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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 05 149 53671 Office: CALIFORNIA SERVICE CENTER Date: SEP 26 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Other 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.

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 remanded for further consideration.

The petitioner is a residential care home. They seek to employ the beneficiary permanently in the United States as a live-in nurse assistant. 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 the beneficiary met the experience requirements of the labor certification as of the priority date of the visa petition and denied the petition accordingly.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 14, 2006 denial, the single issue in this case is whether or not the petitioner established that the beneficiary met the experience requirements of the labor certification as of the priority date of the visa petition.

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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (ii) *Other documentation* – (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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> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.
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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 be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is January 20, 1998.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational,

training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary have three months of experience in the job offered. Block 15 requires that if the beneficiary is hired, he "must speak, read and write English; must obtain First Aid, CPR, Health Screening Report issued by the State of California Health and Welfare Agency; must be willing to be fingerprinted to be submitted to the Department of Justice; must have legal right to work; live on premises; must be available on call 24 hours per day. The employer will compensate in accordance with the CA State law and regulations."

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of nurse assistant must have three months of experience as a nurse assistant; must speak, read, and write English; must obtain First Aid, CPR, Health Screening Report; must be willing to be fingerprinted; must have a legal right to work; must live on premises; and must be available on call 24 hours per day.

In the instant case, the petitioner submitted a letter, dated April 1, 2002, from Norma Solidum of Solidum Care Home #7, stating that she employed the beneficiary from November 1997 to January 1998 (approximately two months) as a household domestic worker/caregiver/uncertified nurse assistant. The petitioner also submitted a sworn affidavit from [redacted] dated April 2, 2002, stating that he had knowledge that the beneficiary was employed by [redacted] from April 1993 to August 1996. [redacted] stated that he referred the beneficiary to [redacted] In response to a request for evidence, the petitioner submitted a letter, dated December 22, 2005, stating that she has employed the beneficiary from January 1988[1] to the present as a caregiver. The director denied the petition noting that the petitioner's letter describing the beneficiary's duties was vague, and the director was unable to determine if the beneficiary has the experience required to perform the duties required by the labor certification.[2]

On appeal, the petitioner provides copies of the beneficiary's First Aid and Adult CPR certifications, dated November 26, 1997, August 9, 1999, June 7, 2001, May 29, 2003, and May 18, 2005. The petitioner also submitted a copy of the beneficiary's Health Screening Report, dated December 3, 1997, a copy of the beneficiary's fingerprints, another copy of the job verification from Norma Solidum, another copy of the affidavit from [redacted] and a new job description of the beneficiary's duties. The new job description contained the same requirements as those of the labor certification.

Since the petitioner did not begin to employ the beneficiary until five days before the priority date of January 20, 1998, the beneficiary would appear to still be approximately a month short of the three-month experience requirement of the labor certification. However, the director did not consider the sworn affidavit of [redacted] As the director gave no reason to doubt the veracity of the affidavit nor did he require additional proof; as the duties performed by the beneficiary were similar to those of the labor certification; as the beneficiary has the required First Aid, CPR, Health Screening, and fingerprints; and as the beneficiary's employment with Cammarata Guest House was for a period of more than three years, the AAO can only conclude that the petitioner has established that the beneficiary met the experience requirements of the labor certification at the time of the priority date.

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[1] It is noted that all other evidence in the record indicates the petitioner began employing the beneficiary in 1998. It is assumed that the petitioner made a simple clerical mistake when typing 1988.

[2] Although the petitioner's statement of the beneficiary's current job description may have been vague, the petitioner did not begin to employ the beneficiary until January 15, 1998, only five days before the priority date of January 20, 1998. The additional five days of employment would not have significantly added to the experience required by the labor certification.

Beyond the decision of the director, another issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage from the priority date and continuing to the present.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is January 20, 1998. The proffered wage as stated on the Form ETA 750 is $1,584.27 per month or $19,011.24 annually.

Relevant evidence submitted in response to a request for evidence from the director includes copies of the petitioner's 2000 through 2004 Schedule Cs, Profit or Loss From Business, for the address [redacted], copies of the owner's personal assets, a list of the petitioner's monthly expenses, copies of the petitioner's 2005 (first three quarters) Forms 941, Employer's Quarterly Federal Tax Returns, for P.O. Box [redacted], and a copy of an Application For License, Permit or Certification, for [redacted] The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2000 through 2004 Forms 1040, Schedule Cs, also reflect net incomes from business as $98,554, $56,795, $51,987, $89,052 and $110,311, respectively.

The petitioner's personal assets include savings of $100,000, life insurance cash value of $500,000, and real estate valued at $3,020,000.

The petitioner's monthly expenses were listed as $20,832, including food, cable, gas, phone, and internet at the care home, or yearly expenses of $249,984.

The petitioner's 2005 Forms 941 reflect wages paid of $44,947.15 in the first quarter, $43,418 in the second quarter, and $42,812 in the third quarter.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer

[3] It is noted that ETA 750 requires the beneficiary to work at 8516 Edgefield Way, Stockton, CA 95209.

remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 instant case, on the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary claims to have been employed by the petitioner since January 15, 1998. However, counsel has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary from 1998 to the present. In an unsworn affidavit, the petitioner states that the beneficiary is currently being compensated at a rate of $1,456.00 per month. The declaration provided is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations, who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746. Such an unsworn statement made in support of a petition is not evidence and thus, is not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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 petitioner is a sole proprietorship, 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*, [redacted] 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 has only provided its Schedule Cs for an entity at [redacted] not the petitioner. The owner's complete Forms 1040 were not provided. Also, the list of monthly expenses submitted by the petitioner includes the expenses of at least one of the owner's facilities. Furthermore, the owner's personal assets include real estate, which will not be considered as evidence of the petitioner's ability to pay the proffered wage. Property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases" CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the owner's household expenses, to provide verifiable evidence of its current assets and liabilities, to provide the petitioner's complete Forms 1040 if it is a sole proprietorship, or other complete tax forms if the petitioner is not a sole proprietorship, to provide evidence of additional resources with which to pay the proffered wage such as bank accounts, CDs, etc., to show proof of the wages paid to the beneficiary, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 14, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.