U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 15 2009

LIN-07-209-53105

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, 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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition for the beneficiary[1] was denied by the Director, Nebraska 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 home health aide (caregiver) pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 1, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Act 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 skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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, which is the date the Form ETA 750 was accepted for processing by any office within the DOL employment system. *See* 8 C.F.R. § 204.5(d). Here, the accompanied Form ETA 750 was

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[1] The record shows that the petitioner filed an Form I-140 immigrant petition (LIN-06-244-52491) on behalf of the beneficiary on August 21, 2006 based on an approved Form ETA 9089 Application for Permanent Employment Application ( ) and the petition was denied on May 11, 2007 as abandoned because the petitioner failed to respond the director's request for evidence. No further action was taken on that petition. The instant petition was filed by the petitioner on behalf of the beneficiary on July 16, 2007 based on an ETA Form 750 approved for the petitioner on behalf of

accepted on March 23, 2005. The proffered wage as stated on the Form ETA 750 is $1,523.58 per month ($18,282.96 per year). The petitioner's business status was changed from a sole proprietor to a corporation on June 5, 2006. Therefore, the petitioner must establish its ability to pay the proffered wage as a sole proprietorship from the priority date to May 2006 and as a corporation from June 2006 to the present.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner 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. In the instant case, the petitioner submitted the beneficiary's W-2 form for 2007 and pay stubs for 2008. The W-2 form shows that the petitioner paid the beneficiary $16,575.00 in 2007. The pay stubs show that the beneficiary was paid $650.00 for each semi-month period from February 1 to August 15, 2008 and as of August 15, the year-to-date amount paid to the beneficiary in 2008 is $8,450.00. The record does not contain any other documentary evidence of the beneficiary's compensation from the petitioner in 2008, such as W-2 form. The record has demonstrated that the petitioner employed and paid the beneficiary the partial proffered wage in these two years, however, the petitioner is still obligated to demonstrate that it could pay the difference of $1,707.96 in 2007 and $9,832.96 in 2008 between wages actually paid to the beneficiary and the proffered wage, and the full proffered wage in 2005 and 2006 with its net income or its net current assets.

As previously noted, the petitioner was a sole proprietorship until May 2006. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they must

[2] 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). However, counsel did not submit any additional or new evidence on appeal but a statement of reasons of appeal. Therefore, the AAO will adjudicate the instant appeal based on evidence already submitted in the record only.

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*, 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, USCIS considers net income to be the figure shown on line 33[3], Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2005. The tax return demonstrated that in 2005, the sole proprietor had adjusted gross income of $49,238. However, the record does not contain any statement of the sole proprietor's household monthly expenses. Although this amount appears sufficient to pay the beneficiary the proffered wage of $18,282.96 per year, without the statement of the sole proprietor's household monthly expenses, it is not clear whether the balance of $30,955.04 would be sufficient to sustain the living expenses of the sole proprietor's family of four for 2005, and therefore, the AAO cannot determine whether or not the sole proprietorship established its ability to pay the proffered wage in 2005.

If the petitioner is a corporation and does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS 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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. On appeal counsel argues that in order to determine the petitioner's true ability to pay the proffered wage, all applicable accounting principles must be taken into consideration, and the depreciation deduction is an example of an amount allowed by the Internal Revenue Service (IRS) in the calculation of taxable income. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava*

[3] The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002, Line 34 for 2003 and Line 36 for 2004.

specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and the year-end current liabilities are shown on lines 16 through 18 of the Form 1120. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2006 and 2007. The petitioner's tax returns for 2006 and 2007 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage in these years:

- In 2006, the Form 1120 stated a net income[5] of ($13,825) and net current assets of $16,866.
- In 2007, the Form 1120 stated a net income of $9,414 and net current assets of $22,248.

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[4] 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 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.

[5] Taxable income before net operating loss deduction and special deductions on Line 28 of the Form 1120.

For the year 2006, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the full proffered wage of $18,282.96 while the petitioner had sufficient net income or net current assets to pay the instant beneficiary the difference of $1,707.96 in 2007 between wages actually paid to the beneficiary and the proffered wage.

Therefore, from the priority date in 2005 to the present, the petitioner failed to establish its ability to pay the proffered wage in 2005 and 2006.

The record contains statements of the petitioner's business bank account. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's October 1, 2008 decision that the petitioner failed to demonstrate that it could pay the proffered wages from the day the Form ETA 750 was accepted for processing by the DOL.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has valid labor certification to support the instant petition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

This office notes that the instant case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at certain time periods. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which

reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications.

The regulation at 20 C.F.R. § 656.30 states in pertinent part:

> (c) *Scope of validity.* For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:
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> ... ...
>
> (2) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The relevant labor certification in the instant case was initially filed on March 23, 2005 for an alien named [redacted] and certified on June 28, 2007. Therefore, 20 C.F.R § 656.30(c)(2) is applicable to this case. The instant immigrant petition was filed on July 16, 2007, the same day the DOL's final rule of prohibiting the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications became effective with a labor certification certified for [redacted]. The petitioner sought the substitution of a beneficiary on the labor certification. However, the record does not contain any documentary evidence showing that a substitution was approved prior to July 16, 2007. Therefore, the AAO finds that the instant immigrant petition does not have a valid labor certification to support its benefits sought because the regulation of prohibiting substitution became effective on July 16, 2007 the same day the petition was filed and the petitioner did not provide any documentary evidence showing that the substitution was approved prior to July 16, 2007. Accordingly, the petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.