,750 wages from the petitioner. A 2003 W-2 was supplied with the petitioner's response, but it shows that the beneficiary was not employed by the petitioner, although the petitioner's state quarterly wage report for the last quarter of 2003 shows that the petitioner paid her compensation of $2,000. By the end of the March 31, 2004, the state quarterly wage report indicates that the petitioner paid the beneficiary $3,000.

The director determined 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 denied the petition. The director noted that the petitioner's documentation was not responsive to the request for evidence. In 1999, he found that the sole proprietor's adjusted gross income of $29,874 could not reasonably support the payment of the proffered wage of $14,559.96 in addition to establishing sufficient income to cover the costs of maintaining the sole proprietor and her family of four. He also determined that the corporate petitioner's 2000 tax return reflected insufficient taxable income or net current assets to pay the proffered wage during that period.

On appeal, the petitioner resubmits the letter earlier provided relating to Ms. [redacted]'s request for recognition as an accredited representative. The petitioner also resubmits copies of the individual owner's 2001 and 2002 individual tax returns, and additionally provides a list of her personal assets, as well as four copies of individually held bank or money market account statements. In addition, the petitioner submits a copy of a bank statement issued July 30, 2004 to the corporate petitioner, showing an ending balance of $4,051.03. A letter from the principal owner summarizes these items and asserts that she has sufficient assets to pay the proffered wage, as well as owning rental properties in the Philippines.

The director failed to address the issue of representation by Ms. [redacted] It is noted that the regulation at 8 C.F.R. § 103.2(a)(3), relating to representatives authorized to file appeals, provides in pertinent part:

> *Representation.* An applicant or petitioner may be represented by an attorney in the United States as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

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expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The regulation at 8 C.F.R. § 1.1(f) defines an attorney as a person who is a member of good standing in any state bar. The regulation at 8 C.F.R. § 292.1(a)(4) provides that an accredited representative is a person "representing an organization described in § 292.2 of this chapter who has been accredited by the Board."[2] There is no indication in the record that Ms [redacted] is an attorney or an accredited representative authorized by the Board.

It is further noted that 8 C.F.R. § 292.1(a)(2)(i), (iii), and (iv) provides that a law graduate not yet admitted to the bar may act as a representative if he or she is appearing at the request of the person requiring representation, that he or she has permission from the official "before whom he or she wishes to appear (namely an immigration judge, district director, officer-in-charge, regional director, the Commissioner, or the Board)," and that he or she "has filed a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative and that he or she is appearing without direct or indirect remuneration from the alien he or she represents...." The record in this case contains only a copy of a state-required surety bond that Ms [redacted] filed and a G-28. The record fails to establish that Ms [redacted] falls within any of the relevant categories of representatives authorized by federal immigration regulations, regardless of any state surety bond requirements. The AAO concludes that this individual is not authorized to act as a representative in immigration proceedings.

The petitioner's assertions relating to its continuing ability to pay the proffered wage are not persuasive. 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 may have 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. If any shortfall between the actual wages paid and the proffered wage can be covered by either a petitioner's net income or net current assets, then the petitioner is deemed to have established its ability to pay a certified wage during a given period.

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).

The examination of a petitioner's ability to pay a certified salary differs slightly when the petitioner is a sole proprietorship. In this case, the record indicates that the petitioner was a sole proprietorship in 1999, but incorporated in 2000. A sole proprietorship is 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,** individual assets and liabilities are also considered as part of the petitioner's ability to pay during the period under review. 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

[2] "Board" means the Board of Immigration Appeals." 8 C.F.R. § 1.1(e).

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). For that reason, as is the case here, a petitioner is frequently requested to provide a summary of the sole proprietor's household expenses

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.

Although the director failed to request a summary of household living expenses to better determine the petitioner's ability to pay the $12,559.96 shortfall between the actual wages paid to the beneficiary and the proffered wage of $14,559.96 in 1999, his conclusion that the petitioner's tax return failed to demonstrate such ability was not unwarranted. Even without considering any household expenses, the $12,559.96 difference to be covered represented 42% of the petitioner's adjusted gross income. Further, none of the documentation relating to the individually held cash equivalent assets that is offered on appeal relates to the sole proprietor's financial profile in 1999. 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)).

As noted above, as the petitioner was incorporated on July 1, 2000, only the specific corporate financial data is directly probative of its ability to pay a certified wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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." Relevant to the period beginning July 1, 2000, and subsequent, the relevant evidence submitted to the record consists of the beneficiary's W-2s, the petitioner's 2000 tax return, and the copy of a 2004 bank statement submitted on appeal.

For 2000, if the corporate petitioner's tax return covering the second six months of 2000 is compared to $2,450 received in earnings as extrapolated from the beneficiary's W-2 for 2000, the petitioner's net income of $7,087 would be sufficient to show its ability to pay the designated portion of the proffered wage ($4,829.98) remaining after deducting the beneficiary's earnings for those six months. However, as no other tax return or audited financial statement was provided covering the *first* six months of 2000, the petitioner's evidence failed to establish its ability to pay the proffered salary during this year.

Similar conclusions must be reached for 2001, 2002, or 2003. No corporate tax return, audited financial statement, or annual report was provided. The individual tax returns and individual assets are not determinative of the corporate petitioner's ability to pay the certified wage. Therefore, the petitioner has not demonstrated its ability to pay the 2001, $3,759.96 difference between the actual wages paid to the beneficiary and the proffered wage. In 2002, the corporate petitioner has not established that it could pay the $2,809.96 shortfall between actual wages paid and the proffered salary. For 2003, the record fails to

demonstrate that the petitioner could pay the $12,559.96 shortfall between the proffered salary and the $2,000 that the beneficiary received as compensation.

With respect to the single 2004 bank statement submitted on appeal, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," in this case it has not been established why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial picture of a corporate petitioner. Bank statements illustrate only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. It cannot be concluded that a single 2004 bank statement considered in isolation from other corporate financial information may demonstrate the petitioner's ability to pay the proffered wage.

Following a review of the documents submitted to the underlying record and on appeal, the AAO finds that the petitioner has not demonstrated its continuing ability to pay the proffered salary as of the priority date as required by regulation.

Beyond the decision of the director, the evidence submitted to the record also fails to establish that the beneficiary had obtained the requisite work experience as of the visa priority date of October 18, 1999 as described in the labor certification. Item 14 requires that an applicant for the position of a household domestic/caregiver must have three months of experience in the job offered. The regulation at 8 C.F.R. §§ 204.5(l)(3)(ii)(A) & (D) requires that such experience be verified by the relevant trainer or employer. In the instant case, two statements from the petitioner's owner and beneficiary were submitted in response to the director's request for corroborating proof of such employment. The petitioner's owner merely summarizes the experience the beneficiary had gained at her place of employment beginning in October 1999. The beneficiary's statement simply states that she can't reach her former employers in the Philippines because they have gone out of business. No other evidence was submitted that she may have worked in the qualifying occupation with other employers as suggested on the ETA 750B or that attempts were made to procure other kinds of proof of employment if the employer's letters were clearly demonstrated to be unavailable. The response to the director's request for evidence on this issue was not sufficient and fails to demonstrate that the beneficiary obtained the required work experience as of the priority date.

In view of the foregoing, the petitioner's evidence fails to demonstrate its continuing ability to pay the proffered wage and fails to establish the beneficiary's prior employment experience in the certified position. Each reason is considered to be an independent and alternative basis for denial. In visa proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In this matter, that burden has not been met.

**ORDER**: The appeal is dismissed.