U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 19 2006

SRC 05 030 52059

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a child monitor. As required by statute, the petition is accompanied by a Form ETA 750, letter of certification, indicating there was an Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the petitioner had not established that she 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.

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 unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (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 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. 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 letter of certification of Form ETA 750 was accepted on April 19, 2001. The proffered wage as stated on the Form ETA 750 is $6.00 per hour ($12,480.00) per year.

On appeal, counsel submits a statement and additional evidence.

With the petition, counsel submitted copies of the following documents: letter of certification of a U.S. Department of Labor that is a confirmation of the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for

2002 and 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on July 2, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of a copy of petitioner's U.S. federal tax return for 2004 together with a list of the petitioner's personal expenses and her bank statements[1] for the previous six months.

In response to the request for evidence, counsel submitted the requested evidence.

The director denied the petition on September 12, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner has additional income that is evidence of petitioner's ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: evidence of a part-time employment; bank statements; the balance in the petitioner's retirement account; child support received from January 2005 to August 2005 in the amount of $23,677.00; and, a warranty deed for property she owns.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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).

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $12,480.00 from the priority date of April 19, 2001:

- In 2002, the Form 1040 stated an adjusted gross taxable income of $24,133.00. Childcare expenses stated on Form 2441 were $1,440.00.

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[1] Bank statements were submitted for the period January 12, 2005 to June 13, 2005.

- In 2003, the Form 1040 stated an adjusted gross taxable income of $30,412.00. Childcare expenses stated on Form 2441 were $2,280.00.
- In 2004, the Form 1040 stated an adjusted gross taxable income of $26,449.00. Childcare expenses stated on Form 2441 were $6,400.00.

The petitioner's adjusted gross taxable income is more than the proffered wage for each year for which tax returns were submitted without consideration of childcare expenses paid or personal expenses as discussed below.

The petitioner is a private household. Therefore, to determine the ability of the petitioner to pay the proffered wage, her living costs,[2] that is a statement of recurring household expenses for the petitioner's family must be considered. According to a statement of personal expenses dated July 29, 2005, the petitioner's monthly expenses are $1,449.00 ($17,388.00 calculated yearly).

In 2002, the petitioner's declared adjusted gross income of $24,133.00 with credit given for the childcare expenses paid of $1,440.00, but deducting $17,388.00 yearly expenses, does not totally cover the proffered wage of $12,480.00 per year (a $4,295.00 shortfall). In 2002, there would be insufficient income available to pay her personal living expenses for the year.

In 2003, the petitioner's declared adjusted gross income of $30,412.00 with credit given for the childcare expenses paid of $2,280.00, but deducting $17,388.00 yearly expenses does cover the proffered wage of $12,480.00 per year. In 2003, there would be sufficient income available to pay her personal living expenses for the year.

Similarly, in 2004, the petitioner's declared adjusted gross income of $26,449.00 with credit given for the childcare expenses paid of $6,400.00, but deducting $17,388.00 yearly expenses does cover the proffered wage of $12,480.00 per year. In 2004, there would be sufficient income available to pay her personal living expenses for the year.

Counsel asserts in her brief statement that there is sufficient income and assets to evidence the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[3] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel advocates the use of the cash balance of the petitioner's bank account to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

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[2] This statement should indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

[3] 8 C.F.R. § 204.5(g)(2).

Counsel submits evidence of child support[4] received from January 2005 to August 2005 in the amount of $23,677.00, and she asserts that these funds are evidence of the ability to pay the proffered wage. Counsel is correct.

Further, counsel presents evidence that the petitioner is now generating additional income from her employment with ALL-N-1 Security Services Inc. in the approximate amount of $250.00 weekly and she has submitted bank deposits to prove this additional income. Since the monthly proffered wage is $1,040.00, this income source alone is approximately enough to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has demonstrated its ability to pay the proffered wage[5] from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 met that burden.

ORDER: The appeal is sustained.

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[4] Canceled checks payable to the petitioner from January to August 2005 in the total amounts of $23,677.00.

[5] The U.S. Department of Labor's (USDOL) regulation at 8 C.F.R. § 656.21, *et seq.*, regarding Applications for Alien Employment (Form ETA 750 A/B) required in pertinent part that that the petitioner (employer/applicants therein) submit in the form or on its attachments " ... Two copies of the employment contract, each signed and dated by both the employer and the alien (not their agent) ...", that a duplicate contract be furnished to the alien, and, any other "agreement or conditions not specified " ...on the *Application for Alien Employment Certification* form ...." There is no employment contract in the record of proceeding. If this matter is pursued by the petitioner, an employment contract should be submitted.