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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 252 53091 Office: CALIFORNIA SERVICE CENTER Date: MAR 29 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant 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, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as an unskilled or "other worker." The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a household domestic worker/caregiver. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had failed to establish its continuing ability to pay the proffered salary as of the visa priority date and failed to establish that the beneficiary had the necessary qualifying employment experience.

On appeal, the petitioner submits additional evidence and asserts that the beneficiary's services are greatly needed.

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) provides:

> (2) *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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter is based, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is August 10, 1998. The beneficiary's salary as stated on the labor certification is $1,423.07 per month or $17,076.84 per year based on a 40-hour week. The record indicates that the petitioner is organized as a sole proprietorship and employs one person. Tax documentation contained in the record also reflects that the petitioner's owners have paid the beneficiary for her services since 1998.

As evidence of its ability to pay the beneficiary's proposed annual salary of $17,076.84, the petitioner's sole proprietors initially submitted three pages of miscellaneous "federal attachments" from 2000 and 2001 reflecting various deductions taken for a home mortgage and depreciation. No explanation of how these figures supported the petitioning owners' ability to pay the proffered wage was included.

In October 2002, the director requested additional evidence to support the petitioner's ability to pay the beneficiary's annual wage offer of $17,076.84. The director requested annual reports, federal tax returns, or audited financial statements from the petitioner pursuant to the regulatory requirements of 8 C.F.R. § 204.5(g)(2). The director also instructed the petitioner's owners to submit copies of any Wage and Tax Statements (W-2s)

documenting payment of wages to the beneficiary, documentation of the petitioner's business identity, copies of the last four quarters of its state quarterly wage report, and a statement of the sole proprietors' monthly household living expenses. The director further requested the petitioner's owners to submit copies of their federal tax returns for 1998 through 2001 including all attachments and schedules, as well as letters from employers verifying the beneficiary's work experience.

The sole proprietors' response included copies of W-2s that the petitioning business issued to the beneficiary for 2000 and 2001. They show that the petitioner paid the beneficiary $12,480 in 2000 and $6,240 in 2001. The owner also submitted a copy of a Form 1099, Miscellaneous Income reflecting that the petitioner paid the beneficiary $12,480 in 1999. Finally, the response included a copy of a Schedule C, Profit or Loss from Business that was filed in the beneficiary's name for the year 1998. This tax form indicates that the beneficiary declared a business income of $4,000 that year.

The petitioner's owners also submitted copies of six checks written to the beneficiary in 2001, a copy of their Form 941, Employer's Quarterly Federal Tax Return for the quarter ending June 30, 2000, various copies of Schedule C, Profit or Loss from Business for 1998 through 2001, and various documents confirming a business identity as a residential care facility. The actual federal tax returns were not submitted. The petitioner's quarterly tax return indicates that approximately $3000 was paid in wages during the quarter ending June 30, 2000.

The director denied the petition, noting that the petitioner's owners had failed to submit complete copies of their federal tax returns as requested and had not provided sufficient other evidence to establish the continuing ability to pay the beneficiary's proffered wage of $17,076.84. The AAO agrees and would note that because a sole proprietorship is not legally separate from its owners, the ability to pay the proffered wage includes a consideration of all of the income and expenses generated by the sole proprietors and their dependents. The business income reflected on Schedule C of an individual Form 1040 is included in the calculation of the adjusted gross income on the first page of the tax return. Following an adjustment of reasonable household living expenses, the sole proprietors' continuing ability to pay the proffered wage can be established if there is sufficient income to cover a beneficiary's proposed salary. In this case, it is noted that the petitioning owners also offered no information related to their living expenses as previously requested by the director.

On appeal, the petitioner's owners offer complete copies of their federal tax returns for the years 1998 through 2001. They show that the petitioner's married owners filed jointly and claimed two dependents in 1998 and 1999 and one dependent in 2000. The following information appears on Form 1040, U.S. Individual Income Tax Return for each of the pertinent years:

Year	Schedule C/Business Income	Adjusted Gross Income
1998	-$ 9,109	-$31,363
1999	13,548	11,608
2000	18,923	16,735
2001	15,322	14,248

The additional evidence submitted on appeal also includes a copy of Form 1099, Miscellaneous Income issued to the beneficiary for the year 1998. It shows that the petitioner paid the beneficiary $4,000 and conforms to the beneficiary's Schedule C as previously noted above. The difference between the proffered wage of $17,076.84, prorated from August 10, 1998, and the $4,000 already paid to the beneficiary is approximately $2,700. This amount could not be covered by an income of -$31,363.

The difference between the proposed salary of $17,076.84 and the monies already paid to the beneficiary in 1999 and 2000 is $4,596.84 for each year. Although this sum could be covered by the owners' income in each of these

years, it would leave an extremely modest amount to sustain the owners' and their dependents even without a consideration of reasonable monthly living expenses.

The difference between the $6,240 already paid to the beneficiary in 2001 and the proffered salary of $17,076.84 is $10,836.84. Although it could be covered by the owners' income of $14,248 that year, it represents 76% of their income, leaving very little to sustain the two owners and their dependent. In *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F. 2d 571 (7th Cir. 1983), where the petitioner stated that he would pay the beneficiary an annual salary of $6,000 out of a gross income of $20,000 and a net taxable income of $13,000 and still support himself and a wife and five children, the court found it highly unlikely that the beneficiary could be compensated at a rate that represented such a high percentage of the petitioner's income.

In view of the foregoing, the AAO cannot conclude that the director erred in finding that the petitioner had failed to establish its continuing ability to pay the beneficiary's proposed salary of $17,076.84. Other than a brief statement that the beneficiary's services are needed to help elderly people and that she is only related to the petitioner through her deceased husband, the petitioner offers no specific rationale on appeal to persuasively rebut the director's conclusion that its ability to pay the proposed salary has not been established.

The director also denied the petition because the petitioner had failed to provide sufficient proof that the beneficiary met the minimum three months of previous experience in the job offered as a household domestic worker/caregiver as required by the terms of the approved labor certification. To be eligible for approval, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971).

Included among the documents submitted on appeal is a letter from one of the beneficiary's previous employers. She states that the beneficiary worked for her from 1982 until 1995 as a caregiver and domestic worker. Although lacking much detail, it appears to the meet the director's concern that the petitioner has not accrued sufficient experience in the job offered.

As discussed previously, however, it cannot be found that the petitioner has persuasively established that it has had sufficient available funds to pay the proffered wage as of the priority date of the visa petition and continuing until the present. Therefore the petition cannot be approved.

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.