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U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 258 50694 Office: VERMONT SERVICE CENTER Date: JUN 21 2005

IN RE: Petitioner: [Redacted]
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:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

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 statement and additional evidence.

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 at 8 C.F.R. § 204.5(1)(3) provides:

(ii) Other documentation--

(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(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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$500 a week, which amounts to \$26,000 annually.

The petitioner is a private household. The Form ETA 750 indicated that the beneficiary had worked for the petitioner since March 2000. In addition, the initial petition indicated that the petitioner was filing for the classification of skilled worker, requiring two years of requisite work experience. The petitioner also submitted two letters verifying the beneficiary's three years of work experience in Brazil.

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 2, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal corporate tax returns for 2001 and 2002, with all schedules, and attachments. If the petitioner was organized as a sole proprietorship, the director requested that the owner's individual tax return, Form 1040, be submitted as well as a Schedule C that related to the business. The director noted that the beneficiary's ETA Form 750 had been certified for the classification of "other worker", and stated that if the petitioner wished to change the requested preference classification from the category of skilled worker indicated on the I-140 petition to other worker, the petitioner could do so.

In response, the petitioner indicated that he wished his petition to be adjudicated as "other worker". In addition, the petitioner submitted an unaudited statement of financial condition dated December 31, 2002. In Note 1, this document states that all major assets owned and all major liabilities of the petitioner are included in the statement. Subsequent notes in the statement of financial condition identified the petitioner's investments in real estate partnerships and closely held corporations.

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 8, 2003, denied the petition. The director noted that the petitioner had not submitted its federal income tax returns for 2001 and 2002, or the beneficiary's W-2 forms for 2001 and 2002. The director described the petitioner's statement of financial condition as self-generated, and stated that the petitioner had failed to respond to the director's request for further evidence.

On appeal, the petitioner submits his individual income tax return, Form 1040, along with his Forms W-2 for tax year 2001. The petitioner states that his 2002 return has not been filed, and that he had filed for and been granted an extension to file the 2002 return. The petitioner notes that his 2001 income tax return shows substantial bad debt write-offs from [REDACTED] Inc, a family enterprise that filed for Chapter 11 reorganization in August 2000. The petitioner further states that these write-offs, the operating losses in certain entities, and the depreciation applied to real estate investments combined to produce a substantial loss to be carried forward. The petitioner asks that when reviewing the petitioner's ability to pay the proffered wage, the statement of financial condition previously submitted which the petitioner identifies as his net worth statement, be considered in addition to his complex federal income tax return. The petitioner also adds that the tax return should also confirm his ownership interest in the entities listed in his net worth statement.

The response to the director's request for evidence included an unaudited financial statement as proof of the ability to pay the proffered wage. The unaudited financial statement that the petitioner submitted is not persuasive evidence of the petitioner's ability to pay the proffered wage. 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 the petitioner. The unsupported representations of the petitioner are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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, although the Form ETA-750 stated that the

beneficiary had worked for the petitioner since March 2000, the petitioner provided no evidentiary documentation, such as W-2 Forms, to further substantiate this assertion. The assertions of the petitioner do 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). Without any persuasive evidence, the petitioner has not established that it has previously employed and paid the beneficiary. Thus, the evidence contained in the record of proceeding is insufficient to establish that the petitioner previously employed and paid the beneficiary as of the priority date and onward.

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).

However, it is noted that on May 2, 2003, the director requested the petitioner's 2001 and 2002 federal income tax returns. In its response, the petitioner did not submit any federal income tax returns in its response to the director's request for further evidence, or any explanation as to why the 2001 income tax return was unavailable, as of July 28, 2003, the date by which the petitioner had to respond to the director's request. On appeal, the petitioner submits its 2001 income tax return, along with a notation on Form I-290B, that the information was not available when requested previously. The petitioner provides no evidentiary documentation or explanation as to why the return was not available earlier and when it was actually filed. It is also noted that, on appeal, the petitioner submits Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, as an explanation for the absence of the 2002 income tax return.

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, or provided an explanation as to why the evidence was not available. *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.

Nevertheless, for purposes of further clarification, the AAO will further examine the petitioner's ability to pay the proffered wage. In the instant case, the petitioner is a private household, with five members. 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).

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.

With regard to the instant petition, in 2001, the petitioner's adjusted gross income is -\$4,978,171. Although the petitioner states that this negative figure is the result of a one-time bad debt write-off, he has provided nothing to document that the write-off does not negatively affect the petitioner's ability to pay the proffered wage. Based on this negative adjusted gross income, the petitioner cannot pay the proffered salary. In examining the source of additional funds from which to provide for the petitioner's and his dependents expenses, and for the beneficiary's proffered wage, the petitioner provided a Schedule C with his income tax return that shows a business income for the year 2001 of \$150,000. In addition, the petitioner submits W-2 Forms from two business entities that indicate his combined wages for 2001 were \$220,040. The petitioner's unaudited balance statements also show items such as available cash, or marketable securities, but as stated previously, the unaudited financial statement that the petitioner submitted is not persuasive evidence of the petitioner's ability to pay the proffered wage. 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. Furthermore, the relationship between items contained on the petitioner's financial statement and figures in the petitioner's income tax return is not clearly established in the record. In addition, the petitioner's partial ownership of businesses, IRA accounts, or real estate investments would not be considered sources of available funds to pay the proffered wage, as they are not sufficiently liquid. Therefore, without more persuasive supporting evidence, such as brokerage statements, bank statements, or certificates of deposit statements, documenting the source of any additional available current assets that are sufficiently liquid to pay the proffered wage, it appears that the petitioner has not documented that he has sufficient resources to pay the proffered wage as of the 2001 priority date and to the present. Although the petitioner described various resources that would be sufficient to pay the proffered wage, simply 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 to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. This decision is made without prejudice and the petitioner is free to file a new petition with more persuasive evidentiary documentation.

ORDER: The appeal is dismissed. The petition is denied.