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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



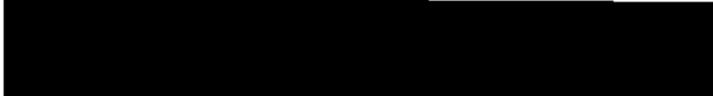
**U.S. Citizenship
and Immigration
Services**



B6

Date: **OCT 11 2011** Office: NEBRASKA SERVICE CENTER

FILE: 

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 second motion to reopen or reconsider. 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 [REDACTED] addressed to [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.

In its first 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]

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 [REDACTED] to his employees has been considered and/or deducted in determining his net income or loss in Line 31 of Schedule C. [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 [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], Victim Witness Specialist of the Department of Justice, to [REDACTED] informing her that [REDACTED], an immigration consultant in [REDACTED] 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 [REDACTED]

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

In the second motion, currently before the AAO, the petitioner states the he has paid the beneficiary the difference between the proffered wage and the wages actually paid to her covering the period from 2003, 2004, 2005, 2006 and 2007 on a retroactive basis. The petitioner submits a copy of a cashier's check dated April 25, 2011 from [REDACTED] payable to the beneficiary in the amount of \$12,330.83 along with a document called a "computation of Back Wages of [REDACTED]" The petitioner also submits a recruitment instruction dated March 2, 2007 that he received from USDOL showing the prevailing wage that was current for the offered position on that date.

As stated 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. This is a factual determination based on actual events, in this case from 2003 through 2007. The petitioner cannot alter the payments that were actually paid to the beneficiary during that time period by compensating her for the differences retroactively in 2011. This does not establish that the job offer at the proffered wage was realistic from 2003 to 2007. Accordingly, the AAO again finds that 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 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. *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 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 (7th 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 reflect his adjusted gross income as follows:

2003 Line 34	2004 Line 36	2005 Line 37	2006 Line 37	2007 Line 37	2010 Line 37
\$47,676	\$55,813	\$35,765	\$68,272	\$55,602	\$53,810

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. On this motion, the petitioner submits a copy of [REDACTED] checking account statements for his business account ending in the digits [REDACTED] for February, March and April 2011 [REDACTED] account statement dated April 15, 2011 for his checking account ending in the digits 8780, his IRS Form 1040 for 2010, his [REDACTED] 401(k) Investment Plan statement as of April 20, 2011, and his wife's quarterly [REDACTED] statement for the period from January 1, 2011 to March 31, 2011. He also provides a copy of his current breakdown of monthly income from employment and business along with household and living expenses with a breakdown of mortgage payments and living expenses. Additionally, he submits the company's Quarterly Contribution and Wage Report for the quarter ending March 31, 2011 that was submitted to the State of [REDACTED]. However, 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 during those years. 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 Treasure Craft of California*, 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 [REDACTED]. 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. On motion, the petitioner indicates that since other evidence is unavailable, he is submitting other documentation relating to the beneficiary's experience or training for consideration. He submits certificates showing the beneficiary completed a number of courses from [REDACTED], including Becoming a Caregiver on April 4, 2011, Duties of a Caregiver on April 5, 2011, Caregiver Conduct-Regulations, Co-workers, and Families and Infection Control on April 6, 2011, Communicating with Others, Nutrition and Hydration and Elimination and Toileting on April 14, 2011 and Home Care Medications on April 20, 2011. One again, going on record without supporting evidence concerning the experience the beneficiary attained as a caregiver/household domestic worker from January 1990 until October 1995 and from January 2002 until September 2002 is not sufficient for meeting the burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165. Therefore, the petition shall remain denied for this additional reason.

Additionally, this 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 this 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.

On this motion, the petitioner states that the employer is now a limited liability company and no longer a sole proprietorship. The petitioner submits a copy of a [REDACTED] State Business License awarded to [REDACTED] valid until July 31, 2011. This raises a new issue which is whether the petition is accompanied by an individual labor certification from the USDOL which pertains to the position currently being offered to the beneficiary by [REDACTED]. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). The record reflects the Form ETA 750 and the Form I-140 were originally filed by [REDACTED] operating under FEIN [REDACTED].

However, it appears that the current offer of employment is being made by [REDACTED]. [REDACTED] As the two companies are separate and distinct businesses, a petitioner could use a Form ETA 750 approved for a different employer only if it established it is a successor-in-interest to that company. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage from the date of transfer of ownership forward. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. The petitioner has not meet the above requirements. Therefore, the motion 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.