

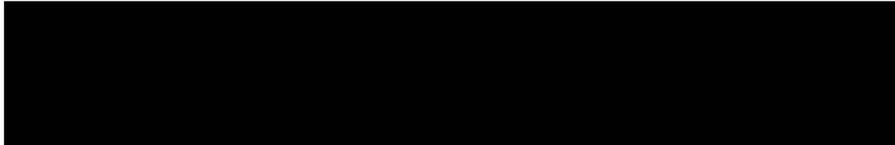
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 16 2008
SRC 04 147 52951

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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:

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, 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 an executive housekeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. As set forth in the director's July 5, 2005 decision denying 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, or that the beneficiary is qualified to perform the duties of the proffered position. 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 of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of 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(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.03 per hour, which amounts to \$20,862.40 annually.

The AAO reviews appeals on a *de novo* basis. See *Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a letter and additional evidence, entailing the petitioner's federal income tax returns for 2000 through 2003, and a letter from the beneficiary's foreign employer.

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).

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); see also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a private individual. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the petitioner and her husband for 2000 through 2003.

A private individual's income and personal obligations are considered as part of the petitioner's ability to pay. Private individuals report income on the Form 1040 U.S. Individual Income Tax Return. A private individual must show sufficient resources for his or her own support and for that of any dependents as well as to pay the proffered wage. *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 the owner, his spouse and five dependents on a gross income

of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner are joint returns of the petitioner and her husband. Those returns show five dependent children. Therefore the household size of the petitioner at the time of filing was seven persons.¹

For a private individual, CIS considers net income to be the figure shown on line 33 (for years 2000 and 2001), line 35 (for year 2002), and line 34 (for year 2003) Adjusted Gross Income, of the petitioner's Form 1040 U.S. Individual Income Tax Return. The petitioner's tax returns state amounts for adjusted gross income as \$4,075,727.00, \$4,580,842.00, \$5,106,611.00, and \$6,134,494.00 for 2000, 2001, 2002, and 2003, respectively. This information is sufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Based on the foregoing, the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal overcome the decision of the director.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The director determined that the petitioner had not established that the beneficiary had the minimum four years of experience as required on the Form ETA 750, and denied the petition accordingly.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001.

On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary did not claim to have worked for the petitioner. It is noted, however, that the Form G-325, Biographic Information, signed by the beneficiary on January 12, 2004, reflects that the beneficiary has worked as the petitioner's housekeeper from July 1999 to the present. The ETA 750 was certified by the Department of Labor on December 17, 2003.

The I-140 petition was submitted on June 7, 2004 with supporting evidence.

In a request for evidence dated March 26, 2005, the director requested documentation to establish that the beneficiary has four years of experience in the job offered. In response to the request for evidence, the petitioner submitted a letter from the beneficiary's foreign employer.

¹ According to the website of Wikipedia, Winthrop Paul "Win" Rockefeller died on July 16, 2006. A review of the website at <http://www.nwanews.com/adj/News/165152/print/> finds that, according to the Arkansas Democrat Gazette, the late Lt. Gov. Win Rockefeller left all his estate to his widow, [REDACTED] an estate estimated by Forbes magazine to be worth \$1.2 billion.

In a decision dated July 5, 2005, the director determined that the letter submitted by the petitioner did not contain a description of the beneficiary's duties or the dates of her employment. The director therefore denied the petition.

On appeal, the petitioner submits a letter from the beneficiary's foreign employer describing her housekeeping duties in the capacity of assistant manager and specifying the dates of her employment from November 1983 to July 1988.

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).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of executive housekeeper. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

- | | | |
|-----|------------------------------|---|
| 14. | Education (number of years) | |
| | Grade School | Blank |
| | High School | Blank |
| | College | Blank |
| | College Degree Required | Blank |
| | Major Field of Study | Blank |
| | Training - yrs | Blank |
| | Experience | |
| | Job Offered | Yrs 4 |
| | Related Occupation | Yrs Blank |
| | Related Occupation (specify) | Blank |
| 15. | Other Special Requirements | Physical Demands: Reaching, handling, fingering, near acuity are frequently present. Color vision is occasionally present. Talking and Hearing are Constantly Present. Noise Intensity Level is 3 – Moderate. The work schedule is Wednesday to |

Sunday from 12:00 p.m. to 9:00 p.m. with one hour lunch. Work schedules will vary. Work schedules will change from week to week.

The beneficiary states her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Primaria, [REDACTED] Jalisco, Mexico	general studies	09/75	06/81	Blank
Secundaria, [REDACTED] [Ladewig] Jalisco, Mexico	general studies	09/82	06/85	Certificate
Preparatoria, [REDACTED] Jalisco, Mexico	general studies	09/85	06/87	Certificate

The beneficiary states her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
Secundaria Escuela Jalisco, Mexico	housekeeping supervisor	11/83	07/88	school

The issue is whether the beneficiary met all of the requirements stated by the petitioner in blocks 14 and 15 of the labor certification as of the day it was filed with the Department of Labor. As discussed above, the petitioner submits a letter from the beneficiary's foreign employer describing her housekeeping duties in the capacity of assistant manager of housekeeping at the Mexican school **Secundaria** [REDACTED] and specifying the dates of her employment from November 1983 to **July 1988**. In November 1983, however, the beneficiary was only 14 years old and a student at the same institution for which she was allegedly the housekeeping supervisor. The record contains no explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In view of the foregoing, the petitioner has not established that the beneficiary has the minimum four years of experience as required on the Form ETA 750. Therefore, the petitioner has not overcome this portion of the director's decision.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.