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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
WAC 03 025 52341

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

FEB 24 2005

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:



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 housekeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 other 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 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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour, which amounts to \$16,640 annually. The ETA 750B, signed by the alien beneficiary on January 9, 1998, indicates that the alien has not worked for the petitioner.

On Part 5 of the visa petition, it is claimed that the petitioner earns approximately \$39,000 per year. With the petition, the petitioner submitted copies of the household's Form 1040, U.S. Individual Income Tax Return for 1998 through 2001. Except for 1998 when no dependents were claimed, the householders filed jointly and declared one dependent.

The tax returns reflect the following information for the following years:

	1998	1999	2000	2001
Household's adjusted gross income (Form 1040)	\$ 20,558	\$27,268	\$24,336	\$36,981
Net business income (Schedule C and Form 1040)	\$ 22,121	\$29,341	\$11,566	\$20,904
Taxable Interest	-0-	-0-	-0-	-0-

Wages & Salaries	-0-	-0-	-0-	-0-
Rental real estate, royalties, partnerships, etc.	-0-	-0	\$13,587	\$17,554

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on March 19, 2003. The director requested that the petitioner provide a statement of monthly household living expenses as well as Internal Revenue computer printouts of the household's tax returns for 1998 to the present.

In response, the petitioner, through counsel, resubmitted copies of the household's tax returns originally submitted with the petition. Additionally, a copy of what appears to be the IRS computer printout for 2001 is also included with this response. It shows adjusted gross income of \$22,111, including net business income of \$4,904, no taxable interest, and rental real estate of \$17,554. No explanation of the difference between the numbers reported on this return and the signed 2001 return is offered.

By cover letter accompanying the response, counsel asserts that the adjusted gross income of the household as shown by the tax returns was substantially more than the proffered wage during the relevant period. Counsel does not submit an itemization of the household's monthly living expenses, but rather asserts that the household expenses are covered by the personal savings and checking account of the household and therefore "must not be deducted from the adjusted gross income." No corroborating documentation of such resources was submitted with the response.

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 June 25, 2003, denied the petition. Reviewing the adjusted gross income of the signed tax returns for 1998-2001, the director concludes that although the amounts are more than the proffered wage of \$16,640, after deducting the proffered wage from these figures, it is not reasonable to conclude that the remaining amount is sufficient to support the petitioning household.

On appeal, counsel resubmits copies of various documentation previously supplied to the record, along with copies of correspondence directed to the Dept. of Labor related to the recruitment efforts supporting the labor certification. Counsel also supplies a copy of the petitioning household's 2002 individual tax return, as well as a copy of an IRS application for extension of time to file such return. It shows that the petitioning household reported an adjusted gross income of \$43,496, including a business income of \$2,422, and for the first time, taxable interest of \$181.

Counsel again asserts that the petitioning household does not have to use its adjusted gross income proceeds to pay its personal and family expenses because they are covered by other personal savings accounts. Therefore the entire adjusted gross income is available to pay the proffered wage. Counsel maintains that the fact that the adjusted gross income is larger than the proffered wage has carried the petitioning household's burden of proof in demonstrating by a preponderance of the evidence that it has the ability to pay the proffered wage. Counsel cites *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989) for the proposition that a preponderance of evidence means that it is sufficient if the proof only establishes that it is probably true. Counsel also claims that the petitioning householders will suffer a hardship if the alien's permanent employment is not allowed in order to maintain the home so that the owners can perform their own job duties with greater ease. Finally it is asserted that all recruitment attempts have complied with the Dept. of Labor procedures and further efforts to attract an available U.S. worker would be futile.

The AAO concurs with counsel that a petitioner must carry its burden of proof. 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 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). "How much of a showing is sufficient to establish eligibility by a preponderance of evidence will often turn upon the factual circumstances of each case." *Matter of E-M-* at p.79. In this case, as noted above, however, there are problems with the evidence submitted, as well as a lack of evidence provided to demonstrate the petitioner's ability to pay the proffered wage. As heretofore mentioned, no clarification has been offered to explain why the computer printout of the 2001 tax return actually filed shows an adjusted gross income of \$22,111 and a net business income of \$4,904, rather than reflecting the figures stated on the signed tax return submitted with the petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

In view of this inconsistency and lack of acceptable explanation, the AAO cannot conclude that the director erred in requesting the original IRS printouts of the household's tax returns, and finds that the discrepancies noted raise a question as to the veracity of the other signed tax returns submitted as evidence of the petitioner's ability to pay the proffered wage. It is further noted that 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).

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 may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. This record does not indicate that the petitioner 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 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner is a private household. It does not exist as an entity apart from the individual owner(s). See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the

individual owners' adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Private individuals report income and expenses from their businesses as sole proprietorships 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. Existing business expenses as well as the ability to pay the proffered wage must be shown to be covered by their adjusted gross income or other available funds. In addition, sole proprietors must show that they can personally sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In order to review whether sole proprietors or a private household can personally support the household and dependents, as well as pay the proffered wage, CIS frequently requests a summary of household living expenses from petitioners.

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.

It is difficult evaluate this petitioning household's ability to pay the proposed wage offer of \$16,640 per year because of the failure to submit a summary of household living expenses as requested, even in light of counsel's bald assertion that the household expenses are covered by other personal savings and checking accounts. As noted again, 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). Additionally, the record reflects that there is no indication on any of the tax returns, with the exception of the 2002 return submitted on appeal, that interest income has been reported on any savings account. The record contains no other evidence that the householders have held any accounts or readily available cash or cash equivalent assets other than the earned income reported on the relevant tax returns. Without documentary evidence to support the claim, the assertions of counsel do not satisfy the petitioner's burden of proof in this regard. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In the instant case, the tax returns reflect that the private household consists of a family of three. Although the household was comprised of fewer dependents than in *Ubeda*, the comparison of the beneficiary's proposed wage measured against the sole proprietor's adjusted gross income in each of the relevant years shows that it represented 81% of the sole proprietor's adjusted gross income in 1998, 61% in 1999, and 68% of the adjusted gross income in 2000. Depending on which tax return is used, the proffered wage is either 45% or 75% of the adjusted gross income in 2001. Even using the figures in these tax returns and without considering any living expenses, it is improbable that the petitioning household could sustain itself on the remaining \$3,918 in 1998, \$10,628 in 1999, or \$7,696 in 2000. As the director did not have the 2002 tax return before him and the 2001 figures are demonstrably problematic, they will not be considered as probative of the petitioning household's ability to pay the proffered wage. The record contains no corroborating evidence that other resources have been available to pay unspecified living expenses. The proof of this claim cannot be determined to be probably true. See *Matter of E-M-*, *supra*.

Counsel argues on appeal that the household would incur hardship if the preference petition is not approved allowing it to permanently hire the alien beneficiary. Counsel offers evidence of recruitment requirements underlying the DOL certification procedure in determining that there are no available U.S. workers that are eligible for the certified position. These arguments are not persuasive. The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of

CIS to review whether a petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, at 1302. Similarly, there are no statutory or regulatory provisions that allow consideration of a petitioner's hardship in determining the eligibility of an employment-based visa petition filed under section 203(b)(3) of the Act.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO cannot conclude that the director erred in finding that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa 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.