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FILE: [Redacted]  
SRC-03-205-53794

Office: TEXAS SERVICE CENTER Date: **MAY 23 2005**

IN RE: Petitioner: [Redacted]  
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:



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 cook. 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 new evidence.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.16 per hour, which amounts to \$20,311.20 annually based on a 35-hour work week.

With the petition, the petitioner submitted a letter stating that her household income was \$110,000, along with a copy of her Form 1040, Individual Income tax return for 2001, and the individual income tax return of [REDACTED]

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 November 6, 2003, the director issued a notice of intent to deny and 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 both the petitioner and Mr. [REDACTED] filed their taxes as "head of household," which under IRS regulations indicate that they are unmarried. Thus, the director requested evidence of the petitioner's marital status and any additional evidence of funds available to the petitioner to pay the proffered wage.

In response, counsel submitted a letter stating that Mr. [REDACTED] and the petitioner are divorced but that Mr. [REDACTED] provides financial support including "mortgage, city fees, home insurance, and vehicle payments, while [the petitioner] pays for food and other expenses." The petitioner submitted its 2002 individual income tax return along with Mr. [REDACTED] individual income tax return for 2002, and a copy of a Mediator's Report Agreement, which details the allocation of assets pursuant to the divorce between the petitioner and Mr. [REDACTED] that was finalized in 1997.

The Mediator's Report Agreement details the following, in pertinent part:

1. . . The parties have agreed that the Wife may acquire the Husband's interest in the marital residence for the sum of \$15,000. The parties have agreed that the Wife shall have six (6) months from the date of this Agreement in order to pay the Husband the \$15,000 set forth herein; failing which, the parties have agreed that the property shall then be placed on the market for sale at it's [sic] highest and best price, with the sales proceeds being divided equally between the parties.

The parties recognize that the mortgage encumbering the marital residence is in the joint names of the parties, and that any default or late payment of the mortgage will affect the credit rating of both parties. The parties have agreed that commencing May 1, 1997, the Wife shall be responsible for the timely payment of the mortgage and she agrees to indemnify and holds the husband harmless therefrom.

\* \* \*

6. Unaccounted obligations. No other obligations of the parties are known to exist. Neither party shall incur any obligation for which the other is liable. Unaccounted for obligations are the responsibility of the party who incurred them. Each holds the other harmless and will indemnify the other against any liability for obligations incurred by the party except as provided herein.
7. Waiver of Alimony: Neither Husband nor Wife shall receive alimony of any kind or description from the other, and each party waives any right he or she may have now or in the future to alimony for support and maintenance or to achieve an equitable distribution.

The petitioner's tax returns reflect the following information for the following years:

|  | <u>2001</u> | <u>2002</u> |
|--|-------------|-------------|
| Proprietor's adjusted gross income (Form 1040) | \$25,291    | \$24,197    |

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 December 11, 2003, denied the petition. The director determined that the evidence indicated that Mr. [REDACTED] was not legally responsible to pay the proffered wage of the beneficiary and that the petitioner's adjusted gross income along did not reflect a continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserted that the evidence contained in the record of proceeding was sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage and submitted the petitioner's bank records and Mr. [REDACTED] bank records. The petitioner's banking records show amounts that never reach

\$1,000. Two months later, counsel submitted a statement that a new private household, of [REDACTED] (Ms. [REDACTED] and [REDACTED] wish to employ the beneficiary and that the beneficiary is eligible to change employers under the American Competitiveness in the 21<sup>st</sup> Century Act (AC21), Pub.L.No. 106-313 because the beneficiary's application to adjust status to lawful permanent resident has been pending since July 21, 2003. No Form G-28, Notice of Entry of Appearance as Attorney or Representative, was executed and submitted into the record of proceeding on behalf of Ms. [REDACTED] and Mr. [REDACTED]. An unnotarized letter by Mr. [REDACTED] briefly states that he offers a "full-time permanent position as Cook to the [beneficiary], in accordance with the terms and conditions of her approved labor certification." Counsel also submitted a copy of Ms. [REDACTED] and Mr. [REDACTED] joint individual income tax return for 2003.

AC21 amended the Act enabling qualified beneficiaries to retain eligibility for an employment-based preference visa if they met certain eligibility requirements in the instance of lengthy adjudications and changed circumstances during a petition's pendency. Those eligibility requirements under section 106(c) of AC21 are that (a) the I-485, Application for Adjustment of Status, must be pending (unadjudicated) for 180 days or more; and (b) the new job must be the same as, or similar to, the job described in the labor certification and I-140 petition. Counsel's assertion that portability applies to the instant petition because the beneficiary's adjustment application was pending since July 21, 2003 is simply a mistaken application of AC21 and the facts of this case. The crux of a portability analysis is the length of adjudication of an I-485. The beneficiary's I-485 was filed on July 16, 2003 and adjudicated and denied on December 11, 2003. Thus, the beneficiary's I-485 was pending for 148 days. The beneficiary's adjustment application was therefore not pending unadjudicated for 180 days or more. Regardless, to utilize the portability provisions, a beneficiary needs an approved employment-based visa, but in this case, there is no approved employment-based visa. For the aforementioned reasons, the portability provisions do not apply<sup>1</sup>.

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

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<sup>1</sup> The AAO notes that even if AC21 did apply, the evidence submitted on appeal is not sufficient to prove the intent of Ms. [REDACTED] and Mr. [REDACTED] to sponsor the beneficiary. Ms. [REDACTED] and Mr. [REDACTED] did not present a notarized statement of their intent to offer employment to the beneficiary, nor did they consent to be represented by counsel in these proceedings. Thus, Mr. [REDACTED] letter provided on appeal is not acceptable evidence of Mr. [REDACTED] intent as the letter was not sworn to or affirmed by Mr. [REDACTED] before an officer authorized to administer oaths or affirmations who has, having confirmed Mr. [REDACTED] identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. The AAO further notes that jurisdiction over the determination as to whether the petition would "remain valid" for purposes of adjustment of status under the provisions of AC21 lies with the I-485, which falls under the jurisdiction of the service center director. If the beneficiary wishes to pursue adjustment of status under AC21, then the proper procedure and venue is by filing a motion to reopen the I-485 with the service center director.

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 three, but according to the mediation agreement in her divorce, she receives child support payments from Mr. [REDACTED]. Thus, the AAO will consider her household size to be only one. In 2001, the petitioner's adjusted gross income of \$25,291 leaves the petitioner with only \$4,979.80 after reducing that amount by the proffered wage of \$20,311.20. It is improbable that the petitioner could support herself on \$4,979.80 per year. In 2002, the petitioner's adjusted gross income of \$24,197 is greater than the proffered wage of \$20,311.20. It is improbable that the petitioner could support herself on \$3,885.80 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002. Mr. [REDACTED] and the petitioner divorced in 1997, which precedes the priority date in this case. Their mediation agreement explicitly states that any unaccounted for obligation would be the sole responsibility of the party undertaking it. The petitioner filed all of the immigration forms in this matter, not Mr. [REDACTED] subsequent to the petitioner's divorce from Mr. [REDACTED]. Thus, the petitioner developed an unaccounted for obligation for which Mr. [REDACTED] has no responsibility or liability. And, contrary to counsel's assertions, the mediation agreement explicitly states that the petitioner is responsible for the mortgage on the home and receives no alimony. Although counsel states that Mr. [REDACTED] actually does provide for the petitioner financially, there is no evidence to support counsel's assertions, only evidence that directly contradicts counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, the petitioner maintains a checking account with low balances that are not substantial enough to cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 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.