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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



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

**PUBLIC COPY**



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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

MAR 30 2011

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on October 5, 2010, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a residential care home for the elderly which sought to employ the beneficiary permanently in the United States as a health aide. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, was accompanied by an individual labor certification, Form ETA 750, approved by the United States Department of Labor (USDOL).

On November 6, 2008, the director denied the petition after determining the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. The director also determined the petitioner had not established the beneficiary met the educational and experience requirements listed on the labor certification.

AAO examined whether the petitioner employed and paid the beneficiary from the priority date onwards. This was important in this case because a finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. To reach a determination, the AAO reviewed evidence submitted by the petitioner including an unsigned letter dated November 19, 2008 from Mr. [REDACTED] addressed to Mrs. [REDACTED] at [REDACTED] providing her a "breakdown" of the purported income earned by the beneficiary from 2003 through 2008. Also reviewed was an unsigned copy of the beneficiary's earning card for the period from January 1 to November 15, 2008 as an attachment to the letter. The AAO noted the letter and attachment were not accompanied by any documentary evidence such as the beneficiary's IRS Forms W-2, Wage and Tax Statement, or Forms 1099-MISC, Miscellaneous Income, establishing that the beneficiary was actually employed by the petitioner during the requisite period. The AAO also determined the petitioner had not established the beneficiary had attained the required three months experience in the job offered or one year of experience in a related occupation when the labor certification was accepted for processing.

On motion, the petitioner provides the following evidence in an effort to establish that the beneficiary had been employed and paid by the company from April 2, 2003 onward and to document the beneficiary's job experience:

1. The beneficiary's IRS Forms 1040, U.S. Individual Income Tax Return, for 2003 and 2004 accompanied by her Forms 1099-MISC, from [REDACTED] showing she earned \$12,000 in 2003 and \$14,400 in 2004.
2. The beneficiary's IRS Forms 1040EZ, U.S. Income Tax Return for Single and Joint Filers With No Dependents, for 2005 through 2009 with her IRS Forms W-2 from [REDACTED]

Residence showing she earned \$14,400 in 2005, \$14,400 in 2006, \$17,150.40 in 2007, \$22,591.20 in 2008 and \$25,305.60 in 2009.

3. The petitioner's IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2004 through 2009.
4. The petitioner's IRS Forms 1040, U.S. Individual Income Tax Return, for 2003, 2004 and 2007 through 2009.
5. A letter dated October 25, 2010 from [REDACTED] the petitioner's tax preparer who states that the amount of salaries paid by Mr. [REDACTED] to his employees has been considered and/or deducted in determining his net income or loss in Line 31 of Schedule C. Mr. [REDACTED] states that this amount is forwarded to line 12 of Form 1040 and included to determine his adjusted gross income on line 37. He further states that Mr. [REDACTED] adjusted gross income showing on his tax returns are therefore net of salaries paid to his employees.
6. A letter from the petitioner dated October 27, 2010 who states that a person named [REDACTED] did not communicate the USCIS requirements thoroughly to her and that, as of the priority date of March 21, 2003, she was paying the beneficiary \$1,200 per month which she thought was "good enough." She further states that had she known, she could have adjusted the proper amount to comply with the prevailing wage.
7. A letter from [REDACTED] Witness Specialist of the Department of Justice, to [REDACTED] informing her that [REDACTED], an immigration consultant in San Jose, California, has had charges filed against her and that [REDACTED] is considered as a victim or potential victim of this person.
8. A letter from [REDACTED], the petitioner, writing in behalf of his deceased parents dated October 27, 2010 who states that [REDACTED] took care of his father from January 1990 to October 1995 and his mother from January 2002 to September 2002 in the Philippines.

On her IRS Form 1040 for 2003, the beneficiary reported that she had earned \$12,000 in "unreported tip income" from the petitioner. This Form 1040 is accompanied by her Schedule U, U.S. Schedule of Unreported Tip Income, along with an IRS Form 1099-MISC from the petitioner showing it paid the beneficiary \$12,000 in nonemployee compensation in 2003. On her IRS Form 1040 for 2004, the beneficiary reported that she earned \$14,400 from "gross receipts or sales" from the petitioner. This Form 1040 is accompanied by her Schedule C, Profit or Loss From Business, along with an IRS Form 1099-MISC from the petitioner showing it paid the beneficiary \$14,400 in nonemployee compensation in 2004. (Item #1 above).

A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. Based upon the beneficiary's

tax forms (Item # 1) and her IRS Forms W-2 for 2005 through 2008, (Item # 2) the petitioner has established that it employed and paid the beneficiary wages as follows:

- 2003 \$12,000.00
- 2004 \$14,400.00
- 2005 \$14,400.00
- 2006 \$14,400.00
- 2007 \$17,150.40
- 2008 \$22,591.20
- 2009 \$25,305.60

Accordingly, the petitioner has not established that it paid the beneficiary the full proffered wage in 2003, 2004, 2005, 2006, and 2007.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *Rev. Shari Dennis, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); [REDACTED], 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. [REDACTED], 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing [REDACTED], 736 F.2d 1305 (9th Cir. 1984)); *see also* [REDACTED], 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 IRS Forms 1040 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 (7<sup>th</sup> Cir. 1983).

In *Ubeda, supra*, at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In this case, the sole proprietor supported a family of four in 2007 and a family of three in 2003 to 2006. The IRS Forms 1040 which he provided for the record and on motion (Item # 4) reflect his adjusted gross income as follows:

2003 Line 34	2004 Line 36	2005 Line 37	2006 Line 37	2007 Line 37
\$47,676	\$55,813	\$35,765	\$68,272	\$55,602

As indicated above, sole proprietors must show that they can cover their existing household expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. The petitioner has not provided evidence that he could cover his personal expenses as well as pay the beneficiary the difference between the proffered wage and wages actually paid to the beneficiary out of his adjusted gross income in 2003, 2004, 2005, 2006, and 2007. The record is devoid of evidence of the petitioner's monthly expenses, liquid assets and liabilities. 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 [REDACTED]*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is determined the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and the appeal will remain dismissed for this reason.

On Form ETA 750, Part B, signed on March 21, 2003, the beneficiary indicated that she worked as a caregiver/household domestic worker from January 1990 until October 1995 and from January 2002 until September 2002 at the private home of [REDACTED]. Evidence relating to qualifying experience shall be in the form of letters from employers giving the name, address and title of the employer and a description of the experience of the alien. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. See 8 C.F.R. § 204.5(l)(3)(ii)(A); see also 8 C.F.R. 204.5(g)(2). On motion, the petitioner submitted a letter signed by himself attesting to the beneficiary's claimed employment by his parents in the Philippines. The petitioner submitted no other evidence of the beneficiary's alleged employment for at least one year as a domestic worker other than his self-serving letter. Although his parents are now deceased, and cannot provide the letter required by the regulations, the petitioner has not provided any independent, objective evidence verifying his claim. One again, going on record without supporting evidence is not sufficient for meeting the burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165. Therefore, the petitioner shall remain denied for this additional reason.

Additionally, the motion shall be dismissed for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4). The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because

the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it shall be dismissed for this additional reason.

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 motion is dismissed.