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U.S. Citizenship
and Immigration
Services

B6

FILE: [REDACTED]
SRC-06-016-50333

Office: TEXAS SERVICE CENTER

Date: JUN 21 2007

IN RE: Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant 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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further action.

The petitioner is an individual. It seeks to employ the beneficiary permanently in the United States as a mentally impaired teacher (resident care aide). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 9, 2006¹ denial, she 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, 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.

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 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 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 U.S. Department of Labor. *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 U.S. Department of Labor 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.50 per hour (\$19,760 per year). The Form ETA 750 states that the position requires three (3) years of experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all

¹ The director mistakenly dated her decision February 9, 2005.

pertinent evidence in the record, including new evidence properly submitted upon appeal². Relevant evidence in the record includes Form 1040 U.S. Individual Income Tax Return filed by [REDACTED] and [REDACTED] for 2001, a letter dated July 22, 2005 and payment statements from the Massachusetts Department of Social Services, and a letter dated August 10, 2005 and summary of payments from Family Support Services of North Florida Inc. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is a private household. On the petition, the petitioner claimed to have an annual income of \$72,000. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner receives approximately \$63,050 per year tax free from the states of Massachusetts and Florida, which is more than sufficient to pay the beneficiary the proffered wage.

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, Citizenship and Immigration Services (CIS) 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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, counsel claimed in the response to the director's request for evidence (RFE) dated October 31, 2005 that the petitioner did not issue W-2 forms to the beneficiary during 2001 through 2004 because the beneficiary was paid less than \$1,300 each of the years 2001 through 2003 and the beneficiary did not work for the petitioner in 2004. However, counsel did not submit any other evidence such as 1099 forms, paystubs or cancelled checks for the beneficiary's compensation from the petitioner in 2001 through 2003. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for these years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2001 to the present.

As previously noted, the evidence indicates that the petitioner in the instant case is a private household. Like a sole proprietor, a private household is not legally separate from its household members. Therefore the household's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. The household members report income and expenses on their individual (Form 1040) federal tax return each year. The petitioner must show that she can cover her existing expenses as well as pay the

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).

proffered wage. In addition, she must show that she can sustain herself and her 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a private household, CIS considers net income to be the figure shown on line 33³, Adjusted Gross Income, of their Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner for 2001. The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

In 2001, the Form 1040 stated adjusted gross income of \$47,944.

CIS will consider the petitioner's income and her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding contains letters and payment statements from the Massachusetts Department of Social Services and Family Support Services of North Florida Inc. as evidence of income or available funds other than the adjusted gross income reported on line 33 of the form 1040 for the petitioner to pay the proffered wage and/or personal expenses. The letter dated July 22, 2005 and payment statements from the Massachusetts Department of Social Services provide the following information about the payments the petitioner received from the Massachusetts Department of Social Services:

In 2000, the petitioner received \$13,319.79.
In 2001, the petitioner received \$36,326.89.
In 2002, the petitioner received \$39,129.94.
In 2003, the petitioner received \$43,591.00.
In 2004, the petitioner received \$44,503.65.
In 2005, the petitioner received \$45,067.35.

The letter dated August 10, 2005 and summary of payments from Family Support Services of North Florida Inc. indicate that Family Support Services took over the social services from the state of Florida on July 1, 2003 and that the petitioner received \$16,700 in adoption subsidies from July 1, 2003 through July 31, 2005. The breakdown of the payments is as follows:

In 2003, the petitioner received \$4,008.
In 2004, the petitioner received \$8,016.
In 2005, the petitioner received \$4,676.

The record does not contain any statement of the petitioner's household monthly expenses.

In 2001 the petitioner had adjusted gross income of \$47,944 and other income of \$36,326.89, totaling \$84,270.89, which leaves the petitioner \$64,510.89 to cover her personal living expenses for the family of seven. It appears that the petitioner had sufficient income to pay the proffered wage and to sustain herself and

³ The line for adjusted gross income on Form 1040 is Line 33 for 2001.

her six dependents in 2001. However, as noted above, the petitioner did not submit her statement of monthly living expenses. Without the statement of the petitioner's household monthly expenses, the AAO cannot determine whether or not the petitioner established its ability to pay the proffered wage as well as to sustain her family's living expenses. Therefore, the portion of the director's decision denying the petition based on the petitioner's ability to pay in 2001 will be withdrawn and the petition will be remanded to the director for further action.

The record does not contain copies of the petitioner's Form 1040 tax returns for 2002 through the present. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. In the instant case, without the tax returns, the AAO cannot determine the petitioner's adjusted gross income and further cannot determine whether or not the petitioner had sufficient adjusted gross income to pay the proffered wage as well as to sustain the petitioner's household in the years 2002 through the present. The petitioner failed to establish its ability to pay through the examination of adjusted gross income because of failure to submit its tax returns for these years.

However, as indicated above, the petitioner demonstrated that it had other income. In 2002, the petitioner had other income of \$39,129.94 from the Massachusetts Department of Social Services, which leaves the petitioner \$19,369.94 to cover her personal living expenses for the family of seven. As noted above, the petitioner did not submit her tax return for 2002 and did not submit a statement of monthly living expenses. Without the tax return and the statement of the petitioner's household monthly expenses, the AAO cannot determine whether or not the petitioner established its ability to pay the proffered wage as well as to sustain her family's living expenses.

In 2003, the petitioner had other income of \$47,599 from the Massachusetts Department of Social Services and Family Support Services of North Florida Inc., which leaves the petitioner \$27,839 to cover her personal living expenses for the family of seven. However, as noted above, the petitioner did not submit her tax return for 2003 and did not submit a statement of monthly living expenses. Without the tax return and the statement of the petitioner's household monthly expenses, the AAO cannot determine whether or not the petitioner established its ability to pay the proffered wage as well as to sustain her family's living expenses in 2003.

In 2004, the petitioner had other income of \$52,519.65 from the Massachusetts Department of Social Services and Family Support Services of North Florida Inc., which leaves the petitioner \$32,759.65 to cover her personal living expenses for the family of seven. However, as noted above, the petitioner did not submit her tax return for 2004 and did not submit a statement of monthly living expenses. Without the tax return and the statement of the petitioner's household monthly expenses, the AAO cannot determine whether or not the petitioner established its ability to pay the proffered wage as well as to sustain her family's living expenses in 2004.

In 2005, the petitioner had other income of \$49,743.35 from the Massachusetts Department of Social Services and Family Support Services of North Florida Inc., which leaves the petitioner \$29,983.35 to cover her personal living expenses for the family of seven. However, as noted above, the petitioner did not submit her tax return for 2005 and did not submit a statement of monthly living expenses. Without the tax return and the statement of the petitioner's household monthly expenses, the AAO cannot determine whether or not the petitioner established its ability to pay the proffered wage as well as to sustain her family's living expenses in 2005.

Beyond the director's decision and assertions on appeal, the AAO has identified another potential ground of ineligibility and will discuss whether the petitioner demonstrated that the beneficiary possessed the qualifying

experience prior to the priority date with regulatory-prescribed evidence. 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).

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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 certified Form ETA 750 in the instant case states that the position of mentally impaired teacher (resident care aide) requires three (3) years of experience in the job offered to perform the duties described in Item 13 of the Form ETA 750A.

The petitioner must 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 U.S. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant case, the beneficiary's qualifications are not supported by the Form ETA 750B. On the Form ETA 750B, the beneficiary set forth his work experience as a full-time (working 40 hours per week) "Assistant in Education and Care" with [REDACTED] in Tacna, Peru to "assistant in the education and care of minor children. However, the beneficiary did not provide the period of the employment. It is not clear whether or not the beneficiary had at least three years of experience with [REDACTED]. The beneficiary also represented that he worked as a "Children Care" with [REDACTED] in Tacna, Peru from 1997 to 1999. However, without the starting and ending months of the employment and confirmation of his full-time employment, the AAO cannot determine whether or not the beneficiary's experience with [REDACTED] meets the requirements of three years of experience in the job offered as set forth by the Form ETA 750A.

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) of 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.

The record contains two experience letters and a training certificate. The certificate of completion issued by Au Pair School on February 25, 2000 indicates that the beneficiary completed 32 hours of training. The certified Form ETA 750 does not require any training and the employer did not indicate she would accept any training in lieu of three years of experience in the job offered. Therefore, the certificate of training does not establish the beneficiary's qualifications for the proffered position. One of the two experience letters is from [REDACTED]. This letter was dated February 15, 2001 and states in pertinent part that:

It is my pleasure to direct [this] to you, and through this recommend [the beneficiary], a person whom I've known for a very long time and who is worthy of my entire confidence.

The gentleman here mentioned has worked as an ASSISTANT in the education and care of of[sic] my minor children, having at the same time, a high [degree] of experience in Cardio Pulmonary Resuscitation, honesty and Punctuality in his work.

[REDACTED] letter does not indicate the period the beneficiary worked for him as an assistant and does not confirm the full-time employment. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite three years of experience for the proffered position prior to the priority date.

Another experience letter dated January 12, 2001 is from [REDACTED] This letter states in pertinent part that:

It is my pleasure to direct [this] to you to attest that [the beneficiary], a person whom I have known for a long time, whose manner is one of confidence. This manner permits me to recommend him without reservation, for his good work, responsibility and honesty en the care of my children for a period of three years (1997-1999), exercising his work in an efficient manner.

[REDACTED] indicates that the beneficiary worked for him three years from 1997 to 1999, however, without the starting and ending months of the employment, confirmation of the full-time employment and a detailed description of the duties the beneficiary performed, the AAO cannot consider this letter as primary evidence to demonstrate that the beneficiary possessed the requisite three years of experience as a full-time mentally impaired teacher (resident care aide) prior to the priority date of April 30, 2001.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues 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.