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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

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER

Date: **OCT 20 2010**

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)

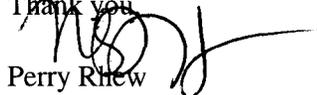
ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rheu
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 dismissed.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a house worker. 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 also determined that the petitioner had not established that the beneficiary possessed the requisite three months of prior work experience. 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 February 9, 2010 denial, the two issues in this case are 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, and whether the petitioner established that the beneficiary possessed the requisite three months of prior work experience.

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(l)(3) also 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 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).

Here, the Form ETA 750 was accepted on December 1, 2003. The proffered wage as stated on the Form ETA 750 is \$16.41 an hour, or \$34,132 per year. The Form ETA 750 states that the position requires four years of high school and three months of prior work experience.¹

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, counsel submits a brief and the following evidence: the petitioner's Forms 1040, U.S. Individual Income Tax Return, for tax years 2003 to 2008, with accompanying Schedules A and E. These documents indicate the petitioner has an adjusted gross income of \$210,785 in 2003; \$130,634 in 2004; \$128,078 in 2005; \$246,265 in 2006; \$226,166 in 2007; and \$151,519 in 2008.

The evidence in the record of proceeding shows that the petitioner is a private household, whose head is a partner in an S corporation dental practice.³ On the Form ETA 750B, signed by the beneficiary on October 17, 2003, the beneficiary did not claim to have worked for the petitioner.

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

¹ Block 15, Other Special Requirements, states "Must obtain evidence of good health and criminal clearance. Must have legal right to work if hired. Employer will compensate according to State Rules and Regulations."

² 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).

³ See Schedules E of the petitioner's tax returns.

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); *Taco Especial v. Napolitano*, --- F. Supp. 2d ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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, 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 a family of four. As stated previously, the petitioner's adjusted gross income is \$210,785 in 2003; \$130,634 in 2004; \$128,078 in 2005; \$246,265 in 2006; \$226,166 in 2007; and \$151,519 in 2008. While the petitioner's adjusted gross income during the relevant period of time covers the proffered wage of \$31,134, the record does not contain an itemized monthly household expense list with which to gauge the petitioner's ability to pay both the

proffered wage and her household annual expenses in each relevant year. The AAO notes that Schedule A of the petitioner's tax returns indicates a combined expense of taxes and mortgage interest for all relevant years of over \$75,000. Thus, in tax year 2005, the petitioner would have had only some \$53,078 to cover both the proffered wage of \$34,132 and her annual household expenses, such as food, clothing, transportation, education, and health expenses. Thus, the record does not establish that the petitioner has established its ability to pay the proffered wage as of the 2003 priority date and onward.

The director in his decision noted that the petitioner had not submitted any documentation with regard to the beneficiary's prior work experience. As stated previously, the certified ETA Form 750 requires three months of prior work experience.

The regulation at 8 C.F.R. § 204.5(l)(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(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 certified Form ETA 750 submitted with the instant petition indicates 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 notes that she worked for [REDACTED] from September 1999 to June 2001 as a nanny/housekeeper/caregiver. The record contained no letter of work verification with regard to this stated prior employment. Thus, the director also denied the instant petition on this issue.

On appeal, counsel submits a letter dated February 12, 2010, written by [REDACTED] that states the beneficiary worked for her from February 2002 through June 2003 as a housekeeper. However, the letter from [REDACTED] conflicts with the information provided by the beneficiary on the ETA Form 750 and certified by DOL. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. Thus the AAO does not find that the letter from [REDACTED] is sufficient to establish

that the beneficiary possessed the requisite three months of work experience prior to the December 1, 2003 priority date. Thus, the petitioner has not established that the beneficiary possesses the requisite work experience.

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.