U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 16 2008

SRC 07 009 52127

IN RE: Petitioner: [redacted]
Beneficiary:

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 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 household. It seeks to employ the beneficiary permanently in the United States as a household cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, certified 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 noted that the petitioner failed to respond to a notice of intent to deny (NOID) dated November 7, 2006. 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 December 22, 2006 denial, the single issue in this case is whether or not the petitioner has shown the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on June 19, 2006. The proffered wage as stated on the ETA Form 9089 is $12.55 per hour ($ 26,104 per year). The ETA Form 9089 states that the position requires two years of experience in the job offered or two years of any other related experience as a household cook.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] Counsel submits a copy of the petitioner's response to the director's NOID, including a receipt from FedEx indicating that the petitioner's response was timely delivered to the Texas Service Center, a list of the petitioner's yearly household income and expenses, a License and Certificate for Marriage issued to [redacted] and [redacted] in the State of South Carolina on December 22, 1998, and a Marriage Register from the Bahamas indicating that [redacted] and [redacted] were married on January 9, 1999 on Paradise Island in the Bahamas. Other relevant evidence in the record includes the petitioner's IRS Form 1040, U.S. Individual Income Tax Return, for 2005 and a Form 1099-R issued to the petitioner by Nationwide Trust Co, FSB, for tax year 2005. 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 an individual household. On the petition, the petitioner claimed to have been established in 1998 and to currently employ no workers. On the ETA Form 9089, signed by the beneficiary on September 18, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner timely responded to the director's NOID and provides a copy of that response on appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 Sonegawa*, 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2006 onwards.[2]

---

[1] 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 FedEx receipt provided by counsel on appeal indicates that the petitioner did timely respond to the director's NOID, even though the petitioner's response was not included in the record. Therefore, 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).

[2] Because the petitioner's 2006 tax return was not yet due as of the date of her response to the director's NOID, this office will review the petitioner's 2005 tax return to determine her ability to pay the proffered

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).

The petitioner is an individual. Therefore the individual's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Individuals must show that they can cover their existing household expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, individual petitioners must show that they can sustain themselves and their dependents. *See 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.

In the instant case, the petitioner's household consists of the petitioner, her husband and three children who are claimed as dependents on her tax return.[3] The petitioner's IRS Form 1040, U.S. Individual Income Tax Return, for 2005 reflects an adjusted gross income of $80,142.00. On appeal, the petitioner submits a list of her yearly expenses, which includes utilities, taxes,[4] mortgage payments and food. She indicates that her yearly household expenses total $33,200.00. However, the list does not account for other expenses that might be applicable to the petitioner's household, including but not limited to automobile costs, insurance costs, medical payments,[5] credit card payments, mobile phone expenses, alimony payments, child support payments, charitable gifts,[6] entertainment expenses, school tuition,[7] clothing, and child care expenses. Therefore, while in 2005, the petitioner's adjusted gross income of $80,142.00 covers the proffered wage of $26,104.00 and the petitioner's asserted household expenses of $33,200.00, the petitioner's estimate of her household expenses is clearly incomplete. The petitioner has not persuasively established that the household income, minus the household expenses, is adequate to pay the wage offered of $26,104 per year.

---

wage.

[3] This office notes that the petitioner's 2005 tax return indicates that one child lived with the petitioner and her husband that year, while two children did not live with the petitioner and her husband due to divorce or separation.

[4] This office notes that while the petitioner indicates that she paid taxes of $5,600.00 in 2005, her tax return indicates that her tax expense was greater than $5,600.00 in 2005. For example, her 2005 tax return indicates that she paid state and local general sales taxes of $1,099.00, real estate taxes of $5,332.00 and personal property taxes of $1,400.00 in 2005.

[5] The petitioner's tax return indicates medical and dental expenses of $6,252.00 in 2005. However, the petitioner's list of expenses omits medical and dental expenses paid that year.

[6] The petitioner's tax return indicates gifts to charity by cash or check of $646.00 in 2005. However, the petitioner's list of expenses omits charitable gifts made that year.

[7] The petitioner's tax return indicates a tuition and fees deduction of $4,000.00 in 2005. However, the petitioner's list of expenses omits tuition and fees paid that year.

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 visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner has not established her continuing ability to pay the proffered wage.

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.