U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 2 4 2007

EAC-05-131-51585

RE: Petitioner: [redacted]
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:

[redacted]

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 Acting Director (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 household. It seeks to employ the beneficiary permanently in the United States as a cook (domestic cook, live-in/live-out). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 11, 2005 denial, the single issue in this case is whether or not the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 20, 2003. The proffered wage as stated on the Form ETA 750 is $11.81 per hour ($24,564.80 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered or in the related occupation of cook in any industry.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO generally

considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal counsel submits the petitioner's individual income tax returns for 2001 and 2003, and statements of monthly expenses for the petitioner's household for 2003 and 2004. Other relevant evidence in the record includes a letter from the petitioner pertinent to her ability to pay the proffered wage. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is a private household. On the petition, the petitioner did not provide information about annual income and occupation. On the Form ETA 750B, signed by the beneficiary on December 2, 2003, the beneficiary claimed to have worked for the petitioner since April 2000.

On appeal, counsel submits the petitioner's monthly expenses statements for 2003 and 2004 and income tax returns for 2001 and 2003, and asserts that these documents establish the petitioner's ability to pay.

The record shows that the petition was filed without any supporting documents pertinent to the petitioner's ability to pay the proffered wage. Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 5, 2005, the director issued a notice of request for evidence (RFE). The director requested the petitioner submit additional evidence to establish that the employer had the ability to pay the proffered wage of $24,564.80 as of February 20, 2003, the priority date and continuing to the present, and specifically listed the following: a copy of the 2003 and 2004 Form W-2 Wage and Tax Statement issued to the beneficiary; the petitioner's United States individual income tax return for 2003 and 2004, with all schedules and attachments; and an itemized list of all of the petitioner's monthly expenses, including rent ort mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. for 2003 and 2004. The petitioner responded the director's RFE on August 1, 2005 without the requested documents, but with a letter from counsel requesting additional time to submit the evidence requested. The director's RFE expressly indicated that the petitioner may not receive an extension of time in order to submit the requested documentation. The AAO notes that the evidence newly submitted on appeal is among the requested documents in the director's RFE. On October 11, 2005, the director determined that the petitioner had not demonstrated that she had the ability to pay the proffered wage from the priority date and accordingly denied the petition. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

[1] Although 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 reasons to preclude consideration of certain documents newly submitted on appeal as detailed herein. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO also finds that if even the AAO considered the newly submitted evidence on appeal, the appeal would have been dismissed and the petition would have been denied because the petitioner failed to establish the continuing ability to pay the proffered wage from 2003 to the present.

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, Citizenship and Immigration Services (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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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, although the beneficiary claimed to have worked for the petitioner since April 2000 and the director specifically requested the petitioner to submit the beneficiary's W-2 forms for 2003 and 2004 in the RFE dated May 5, 2005, the petitioner did not submit the beneficiary's W-2 forms, 1099 forms or any other documents to show the beneficiary's compensation from the petitioner during the relevant years. The petitioner is obligated to demonstrate that she could pay the full proffered wage with her adjusted gross income in 2003 and 2004.

The evidence indicates that the petitioner is a private household. Unlike a corporation, a private household is not legally separate from the individual. Therefore the individual's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. The individual's income is reported on his/her individual (Form 1040) federal tax return each year. Like a sole proprietor, the individuals of the household 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 (approximately thirty percent of the petitioner's gross income).

For a private household, CIS considers net income to be the figure shown on line 33[2], Adjusted Gross Income, of the household's Form 1040 U.S. Individual Income Tax Return. The record contains the petitioner's Form 1040 U.S. Individual Income Tax Return for 2001 and 2003. The priority date in the instant case is April 20, 2003, therefore, the petitioner's 2001 tax return is not necessarily dispositive. The petitioner's 2003 individual income tax return shows the following financial information concerning the petitioner's ability to pay the proffered wage of $24,564.80 per year from the priority date:

[2] The line for adjusted gross income on Form 1040 is Line 33 for 2001, Line 35 for 2002 and Line 34 for 2003.

In 2003, the Form 1040 stated adjusted gross income of $22,547.

On appeal, counsel submits the petitioner's statements of monthly expenses for 2003 and 2004. The petitioner stated that the household's monthly expenses for 2003 and 2004 as follows: mortgage or rent payments $3,812.25, automobile payments $846.34, credit card payments $4,100.00, utilities $194.84, gas $310.50, phone $80.57, landscaping $123.50, and cable $179.31, totaling $9,647.31 per month ($115,767.72 per year).

In 2003, the private household's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage in that year without taking into consideration the household's living expenses.

CIS will consider the individual petitioner's income and her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the petitioning household's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the household to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the private household had extra available funds sufficient to cover the proffered wage as well as the household's living expenses at the end of each year 2003 and 2004.

The record before the director closed on August 1, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2004 should have been available. However, the petitioner did not submit the 2004 tax return. Nor does counsel submit the petitioner's 2004 tax return on appeal. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return for 2004. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2003 and 2004.

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.