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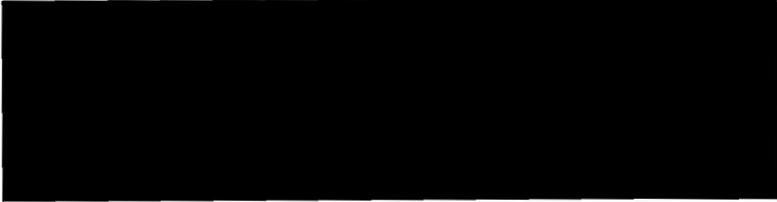
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: WAC-04-152-53694 Office: CALIFORNIA SERVICE CENTER Date: **MAY 04 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for Alien Worker as an Other 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

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 sustained. The petition will be approved.

The petitioner is a private individual. She seeks to employ the beneficiary permanently in the United States as a baby sitter/domestic helper. 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.

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(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 either 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 petition's 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 C.F.R. § 204.5(d). The priority date in the instant petition is March 26, 2002. The proffered wage as stated on the Form ETA 750 is \$5.88 per hour, which amounts to \$12,230.00 annually. The Form ETA 750B is not signed by the beneficiary and is signed only by the petitioner and her husband, signed in the space for the name of an agent. The ETA 750 states no employment of the beneficiary by the petitioner. The ETA 750 was certified by the Department of Labor on January 15, 2004.

The I-140 petition was submitted on May 5, 2004. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated June 28, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on September 13, 2004.

In a decision dated October 19, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a brief and additional evidence. The petitioner states on appeal that the nursing services company of which she is the 100% shareholder changed accounting methods in 2002 from accrual basis to cash basis. The petitioner states that the change caused a temporary decline in taxable income. The petitioner states that the company's tax returns from 1999, 2000 and 2001 showed high taxable income and that the petitioner expects the company's income taxes in 2004 to again show high taxable income. The petitioner also states that her nursing services company has paid substantial wages to the nurses employed by it.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 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 Sonogawa*, 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, which was unsigned by the beneficiary, no claim was made that the beneficiary had worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a private individual. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner and her husband for 1999, 2000, 2001, 2002 and 2003.

The record before the director closed on September 13, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner for 2003 was the most recent return available.

A private individual's income and personal obligations are considered as part of the petitioner's ability to pay. Private individuals report income on the Form 1040 U.S. Individual Income Tax Return. A private individual must show sufficient resources for his or her own support and for that of any dependents as well as to pay the proffered wage. *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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner are joint returns of the owner and her husband. The returns show two dependents in 1999 and 2000, three dependents in 2001, and two dependents in 2002 and 2003. Therefore the household size of the petitioner is four persons in 1999 and 2000, five persons in 2001, and four persons in 2002 and 2003.

The record contains a statement of the petitioner's household expenses, dated September 10, 2004, signed by the petitioner. The list presents most expenses on a monthly basis, some expenses on the basis of every three months, and one expense on the basis of every five months. Calculating annual expenses for each expense item on the list and then totaling the results produces the figure of \$53,096.40 in household expenses for the petitioner annually. No other statements of household expenses for years prior to 2004 have been submitted, therefore the figure of \$53,096.40 will be considered as the petitioner's household expenses for each of the years at issue in the instant petition.

For a private individual, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the petitioner's Form 1040 U.S. Individual Income Tax Return. The tax returns of the petitioner and her husband state amounts for adjusted gross income as shown in the table below.

Tax year	Adjusted gross income	Household expenses	Available income	Wage increase needed to pay the proffered wage	Surplus or deficit
1999	\$125,518.00	not applicable	not applicable	not applicable	not applicable
2000	\$131,386.00	not applicable	not applicable	not applicable	not applicable
2001	\$190,035.00	not applicable	not applicable	not applicable	not applicable
2002	\$23,725.00	\$53,096.40	-\$29,371.50	\$12,230.40*	-\$41,601.80
2003	-\$42,079.00	\$53,096.40	-\$95,175.40	\$12,230.40*	-\$107,405.80

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003, which are the two years at issue in the instant petition.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage.

The petitioner states on appeal that the nursing services company of which she is the 100% shareholder changed accounting methods in 2002 from accrual basis to cash basis. The petitioner states that the change caused a temporary decline in taxable income. The petitioner states that the company's tax returns from 1999, 2000 and 2001 showed high taxable income and that the petitioner expects the company's income taxes in 2004 to again show high taxable income. The petitioner states that the reason the change in accounting caused a temporary decline in taxable income for the corporation is that under the accrual method on the corporation's tax returns through 2001, income was reported in the year it was earned. But under the cash method of accounting used beginning in 2002, many payments received in 2002 had already been counted as income in prior tax years and income taxes had been paid on that income in prior tax years, so that income which accrued prior to 2002 but which was received by the corporation in 2002 would not be counted as income again in 2002.

The record also contains a copy of an IRS Form 3115 dated February 15, 2002 of Sacred Heart Nursing Services, Inc. IRS Form 3115 is titled Application for Change in Accounting Method. The Form 3115 in the record requests a change to a cash basis of accounting, effective for the tax year beginning January 1, 2002.

The record contains a copy of the Form 1120S U.S. Income Tax Return for an S Corporation of Sacred Heart Nursing Services, Inc., for 2003. The Schedule B attached to that return states that its business activity is nursing services and that its product or service is as an employment agency. The Schedule B also states that the method of accounting used is the cash method. The Schedule K-1, Shareholder's Share of Income, Credits, Deductions, Etc., attached to the Form 1120S for 2003 shows the petitioner as the owner of 100% of the stock of the corporation and it shows a loss from trade or business activities in the amount of \$17,267.00

The record does not contain copies of any Form 1120S tax returns for the corporation for prior years.

The Form 1040 U.S. Individual Income Tax Returns of the petitioner and her husband provide some support for the petitioner's assertions about temporary losses of Sacred Heart Nursing Services, Inc., in the years 2002 and 2003. The Form 1040 returns for 1999, 2000 and 2001 show no losses on line 17, which is the line for income or losses from rental real estate, royalties, partnerships, S corporations, trusts and other similar entities. However, for 2002 the Form 1040 U.S. Individual Income Tax Return of the petitioner and her husband shows losses from Sacred Heart Nursing Service, Inc., in the amount of -\$33,949.00 (Form 1040 for 2002, Part II, items 27 and 31). That amount is part of the losses shown on line 17 of -\$58,949.00 that year.

Similarly, for 2003, the Form 1040 U.S. Individual Income Tax Return of the petitioner and her husband shows losses from the corporation in the amount of -\$17,267.00, plus losses of -\$118,107.00 from that corporation described as "PYA - At-Risk Carryover." (Form 1040 for 2003, Part II, item 28). The total loss from that corporation is stated as -\$135,374.00 (Form 1040 for 2003, Part II, item 32). That amount is part of the losses shown on line 17 of -\$157,044.00 that year.

The record contains a letter dated November 4, 2004 on the letterhead of [REDACTED] certified public accountant, of Sun City, Arizona. The letter is signed by [REDACTED]. No title or professional qualification of [REDACTED] is stated in the letter, but on the Form 1040's for 2002 and 2003, and on the

corporation's Form 1120S for 2003 and its Form 3115 [REDACTED] name appears as the preparer of those forms, with the name of the preparer's firm stated as [REDACTED]

In her November 4, 2004 letter, [REDACTED] explains certain items in the petitioner's Form 1040 tax returns for 2002 and 2003, and states that adjusted gross income should be revised upward for each of those years for several reasons.

One of the items of suggested revision concerns depreciation expenses of the corporation. Nonetheless, while it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. *See Internal Revenue Service, Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property) (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.* Therefore, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. *See Elatos Restaurant Corp.* 632 F. Supp. at 1054.

In her letter [REDACTED] also states that for 2002 and 2003 the petitioner had carry-over losses in the amount of \$3,000.00 each year from years prior to 2002. She also states that the change in accounting method resulted in a loss of \$185,819.00, of which \$33,949 was deductible in 2002, and of which \$118,107.00 was deductible in 2003.

For 2002 the Schedule D and Schedule E losses referred to above total \$36,949.00 and for 2003 such losses total \$121,107.00. Adding the Schedule D carryover losses and the Schedule E losses resulting from the change in accounting method to the adjusted gross income of the petitioner and her husband in 2002 produces the figures shown in the following table.

Tax year	Adjusted gross income	Household expenses	Available income	Wage increase needed to pay the proffered wage	Surplus or deficit
1999	\$125,518.00	not applicable	not applicable	not applicable	not applicable
2000	\$131,386.00	not applicable	not applicable	not applicable	not applicable
2001	\$190,035.00	not applicable	not applicable	not applicable	not applicable
	Revised AGI				
2002	\$60,674.00	\$53,096.40	\$7,577.60	\$12,230.40*	-\$4,652.80
2003	\$79,028.00	\$53,096.40	\$25,931.60	\$12,230.40*	\$13,701.20

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

Another of the items noted by [REDACTED] is a deduction on the Form 1040 for 2002 for self-employed health insurance, in the amount of \$4,620.00. [REDACTED] states that that item is already included in the petitioner's statement of monthly expenses. No specific item of health insurance is included in the petitioner's statement of household expenses, but one item of \$600.00 per month for other expenses, equivalent on an annual basis to \$7,200.00 per year, is large enough to include health insurance plus other expenses. The Form 1040 for 2003 contains no deduction for self-employed health insurance.

The amount of \$4,620.00 deducted on the Form 1040 for 2002 for self-employed health insurance is approximately equal to the deficit of -\$4,652.80 shown in the above analysis incorporating the Schedule D carryover losses and the Schedule E losses resulting from the change in accounting method.

For the foregoing reasons, the information in the Form 1040 tax returns of the petitioner and her husband and in the petitioner's statement of monthly expenses is sufficient to establish the petitioner's ability to pay the proffered wage in the years 2002 and 2003.

The record also contains copies of account statements for the petitioner from a credit union, a brokerage firm and a bank. Account statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, evidence such as bank statements may be considered as supplemental evidence to the types of evidence required by the regulation. Where a petitioner is a private individual, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner does not duplicate information already found on the Form 1040 tax returns.

The record contains a statement from Credit Union West dated March 11, 2004 for accounts of the petitioner and her husband which shows a balance in regular savings of \$91.31, a balance in a money market account of \$20,378.00, and a balance in a checking account of \$2,560.00.

The record also contains a statement dated February 5, 2004 for an account of the petitioner with [REDACTED] a division of Citigroup Global Markets, Inc., which shows a balance of \$18,930.49 in bank deposits.

The record also contains a letter dated March 10, 2004 from a banker at Bank One, N.A., of Phoenix Arizona. In that letter the banker states that the petitioner has a balance in a checking account of \$8,000.00 and a balance in an investment account of \$31,455.00.

The record also contains an affidavit of the petitioner dated March 10, 2004 stating the properties owned by the petitioner and her husband. The list shows seven real properties owned by the petitioner, including the residence of the petitioner and her husband. The list shows that four of the properties are rental properties and two of the properties are land. The list also states that the petitioner is the owner of Sacred Heart Nursing Services, Inc., the corporation which is discussed above. The total of the stated values of the petitioner's residence and the four rental properties is \$1,176,000.00. The petitioner's residence and the rental properties are each stated to be subject to mortgages, but the principal amounts of the mortgages are not stated. For the two properties which are land no value is stated and each land property is stated to be paid in full. One land property is a 40-acre lot in Sholow, Arizona, and the other land property is a five-acre lot in Casa Grande, Arizona.

The lists states the year owned for each property, apparently referring to the first year in which the petitioner and her husband owned the properties. The initial years of ownership are stated as 1987 (rental property, present market value \$250,000.00); 1991 (40-acre lot, no market value stated); 1993 (5-acre lot, no market value stated); 1997 (rental property, present market value \$146,000.00); 1998 (rental property, present market value \$230,000.00); 2002 (petitioner's residence, present market value \$380,000.00); and 2003 (rental property, present market value \$170,000.00).

The petitioner's list of properties owned suggests that the petitioner and her husband had ample financial resources during the years 2002 and 2003, which are the years at issue in the instant petition.

Although the information in the account statements of the petitioner and the information in the list of the properties owned by the petitioner and her husband would not be sufficient to independently establish the petitioner's ability to pay the proffered wage during the relevant years, the account information and the property ownership information provide additional corroboration for the information in the petitioner's tax returns.

For the foregoing reasons, in considering the totality of the circumstances under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the evidence is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director stated the petitioner's net income to be \$23,725.00 in the year 2000. The reference to the year 2000 is an apparent typographical error, for the figure of \$23,725.00 is the petitioner's adjusted gross income for 2002, which is the year of the priority date. The director correctly stated that the petitioner's adjusted gross income for 2003 is -\$42,079.00. The director found that the foregoing amounts were insufficient to establish the petitioner's ability to pay the proffered wage in 2002 or in 2003. The decision of the director to deny the petition was correct, based on the evidence then in the record.

The record before the director did not include the Form 1120S of the corporation for 2003 or the corporation's Form 3115 requesting a change in accounting method beginning in 2002, nor the letter dated November 4, 2004 from the petitioner's tax preparer pointing out certain items on the tax returns of the petitioner and her husband for 2002 and 2003. Those documents were submitted for the first time on appeal.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence newly submitted on appeal are sufficient to overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.