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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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

NOV 22 2010

IN RE: Petitioner:
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 Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] is an individual. She seeks to employ the beneficiary permanently in the United States as a housekeeper. 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 (the DOL). The director determined the petitioner has not provided sufficient evidence of her 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 failed to establish that the beneficiary met the experience requirement of three months listed in the Form ETA 750. 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 denial, an issue in this case is whether or not the petitioner has provided sufficient evidence of her ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. An additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

Ability to Pay the Proffered Wage

The first issue to be discussed is whether the petitioner has provided sufficient evidence of her continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[1] According to the petition, the petitioner does not have an EIN number but a social security number. The petitioner is identified in the petition as an employer with the type of business identified as a "private home" with the North American Industry Classification System (NAICS) code 814110 stated in the petition. According to the NAICS Association website http://www.naics.com/censusfiles/ND814110.HTM accessed on November 10 2010, the NAICS code identifies "private households primarily engaged in employing workers on or about the premises."

> 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $10.00 per hour ($20,800.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[2]

Counsel submitted no evidence with the petition and labor certification.

Counsel appealed the denial of the petition on December 17, 2008. On appeal, counsel submits an undated legal brief and the joint personal federal income tax returns (Forms 1040) for 2006 and 2007 filed by the petitioner and her spouse.

The AAO notes that there is are no tax returns or other financial evidence in the record for years 2001, 2002, 2003, 2004, or 2005 to demonstrate the petitioner's ability to pay the proffered wage. A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). This is an additional reason for ineligibility.

The evidence in the record of proceeding shows that the petitioner is reputed to be a homeowner although no direct evidence was presented. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claimed to work for the petitioner and her spouse from February 2001 to "Now" (i.e. April 12, 2001).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

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, U.S. 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 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 2001 and 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*, 696 F. Supp. 2d 873 at 881 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner is a homeowner. The labor certification identifies [redacted] as the employer, and the petition states [redacted] is the petitioner. The petitioner is also identified in the petition (Form I-140, Part 5, Item 3) as an individual in the occupation of therapist with an annual income of "1,000,000.00" dollars. The AAO notes there is no evidence in the record that the petitioner has a one million dollar income. There is no evidence that [redacted] jointly owns a business with her spouse or receives wage or compensation payments.

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 this instance, the director did not request and the petitioner did not submit a listing of her monthly household expenses.[3]

There is evidence in the record that the petitioner receives income in the business of "marriage and family counseling" as a therapist as reported on Form 1040, Schedule C for 2006 (no Schedule C was similarly submitted for the 2007 Form 1040 tax return). Therefore, the petitioner's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Individual petitioners 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, individual petitioners 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).

According to the 2006 Form 1040 tax return submitted, the petitioner is a therapist in the business of marriage and family counseling. The petitioner stated on her Schedule C gross receipts of $7,500.00, with no wage or cost of labor expense, and a net income of $4,432.00. Although the petitioner could have elected to file a Form 1040 Form tax return as a married filing separately, she filed jointly. It is clear that all the income stated on the 2006 return, other than the $4,432.00 mentioned above, was more likely than not derived from her spouse's earnings and jointly owned investments with her husband. The petitioner's spouse did not join in the petition or labor application. In 2006, the petitioner has not demonstrated that she had the ability to pay the proffered wage.

No Schedule C for the petitioner's business was submitted with the 2007 tax return, although the petitioner stated on the petition filed in 2007 that she was a therapist with one-million dollars of income. The Schedule C would be material evidence that the petitioner has business income, and without that Schedule C the AAO has insufficient evidence to analyze or review counsel's assertion that the petitioner had the ability to pay the proffered wage in 2007. In 2007, the petitioner has not demonstrated that she had the ability to pay the proffered wage.

Counsel has not submitted evidence that the petitioner would use personal assets to pay the proffered wage other than as stated in the Form 1040, Schedule C tax return for 2006. According to the regulation at 8 C.F.R. § 204.5(g)(2), evidence must be submitted to verify that the petitioner is in possession of sufficient assets to pay the proffered wage such as her own personal bank statements, checking account statements, or brokerage account statements.

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[3] Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), and car up-keep expense, installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), retirement and education savings accounts, vacation and entertainment, credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly houschold expenses.

Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date for years 2001, 2002, 2003, 2004, 2005, 2006, 2007 and onwards.[4] The record lacks evidence from the first five years of the relevant period. The evidence submitted for 2006 and 2007 is comingled and thus indistinguishable from those assets of a non-petitioner.

On appeal, counsel asserts that "The denial of this petition is inequitable in that appellant clearly demonstrates that she meets the expense requirement mandated on the labor certification."

The AAO has no authority to address an equitable defense or determine matters of equity whatsoever. The AAO, like the Board of Immigration Appeals, has no authority to apply the doctrine of equity so as to preclude a component part of USCIS from performing a lawful action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). The AAO's jurisdiction is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). AAO's jurisdiction is also limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003).

Counsel has not submitted a case decision or regulation that would allow the petitioner to withhold her tax returns from 2001 through 2005 in this matter, or evidence of the petitioner's personal assets.

Counsel contends that although the director is not required to issue requests for evidence if the record is complete in these matters, none was issued in this case although the petitioner was in the process of gathering evidence. The AAO notes that counsel did not convey this reputed fact to the director, or request additional time, and the petitioner submitted the petition without additional evidence other than the labor certification. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, no evidence was submitted. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding. Regardless, as the instant petition was filed after the amendment to the regulation governing requests for evidence in June 2007, the director acted appropriately in denying the petition where initial evidence is not submitted or does not establish eligibility 8 C.F.R. § 103.2(b)(8)(ii).

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[4] An analysis following the case of *Matter of Sonegawa* cannot be accomplished under the circumstances of this case. There is no Schedules C (other than for 2006) in the record or information that would be found in the petitioner's federal tax returns, or audited financial statements. Further, as already stated, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part "Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The Beneficiary's Qualifications

Another issue to be discussed is whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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). The Form ETA 750 states that the position requires three months experience.

The Form ETA 750, Part A, Line 13, describes the job duties for a housekeeper as follows:

> Complete all household chores. Clean, dust, tidy and maintain upkeep of the house. Wash and iron clothes. Plan, prepare, cook and serve meals. Vacuum, run errands like shop [sic] and take clothes to the laundry/dry cleaners. Plan prepare & serve meals including after school lunch children.[5]

On the Form ETA 750 B, the beneficiary stated that she was employed full time by an individual in St. Louis, Missouri, from January 1997 to August 1998 as a housekeeper. From September 1998, to February 2001, the beneficiary stated she was self-employed part-time performing weekly house cleaning. Finally, the beneficiary stated she has been employed by the petitioner and her spouse as a housekeeper from February 2001 to "Now" (i.e. April 12, 2001).

The regulation at 8 C.F.R. § 204.5(l)(3) provides 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.
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> * * *
>
> (D) Other workers. If the petition 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.
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> *

Counsel submitted no evidence according to regulation at 8 C.F.R. § 204.5(l)(3) of the beneficiary's experience as a housekeeper.

There is insufficient evidence in the record to demonstrate that the beneficiary has the job experience as a housekeeper to satisfy the offered job requirement stated above. Therefore, the sole statements

[5] An attachment was mentioned in this section, but it is not in the record.

submitted in the record concerning the beneficiary's qualifications found in the labor certification are insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. No letters or statements of the beneficiary's experience were submitted by the petitioner. Although the beneficiary stated in the labor certification that she was employed by the petitioner and her spouse from February 2001, no USCIS Form I-9, W-2 or 1099-MISC, pay statements, cash receipts or bank statements were submitted to prove the employment.[6]

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

[6] According to the instructions on USCIS Form I-9, when any employer hires an alien as a household employee to work on a regular basis, that employer and the employee must complete the Form I-9, Employment Eligibility Verification. *See* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=838e2f8b69583210VgnVCM100000082ca60aRCRD&vgnextchannel=838e2f8b69583210VgnVCM100000082ca60aRCRD, accessed on November 10, 2010. No later than the first day of work, the employee must complete the employee section of the form by providing certain required information and attesting to his or her current work eligibility status in the United States by examining documents presented by the employee as evidence of his or her identity and employment eligibility. Acceptable documents to establish identity and employment eligibility are listed on Form I-9. No Form I-9 is in the record.