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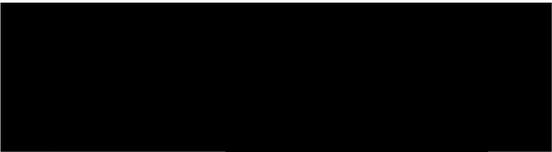
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U.S. Citizenship
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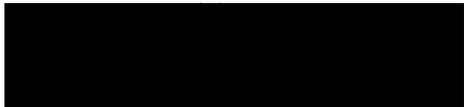
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Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:
Beneficiary:



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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a childcare monitor. 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 additional evidence.

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 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(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$590.48 a week, which amounts to \$30,704.96, annually.¹

The petitioner is a private household. With the petition, the petitioner submitted a letter of support and explained that the beneficiary currently worked for her, caring for the petitioner's two sons. The petitioner stated that she earned \$78,720 annually, and that her husband earned an annual salary of \$190,000, and thus,

¹ The annual salary is the weekly salary of \$590.48 multiplied by 52 weeks, or \$30,704.96.

the petitioner was capable of paying the beneficiary the annual salary of \$590.48, plus any required overtime at the rate of \$13.42 an hour.²

On February 18, 2003, the director sent a Form I-797 Notice of Action to the petitioner and requested that the petitioner submit its individual income tax return for 2001 with all schedules and attachments, as well as an itemized list of all the petitioner's monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, and medical costs for 2001. In response to the director's request, the petitioner submitted a copy of the beneficiary's U.S. individual income tax return for 2001, as well as an itemized list of the beneficiary's monthly expenses.

On September 30, 2003, the director denied the petition. The director stated that the petitioner's submission of the beneficiary's 2001 income tax return did not establish the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the I-797 form did not indicate whether the director was requesting this evidence with respect to the petitioner or the beneficiary, and there also was no statement in the Notice of Action that the evidence was being sought to establish that the petitioner had the financial ability to pay the required wage. Counsel submits copies of the petitioner's income tax returns for 2001 and 2002. Counsel also provides an itemized list of the petitioner's monthly expenses that included mortgage, maintenance, tuition and utilities. The total amount of the petitioner's monthly expenses is \$7,472. Counsel states that the petitioner's income tax returns show an income of \$376,720 for 2001 and an income of \$320,230 for 2002. Finally counsel states that the petitioner has the ability to pay the proffered wage.

With regard to the comments of counsel and the petitioner as to the director's request for further evidence, the I-797 does not preface the request of the director with any generic statement as to the petitioner's ability to pay. Regardless of this omission, the document was sent to the petitioner, as the entity responsible for providing sufficient documentary evidence with regard to the I-140 petition. In addition, the petitioner, in her letter of support, asserted her salary level and the salary level of her husband, without providing any further substantiation of her assertions. The assertions of counsel, or the petitioner 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 the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). For this reason, the director correctly requested the federal income tax returns of the petitioner. Nevertheless, the AAO will consider the documentation submitted on appeal.

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 and paid the beneficiary. Although the beneficiary's 2001 Form 1040 indicates that she earned \$13,000 by babysitting, this documentation is not enough to establish that the petitioner previously employed and paid the beneficiary as of the priority date and onward at a salary equal or greater than the proffered wage.

² The beneficiary's annual salary is \$30,704.96. The petitioner correctly identified \$590.48 as the weekly salary in the ETA 750 and also in the contract between the petitioner and the beneficiary submitted to the record.

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, which is 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 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). Thus, the AAO will consider the personal assets of the petitioner in this case.

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 2001, the petitioner's adjusted gross income was \$379,185, with annual household expenses of \$89,664.³ In 2002, the petitioner's adjusted gross income was \$324,613, with the same amount of annual household expenses. In both tax years, the petitioner's adjusted gross income was sufficient to pay the proffered wage of \$30,704 and the petitioner's household expenses of \$89,664. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the April 2001 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

³ The petitioner's annual household expenses are calculated by multiplying the petitioner's monthly expenses of \$7,472 by twelve.