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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 28 2009

SRC 08 025 50781

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, 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 sustained in part, and remanded to the director for further consideration of the beneficiary's qualifications for the proffered position.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a general house worker.[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 and 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 August 25, 2008 denial, the 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.

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 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.

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 DOL. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] Form ETA 750 describes the proffered position as Housekeeper/Child Monitor.

Here, the Form ETA 750 was accepted on October 27, 2003. The proffered wage as stated on the Form ETA 750 is $446.90 per week, or $23,238.80 per year. The Form ETA 750 states that the position requires three months of work experience.[2]

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.[3] Counsel submits a brief, and the following evidence:

> A copy of three pay stubs dated November 14, 2003; July 23, 2003, and April 4, 2003. All three pay stubs indicate biweekly gross pay of $3,846. The November pay stub indicates year-to-date gross federal pay of $78,724;
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> An email from the petitioner listing her monthly expenses as $2,240.[4] The petitioner also states that her husband pays the mortgage and the second car expenses; and
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> A copy of the petitioner's joint checking account that indicates an ending balance of $8,732.97 as of December 11, 2008.

Other relevant evidence in the record includes the petitioner's W-2 Wage and Tax Statements for tax years 2004 and 2007 and the petitioner's Forms 1040, U.S. Individual Income Tax Return, for tax years 2005 and 2006. The W-2 Statements indicate that the petitioner earned $93,639.31 in wages tips and other compensation in 2004 and $107,564.47 in 2007; while the petitioner's tax returns indicate she had adjusted gross income of $103,193 in 2005, and $106,367 in 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the beneficiary has been employed by the same employer since 2003, and that the petitioner currently earns in excess of $100,000 per year. Counsel notes that the petitioner provided documentation of her income for every relevant year except 2003, the priority

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[2] Part A, Section l4 of the Form ETA 750 originally identified the required work experience for the proffered position as two years; however, an initialed correction on the Form ETA 750 signed on April 2, 2007 appears to indicate that three months is the required work experience.

[3] 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).

[4] The petitioner's yearly household expenses would be $26,880.

year and that the pay stubs submitted on appeal establish that as of November 14, 2003, the petitioner had earned $89,405.63.[5]

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, United States Citizenship and Immigration Services (USCIS) 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, USCIS 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 employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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.[6] Black's Law Dictionary 1398 (7th Ed.

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[5] Counsel utilizes the petitioner's wages listed on the 2003 pay stub as Medicare Gross.

[6] The director refers to examining the petitioner's net income and net current assets, as well as looking at the petitioner's monthly expenses. An examination of the petitioner's net income and net current assets is done in cases in which the petitioner is structured as a corporation or partnership. In The director draws no conclusions in her decision with regard to the petitioner's net current assets. Nevertheless, the director's discussion of whether the petitioner, as a corporation, has sufficient net current assets to pay the proffered wage, will be withdrawn.

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).

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 sole proprietor, filing her tax returns as married but filing separately supports a family of two, herself and her daughter. As stated previously, the proprietor's tax returns reflect adjusted gross income of $103,193 in 2005, and $106,367 in 2006. While the petitioner has not provided her tax returns for tax years 2003, 2004, and 2007, the petitioner does provide evidence of her earnings in these years as follows: as of November 14, 2003, gross federal pay of $78,724.84; and wages, tips and other compensation of $93,639.31 in 2004, and $107,564.47 in 2007. Based on the petitioner's adjusted gross income, gross federal pay or wages, tips and other compensation, the petitioner could pay the proffered wage of $23,238.80 during the relevant period of time, as well as her yearly household expenses of $26,880. Thus, the petitioner has established her ability to pay the proffered wage. The director's decision with regard to the petitioner's ability to pay the proffered wage is withdrawn.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also 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 regulation at 8 C.F.R. § 204.5(l)(3) provides

> (ii) Other documentation--
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> > (D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

(A) ***General.*** Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The corrected Form ETA 750 submitted with the instant petition appears to indicate that the proffered position requires three months of prior work experience. On the Form ETA 750B, signed by the beneficiary on September 9, 2003, the beneficiary did not claim to have worked for the petitioner. She did note that she was self-employed from January 1999 to the time she signed the Form ETA 750. She also indicated that she had worked for [redacted] Sayreville, New Jersey from January 1997 to January 1999 as a domestic, cooking, cleaning, caring and supervising two children.

The record contains no letter of work verification that establishes the beneficiary has the required three months of work experience. Counsel's assertion on appeal that the beneficiary has worked for the same employer since 2003 does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, the petitioner has to establish the beneficiary had the required work experience prior to the October 27, 2003 priority date, not after this date.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.