

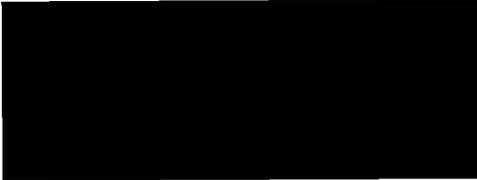
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**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 03 259 54700 Office: CALIFORNIA SERVICE CENTER Date: MAR 30 2006

IN RE: Petitioner:
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, Director
Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director (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 home. It seeks to employ the beneficiary permanently in the United States as a 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 in support of its continuing ability to pay the proffered 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:

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, 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$1,341.60 per month, which amounts to \$16,099.20 per year. The ETA 750B, signed by the beneficiary on January 10, 1998, states that the petitioner has employed the beneficiary since April 1997.

On Part 5 of the visa petition, filed on September 16, 2003, the petitioner claims that it was established in 1997, declares \$68,976 as a gross and annual net income, and currently employs one worker.

Because insufficient information corroborating the beneficiary's qualifying credentials and the petitioner's ability to pay the proffered wage was provided with the petition, on April 14, 2004, the director requested additional

evidence. The director advised the petitioner that such evidence must be in the form of federal tax returns, annual reports or audited financial statements. The director specifically requested the petitioner provide this documentation for the years 1998 through 2003, as well as to submit copies of the beneficiary's Wage and Tax Statements (W-2s) for 1998 through 2003. Additionally, the director instructed the petitioner to submit copies of its state quarterly wage reports for the last four quarters filed as well as a list of job title and the duties of each employee listed on these reports. The director further requested evidence of the beneficiary's CPR and First Aid credentials as required by the ETA 750, copies of business licensing information, employment verification, and evidence that the party submitting the original notice of entry of appearance as an attorney or a representative is an accredited representative recognized by the BIA (Board of Immigration Appeals).

In response, the petitioner provided documentation related to its business licensing and current operation, employment verification related to the beneficiary's prior employment, as well as her CPR and First Aid credentials, but failed to submit the financial information as requested by the director.¹ The only document related to the petitioner's financial status is a copy of a March 2004 "escrow analysis statement" related to the real property where the petitioning business is located.

The director denied the petition on August 3, 2004. He concluded that the petitioner failed to submit evidence of its continuing ability to pay the proffered wage as requested.

On appeal, the petitioner submits a letter from its owner, [REDACTED] as well as copy of a homeowner's policy declaration related to real estate located in Riverside, California. Additionally, a copy of a grant deed showing that the real property where the petitioner is located, was conveyed on July 23, 2004, from a revocable trust held by owner and another individual, to the owner in her individual name. Ms. [REDACTED] letter, dated August 21, 2004, states that these represent sufficient personal assets "to hire a worker and pay a continuous wage." Her statement on appeal expresses dissatisfaction with the representation that she had retained and requests an extension of time to gather more documentation. As the notice of appeal is dated August 30, 2004, and nothing further has been received to the record, this decision will be based on the record as it current stands.

Ms. [REDACTED]'s evidence submitted on appeal does not demonstrate the petitioner's continuing ability to pay the proffered wage as required by the regulation at 8 C.F.R. § 204.5(g)(2). In determining the petitioner's ability to pay the proffered wage during a given period, 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. Wages less than the proposed wage offer will also be given relevant consideration. In this matter, no evidence of payment of wages to the beneficiary was provided.

If the petitioner does not establish that it may have 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

¹ The petitioner submitted some information regarding its representation by the party who submitted the notice of entry of appearance as attorney or representative, but it failed to include evidence of recognition as an accredited representative. The petition has been processed as if no entry of representation has been submitted.

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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

When a petitioner is a sole proprietorship, additional factors will be considered. 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, 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 (line 12). 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). Such petitions often include a summary of household expenses of the sole proprietor.

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.

In the instant case, although it is not clear how the petitioner is structured, it is noted that the financial information provided to the record relates to real estate held by the petitioner's owner. Although CIS will consider a sole proprietor's overall personal assets and liabilities, they must represent cash or cash equivalent assets that would be a readily available resource out of which the proffered wage could be paid. Real estate is a generally considered a long-term asset and is not readily convertible to be available to pay the proffered wage. Moreover, if it is considered part of a petitioner's total depreciable assets used in the business, it would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *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)). Notwithstanding Ms. [REDACTED] dissatisfaction with her representation, it remains that as part of this proceeding, a petitioner must demonstrate that it has the continuing financial ability to pay the certified wage beginning at the priority date. In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the full proffered salary of \$16,099.20.

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.