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U.S. Citizenship
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FILE: WAC-03-079-54042 Office: CALIFORNIA SERVICE CENTER Date: JUL 18 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:

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

DISCUSSION: The preference visa petition was denied by the Director, California 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, the petitioner submits a brief statement and additional 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 January 10, 2001. The proffered wage as stated on the Form ETA 750 is \$375 per week, which amounts to \$19,500 annually.

The petitioner is a private household. With the petition, the petitioner submitted his Form 1040, U.S. Individual Income Tax Return, for the year 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 6, 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 requested evidence pertaining to 2002.

In response, the petitioner submitted his Form 1040, U.S. Individual Income Tax Return, for the year 2002. The tax returns reflect that the petitioner's adjusted gross income was \$95,298 in 2001 and \$22,143 for 2002.

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 August 18, 2003, the director requested additional

evidence pertinent to that ability. The director specifically requested a detailed list of the petitioner's monthly expenses.

In response, the petitioner submitted a letter stating that his annual income is \$95,000 and his monthly expenses are as follows:

House Mortgage: \$3000.00
Utility: \$200.00
Private Schools: \$360.00
Health is completely covered by the employer.
Car is leased by the employer
Food about \$1,000.00 more or less
House cleaning/Gardner [sic]: \$250.00
No student loans.

Thus, the petitioner's monthly expenses total \$4,810, which annualize to \$57,720.

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 19, 2003, denied the petition¹. The director stated that subtracting the petitioner's cost of living expenses from his adjusted gross income does not leave sufficient funds to pay the proffered wage.

On appeal, the petitioner states that he believes that "after all my personal expenses for the year 2002, I have an extra \$22,000.00 to support the prospective alien." The petitioner submits an unaudited financial statement as of September 2003 itemizing his assets and liabilities. The financial statement includes such items as the petitioner's real estate holdings, life insurance policy, vehicle value, personal property values, and business assets, and total \$14,985,000.00 as assets. The petitioner itemized his income from salary and business dividends against expenditures such as real estate taxes, mortgage payments, insurance premiums, and estimated living expenses. The financial statement includes such items as the petitioner's loans owed to banks and credit cards, taxes, and real estate mortgages, and total \$5,915,100.00 as liabilities.

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*

¹ Prior to issuing a decision, the director issued another request for evidence unrelated to the substantive issue of this appeal.

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).

The unaudited financial statements that the petitioner submitted on appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are unsupported representations of a self-interested party and not persuasive evidence of a petitioner's ability to pay the proffered wage.

As a private household, the petitioner's situation can be analyzed similarly 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 2001, the petitioner's adjusted gross income of \$95,298 covers the proffered wage of \$19,500. It is most likely that the petitioner could support himself and his family on \$75,798 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, even after further reducing by the petitioner's stated living expenses, which are \$57,720 and would leave the family with an additional \$18,078 surplus for that year. Thus, the petitioner has established that he could pay the proffered wage in 2001.

In 2002, however, the petitioner's adjusted gross income of \$22,143 barely covers the proffered wage of \$19,500. It is impossible that the petitioner could support himself and his family on \$2,643 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, even after further reducing by the petitioner's stated living expenses, which are \$57,720 and would leave the family with a deficit for that year, -\$55,077. Thus, even adding back the \$18,078 surplus from 2001 would not rectify the poor financial showing in 2002. Thus, the petitioner has not established that he could pay the proffered wage in 2002 and thus, has not established his *continuing* ability to pay the proffered wage beginning on the priority date.

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. The AAO notes that the assets referenced by the petitioner are real estate holdings, which are not the type of assets typically easily liquefied by employers to pay wages. Additionally, the petitioner did not submit any evidence of income not otherwise reflected on his tax returns that factor into

his adjusted gross income, nor any other unencumbered or liquefiable personal assets². Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

² For example, the petitioner did not submit evidence of cash in bank accounts, or copies of documentation to substantiate the assets and liabilities delineated in the unaudited financial statement.