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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
EAC 04 165 51186

Office: VERMONT SERVICE CENTER

Date: MAR 13 2008

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Chief  
Administrative Appeals Office

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

The petitioner is a private residence. It seeks to employ the beneficiary permanently in the United States as a live-in general house worker. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original January 5, 2005, decision, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On appeal, counsel indicates that he would submit a brief and/or evidence to the AAO within 30 days. Counsel dated the appeal February 3, 2005. As of this date and after the AAO notified counsel by fax that the brief had not been received, more than 37 months later, the AAO has received nothing further.

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(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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date 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). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$557.48 per week or \$28,988.96 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes counsel's statement, a copy of the petitioner's Naturalization Certificate, and an affidavit from the petitioner dated February 25, 2005. Other relevant evidence includes copies of the 2001 through 2003 Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] a copy of a Naturalization Certificate for [REDACTED] and an affidavit dated December 6, 2004 from [REDACTED]. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's Certificate of Naturalization shows that the petitioner became a naturalized citizen on July 25, 2000.

The petitioner's affidavit, dated February 25, 2005, states:

With respect to the other issue cited in this matter, that of the familial relationship between the co-sponsor, [REDACTED], and myself, I state the following: [REDACTED] is married to [REDACTED] is a stepsister to my father, [REDACTED], and, hence, my reference to [REDACTED] as my uncle. You will note that this is a relationship established through marriage, rather than bloodline, but it is nevertheless a close, family relationship that has manifested itself in my uncle's generosity to me, insofar as he has always helped me with expenses, including those to pay [the beneficiary] for her live-in housekeeping duties.

It is for this reason that it was logical for my uncle to step forward with an affidavit to document his important role in helping me to pay [the beneficiary's] salary and it most definitely continues to be very important to my family and me that we be able to have her in our household.

[REDACTED]'s 2001 through 2003 Forms 1040 reflect adjusted gross incomes of \$97,299, \$94,468, and \$84,790, respectively.

[REDACTED]'s Certificate of Naturalization shows that he became a naturalized citizen on August 11, 1989.

The affidavit, dated December 6, 2004 from [REDACTED] states:

I am employed and enjoy an annual income in excess of \$90,000.00. In addition, I own real estate, which generates separate income. I am attaching my Income Tax Returns for the past three years, which reflect an adjusted gross income of: \$97,000.00 (2001); \$94,468.00 (2002); and \$84,790.00 (2003). As you will notice from the returns, I took tax losses (paper losses) as well as depreciation/amortization deductions which in effect increase my income. In 2003, I

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

took a \$21,000 tax loss as well as \$6,400.00 depreciation deduction which effectively makes my income \$110,000 for that year.

I regularly give my niece, [the petitioner], money towards her expenses, including her housekeeper's wages.

As such, I believe that I can continue to be in a position to personally guarantee that the proffered wage of \$28,964 will be paid in its entirety to the beneficiary.

On appeal, counsel states:

The petitioner is indeed related to the individual, [REDACTED], from whom financial documentation was submitted to help establish petitioner's ability to [pay] the proffered wage to the beneficiary.

Establishing the familial link between the petitioner and said individual requires that documentation be obtained from the family members' country of birth, Guyana, and such documentation is being requested.

\* \* \*

Upon receipt of the appropriate documentation establishing familial relationship between petitioner and [REDACTED] we will immediately forward same to you for consideration in connection with this appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on April 24, 2001, the beneficiary claims to have been employed by the petitioner from March 2000 to the present (April 24, 2001). Counsel has not, however, submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to show that the beneficiary was employed by the petitioner during those years. Therefore, the petitioner has not established that it employed the beneficiary in 2000 and 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner is a private household. When reviewing the petitioner's ability to pay the proffered wage, a private household is treated as a sole proprietorship in that CIS reviews the private household's adjusted gross income, number of dependents, and personal assets.

A sole proprietorship 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 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 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. 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 the instant case, the petitioner did not submit any evidence of its ability to pay the proffered wage. Instead, the petitioner submitted the 2001 through 2003 Forms 1040 for [REDACTED] as evidence of its ability to pay the proffered wage.

The record of proceeding contains an Agreement of Employment that was signed on April 24, 2001 by both the petitioner as employer and beneficiary as employee. [REDACTED] is not listed on the Agreement, the I-140, or the ETA 750. He is not, therefore, a party to these proceedings.

Because [REDACTED] is not the petitioner, his assets cannot be considered in determining the petitioner's ability to pay the proffered wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Since the petitioner has not submitted any evidence of its ability to pay the proffered wage of \$28,988.96, the petition may not be approved.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.