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MAR 08 2005

FILE: LIN-03-029-53059

Office: NEBRASKA 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 live-in home attendant. 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)(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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.05 per hour for a 44 hour work week, which amounts to \$32,146.40 annually.

The petitioner is a private household. With the petition, the petitioner submitted a letter explaining that she suffered a stroke in 1995 that has left her disabled and dependent on a live-in aide. The petitioner stated that the beneficiary has been working for her since 1996. The petitioner stated that she received a pension and social security payments amounting to approximately \$12,081 per year. In addition, the petitioner stated that her son, [REDACTED] purchased her home for \$100,000 in May 2001 and he pays her \$2,500 per month towards that purchase price. The petitioner stated that he pays all of her utilities and does not charge her rent to live there. Thus, the petitioner explained, she has an annual income of approximately \$42,000 and has been paying the beneficiary \$2,200 per month since August 1996.

The petitioner submitted a purchase agreement dated May 2001 indicating her son's intention to purchase her home. Other documents, such as the deed and evidence from the county recorder's office, indicate that the sale of her home was finalized in February 2002. Her attorney's accompanying cover letter stated that the sale of her home was finalized in February 2002.

The petitioner also submitted a copy of her Form 1040, U.S. Individual Income Tax Return, for the year 2001 showing that her adjusted gross income was \$12,081 in that year. She also submitted copies of bank account statements showing she shares a bank account with her son at National City Bank in Cleveland, Ohio.

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 December 26, 2002, 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 the petitioner's monthly expenses, bank account balances, and proof of wage payments made to the beneficiary.

In response, the petitioner submitted a letter explaining that her son is the only remaining family member who watches over her and that she paid the beneficiary in cash as she does not maintain a bank account. She explained that her monthly expenses include \$60 for medicine not covered by medicare of her insurance; \$190 for utilities; \$200 for food and miscellaneous expenses; and the beneficiary's salary. A handwritten sheet details the medicines prescribed to the petitioner and the cost of each. She states that she does not own a vehicle or have any other expenses, and wished to live in her own home and not a nursing home. Copies of utility bills in her son's name are in the record of proceeding. Also, the petitioner submitted copies of additional banking records for an account held jointly by her and her son with an average balance ranging from approximately \$2,500 to \$3,500 for June 2002 to February 2003. Additional statements for the same bank account were submitted covering the period April 2001 to December 2002 and highlighting sporadic deposits of \$2,500.

The petitioner also submitted a sworn affidavit from the beneficiary stating that she received a monthly salary of \$2,200 from the petitioner who never missed a payment since 1998. The beneficiary states that she is paid in cash because she does not have a social security number due to her immigration status and cannot open a bank account. She describes her cash holdings and expenses over the years.

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 July 3, 2003, denied the petition. The director noted that the evidence submitted only showed deposits of \$2,500 in three out of thirteen months of bank statements; that discrepancies surround the factual assertions concerning the date of the sale of her home and that the sale on her house was finalized in May 2002, which is after the priority date; and that the petitioner's monthly income from her pension and social security was insufficient to pay the proffered wage.

On appeal, the petitioner submits an affidavit from her son who states the following in pertinent part:

I entered into a purchase agreement to purchase my mother's house. . .in May 2001. Whereupon the City of Bedford issued a directive to bring the house up to code. Without bringing the house up to code, I was not permitted to file the deed transfer until April 2002. In an effort to comply with the housing code issues, the filing of the deed was delayed until April 26, 2002.

* * *

[S]hould it become necessary that my mother, [the petitioner], needs any financial assistance to pay [the beneficiary's] salary, I make this full and unconditional commitment to make whatever

payments are necessary to ensure that [the beneficiary] will receive the full prevailing wage . . . I have the financial ability to support this obligation inasmuch as I am a business owner and have sufficient assets and income to provide this support if needed.

Counsel's accompanying letter and brief explains that the petitioner's son owns Northcoast Engineering Copier and Blueprint Service, Inc., and provided unaudited balance sheets and other business filings along with the petitioner's son's individual income tax return evidencing his adjusted gross income as \$149,100.16 in 2002 and \$152,718 in 2001. Counsel also states that \$43,013.25 was deposited into the petitioner's bank account in 2001 and \$33,825.34 was deposited into the petitioner's bank account in 2002. The copies of bank account statements corroborate these deposit amounts. Counsel submits copies of "cancelled" checks for \$2,500 deposited monthly into the petitioner's account from her son as well as some "cancelled" checks made payable to "Cash" as evidence of wage payments made to the beneficiary. Those cancelled checks are just the front of checks without any bank stamps evidencing endorsement and/or deposit into a bank account. Counsel also submits a certificate of inspection dated July 2001 from the City of Bedford requiring repairs made to the petitioner's property. Finally, counsel submits a copy of an appraisal of the petitioner's property and the petitioner's individual income tax return for 2002 showing an adjusted gross income of \$10,086.55 in that year. Previously submitted evidence is re-submitted including the beneficiary's evidence that she has cash holdings and has paid all of her expenses as well as her affidavit that she is aid in cash and has been consistently paid since 1998.

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. The "cancelled" paychecks are not processed through a bank and the beneficiary has only evidenced that she has money and pays her bills, not the source of her income. Thus, the evidence contained in the record of proceeding is insufficient to establish that the petitioner previously employed and paid 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, 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 herself only. In 2001 and 2002, the petitioner's adjusted gross income cannot cover the proffered wage, especially if that income is reduced by her expenses.

The petitioner shares a bank account with her son and is receiving cash for the sale of her home, a sale that was agreed upon in May 2001 and finalized in May 2002. The purchase agreement evidences equity that was in the process of being realized. It shows that the petitioner has the assets to pay the salary. Because the petitioner is an individual, she may utilize all resources available to her, including the equity in her private home, which in this case, she sold a year after filing the petition.¹ The petitioner had \$100,000 in equity in her home, evidenced by the amount for which her son agreed to purchase her home, during the month coinciding the date of filing, or the priority date, which bolsters her position of having the ability to pay the proffered wage.

While the resources of the petitioner's son cannot typically be utilized since he is not the petitioner in this case, his cash assets are commingled with the petitioner's in a shared bank account. Those bank accounts show an average balance after payment of expenses of approximately \$2,500 to \$3,500 per month. Although the AAO cannot accept the petitioner's son's assurances of his commitment to pay the proffered wage since he is not the petitioner, the AAO is exercising favorable discretion and acknowledging the substantial adjusted gross income from his individual income tax returns, close relationship to the petitioner, and commingling of assets with the petitioner. However, the unaudited financial statements that counsel submitted on appeal of the petitioner's son's business 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 the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Based on the limited and unique circumstances of this case, the AAO finds in its discretion that the petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has established that it has 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 met that burden.

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

¹ Typically the AAO does not consider real estate an easily liquefiable asset for the purposes of paying a proffered wage; however, in this case, the petitioner has actually sold the house and actually received cash from the sale.