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U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: 3 2005
SRC-03-039-54391

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a butler. 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.

On appeal, counsel submits a brief and evidence previously submitted.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 6, 2002. The proffered wage as stated on the Form ETA 750 is $13.56 per hour, which amounts to $28,204.80 annually.

The petitioner is a private household. The proffered position indicates that it is a supervisory position overseeing 2-3 other employees. With the petition, the petitioner submitted a letter stating that "[the beneficiary] is an excellent Butler. She deserves permanent residency. We will be crippled without her as our employee." The petitioner submitted his Form 1040, U.S. Individual Income Tax Return, for the years 2000 and 2001. The tax returns reflect that the petitioner supports a family of four[1] and had an adjusted gross income of $64,759 in 2000 and $69,001 in 2001.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 9, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically noted that the proffered position was not new and that the position required supervision

[1] The dependents include a son and daughter in one year and a son and nephew in the subsequent year.

of other employees. Thus, the director requested evidence of wages paid to other employees and to the individual previously holding the butler position. The director asked if the beneficiary was already employed by the petitioner as indicated by the grammatical tense used in the letter submitted with its initial filing.

In response, counsel submitted a letter stating that a typing error was made on the form and the proffered position is not new. Counsel also stated that the proffered position is prospective and the petitioner does not currently employ any other employees, and that the petitioner's letter intended to emphasize their needs and the beneficiary's credentials. Finally, counsel stated that neither the beneficiary nor her husband have been employed since entering the United States. The petitioner submitted its 2002 individual income tax return showing adjusted gross income of $75,441 for four dependents with the petitioner indicating a disabled status as filer.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 7, 2003, the director issued a notice of intent to deny pertinent to that ability. The director noted that the typographical errors made on the petition made the petition inconsistent with the representation made on the ETA 750A. The ETA 750A, Item #13 describes the duties of the proffered position as supervising household staff and also indicates in Items #16 and 17 that the position will supervise 2-3 household employees. The director stated that "[i]t is doubted the certification would have been made if [the Department of Labor (DOL)] had been informed the prospective duties and employees to supervise would come only after the supervisor is hired." The director sought an explanation why it should not consider "prospective" duties and unidentified employees a misrepresentation of a material fact. Additionally, the director stated that she could not evaluate the petitioner's continuing ability to pay the proffered wage without information about wages to be paid to supervised personnel. The director also requested more information and evidence about the petitioner's disability status and dependency of his daughter.

In response to the director's notice of intent to deny, counsel stated that DOL reviewed the issue of the petitioner's ability to pay, and that "require[ing] 'prospective' financial ability to pay" requires the petitioner to prove "capacity to pay ***in perpetuity***," which "amounts to new standards of history." (Emphasis in original). Counsel also stated that the petitioner's reduced income in 2002 was due to an accident and was a temporary loss of income. Counsel stated that the director requested evidence of the beneficiary and her husband's capacity to support themselves in the United States[2], so they submitted a notarized affidavit from Blanca Bustamante, the beneficiary's mother, that she supports them financially. Counsel reiterated past assertions made in response to the director's request for evidence.

In response to the director's notice of intent to deny, the petitioner submitted his spouse's W-2 form for 2002; the petitioner's daughter's 2002 individual income tax return evidencing that she is not a dependent to the petitioner; a copy of 1099-R forms showing distributions of $70,978.46, $20,000, and $5,000 from the petitioner's retirement account held by Fidelity Investments in 2002; a distribution of an individual retirement account in the amount of $14,699.44 to the petitioner in 2003; copies of the petitioner's spouse's retirement savings plan and mutual investment funds showing an ending balance in the amount of $7,260.56 with Tree of Life and $32,928.19 with First Investors Mutual Fund; and a copy of a statement from December 2002 from a checking account held by the petitioner at the Florida Credit Union showing a beginning balance of $21,754.21.

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[2] Neither the director's request for evidence or the notice of intent to deny made such a request.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 24, 2003, denied the petition. The director found the petitioner's response to her notice of intent to deny non-responsive to the issues raised by it. The director quoted the petitioner's taxable income from 2002, of $33,197, and determined that the petitioner could not support a family of four and pay the proffered wage of $28,204.80 per year.

On appeal, counsel reasserts prior assertions and submits previously submitted evidence.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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 has not established that it has previously employed the beneficiary.

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, CIS 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).

A private household is analytically similar to 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 (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 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*, 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the petitioner supports a family of four. In 2002, the petitioner's adjusted gross income of $75,441 is greater than the proffered wage of $28,204.80[3]. It is probable that the petitioner could support himself and his family on $47,236.20 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. The director never sought evidence

[3] The director erred by using the taxable income figure.

concerning the petitioner's expenses. The petitioner provided evidence of significant liquefiable personal assets in addition to significant adjusted gross income. Since the priority date is in 2002, only that year's evidence was considered in this decision.

One problem in this case is the petitioner's failure to provide evidence on material facts and issues raised by the director. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide evidence concerning the temporary or permanent nature of the petitioner's disability and impact on his income[4]. Such evidence would have further revealed the petitioner's continuing ability to pay the proffered wage. The petitioner's failure to submit such evidence cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Although counsel stated that the petitioner suffered a temporary accident, no evidence was provided. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Additionally, counsel's arguments have been non-responsive to the director's concerns, which the AAO finds to be critical to this case. The director sought clarification about how the petitioner could represent to DOL that it will employ a supervisor, who does not perform non-supervisory duties, of staff performing non-supervisory duties, but represent to CIS that it does not have staff performing non-supervisory duties yet. It does not seem plausible to hire a supervisor without any employees to supervise. No explanation was provided. Counsel seemed to misunderstand that point and argued instead that the director was requiring the petitioner to prove a capacity to pay the proffered wage "in perpetuity." Counsel is incorrect. The director never stated or implied such a requirement, and neither the statute, regulations, or interpretive case law or administrative legal authorities provide such a requirement. The director had valid concerns about representations of material facts in this case since inconsistent information and assertions were made to DOL and to CIS at various times in the proceeding.

Since the proffered position is supervisory, that means it could not exist without employees to supervise. The petitioner would have to show that it could handle its expenses in addition to being able to pay the proffered wage. The petitioner's expenses would include the employees being supervised by the butler position. The only explanation made about this point was that the position was prospective and no employees were hired yet. Counsel seemed to again misunderstand the issue being raised by just stating the fact that there are no employees employed by the petitioner, but not explaining how the proffered position could exist without such employees, how representing a supervisory position to CIS without employees to supervise is consistent with representing a supervisory position to DOL with employees to supervise, and how much in added expenses additional employees that would be supervised would add to the petitioner's regular budgetary burden thereby impacting its continuing ability to pay the proffered wage.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in

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[4] Although the petitioner reported greater income for that year than usual, it is also apparent that he cashed out several retirement funds in that year to sustain himself. Thus, the director's request for evidence involved material facts and issues since the petitioner's *continuing* ability to pay the proffered wage was unclear from his represented condition.

support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.