U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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B6

DATE: SEP 27 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

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, with a fee of $630. 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 filed by the petitioner in this case was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The petition will remain denied.

The petitioner is an individual. He seeks to employ the beneficiary permanently in the United States as a housekeeper pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as a housekeeper prior to the priority date. Accordingly, the petition was denied. A subsequent appeal was timely filed, however, the AAO summarily dismissed the appeal because the three letters submitted on appeal regarding the beneficiary's prior work experience do not establish that the beneficiary possessed the requisite two years of experience in the job offered.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). In the instant motion to reopen, counsel submits additional letters from the beneficiary's former employers to establish the beneficiary's qualifications. Therefore, the instant motion to reopen meets the requirement of a motion to reopen.

Section 203(b)(3)(A)(i) of 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.

As set forth in the director's April 15, 2008 denial and the AAO's August 19, 2010 decision, the primary issue in this case is whether or not the petitioner has demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience in the job offered and thus qualifies 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 labor certification application, 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 labor certification application was accepted on April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The job qualifications for the certified position of housekeeper are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

> Supervises and coordinate kitchen activities such as cooking, serving meals, cleaning, washing and ironing, also monitor two children ages 11 and 15 years, observe and monitors play activities prepares and serves meals, assist children to dress, and bathe, accompanies children on walks or other outings, washing and irons their clothes, keep their quarters clean ... etc.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects that the proffered position requires completion of six-year grade school education and two years of experience in the job offered.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's education, she represents that she attended "Inst. Dept. La Idependencia" from February 1966 to November 1969 and "Inst. Dept. dionicio Herrera" from February 1975 to November 1978. On the section of the labor certification eliciting information of the beneficiary's work experience, she does not provide any information regarding her employment history.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (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.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner did not submit any documentary evidence in support of the beneficiary's qualifications with the initial filing. On January 24, 2008, the director served a request for evidence (RFE) requesting the petitioner to submit evidence that the beneficiary obtained the required two years of experience in the job offered before April 30, 2001 among other things. The director also provided specific instructions on the form and content of the requisite evidence. On February 28, 2008, the petitioner timely responded to the director's RFE with a letter dated November 1, 2006 from [redacted] November 1, 2006 letter), a letter dated July 13, 1989 from [redacted] July 13, 1989 letter) and an undated letter from [redacted] first letter). On appeal, the petitioner submitted a letter dated May 1, 2008 from [redacted] of the same church ([redacted] May 1, 2008 letter), a letter dated May 5, 2008 from [redacted] May 5, 2008 letter) and a letter dated May 5, 2008 from [redacted] second letter). On motion, counsel submits another letter dated September 17, 2010 from [redacted] third letter) and a letter dated September 17, 2010 from [redacted] and [redacted] September 17, 2010 letter) as new or additional evidence. These letters are provided as evidence to verify the beneficiary's experience at the church, and with [redacted]

First of all, as of the beneficiary's experience obtained from her employment with the church, the [redacted] November 1, 2006 letter states in pertinent part that:

> This is to verify that [the beneficiary] has been a vital part of our Spanish congregation, [redacted] since September of 2000. She officially became a member in October of that year. She has served weekly in our Children's Ministries department beginning in October of 2001.

The [redacted] May 1, 2008 letter states that in pertinent part that:

> As the coordinating Children's Ministries pastor at [redacted], I have known and worked with [the beneficiary] for the past four and a half years as she has worked faithfully and tirelessly every week in the church nursery as an assistant coordinator. [The beneficiary] has been a part of this congregation for the past eight years. Her work as a leader and coordinator of other teachers and leaders has been invaluable to us.

These two letters do not provide any information about the beneficiary's experience related to the proffered position in the instant case and the irrelevant experience described in these letters is post-priority date experience. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Therefore, the two letters from the pastor of the church for which the beneficiary is a member do not demonstrate that the beneficiary had the required two years of experience in the job offered, and thus, the petitioner failed to establish that the beneficiary qualifies for the proffered position with her experience obtained from her work for the church and with these two letters.

In his July 13, 1989 letter, [redacted] states the following regarding the beneficiary's experience:

> [The beneficiary] kept house for and took care of my aged father in Los Angles, where I spend several months a year, from February through June 1989. Her employment with our father was terminated most regretfully when Father contracted a serious case of pneumonia requiring longterm convalescence in a skilled nursing facility.

[redacted] verifies that the beneficiary's work experience included housekeeping and taking care of his aged father for four months in 1989 from February to June. [redacted] describes the beneficiary's duties in various aspects, however, the letter does not include a specific description of the duties the beneficiary performed during the employment period. In his May 5, 2008 letter, [redacted] further clarifies his letter dated July 13, 1989 to explain in detail the beneficiary's job duties. According to the [redacted] May 5, 2008 letter, the beneficiary supervised and coordinated kitchen activities such as cooking, serving meals, cleaning, washing and ironing, and also took care of his father, observed and monitored activities prepared and served meals, assisted him to dress, bathe, accompanied him on walks or other outings, and kept his quarters clean. However, the job description is exactly the same as the one on the Form ETA 750 and also the same as the one provided for the beneficiary when she worked for [redacted] as we will discuss the [redacted] third letter below. The exact same job description and in the exact same format with the [redacted] third letter raises a doubt on reliability and authenticity of this letter and the beneficiary's alleged employment with [redacted] aged father. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states: "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." Therefore, the AAO cannot accept the two letters from [redacted] as regulatory-prescribed evidence to demonstrate the beneficiary's qualifying experience. Furthermore, while [redacted] letters verify the beneficiary's four months of experience as a housekeeper and caregiver, he does not confirm the beneficiary's full-time employment for the four-month experience. Therefore, the petitioner failed to establish that the beneficiary possessed the required two years of experience in the job offered prior to the priority date with [redacted] letters.

The petitioner has provided three letters from [redacted] regarding the beneficiary's alleged employment with [redacted] family into the record. In her first letter, [redacted] states in pertinent part that:

> [The beneficiary] has worked for my family for the past five years. She works for us every Saturday as a childcare provider. She also does light housekeeping. My children look forward to her coming each Saturday and we consider her as part of our family.

However, because the letter is not dated, and does not include a specific date for the beneficiary to start this employment with [redacted] family, it is not clear whether the five years of experience qualifies the beneficiary to perform the duties described in item 13 of the Form ETA 750A for the proffered position. For this Saturday childcare provider job, [redacted] provided further information on the starting date and detailed job description in her second letter signed on May 5, 2008. The [redacted] second letter states in pertinent part that:

> This is to explain in details [the beneficiary]'s job duties and dates of employment as follows: she started working for us on February 1999 to the present and she coordinates and supervise kitchen activities such as cooking, serving meals, ironing, washing, also she takes care of my children, monitor their activities prepare and serve them meals, assist them to dress, bathe, and accompanies them on walks or other outings, keep their quarters clean.

However, the job description is exactly the same as the one on the Form ETA 750 and also the same as the one provided for the beneficiary when she worked for [redacted] family as previously discussed. Both [redacted] dated and signed their letters on the same day, and the contents of the job description and the format of letters are exactly same. This raises a doubt on reliability and authenticity of the [redacted] second letter and the beneficiary's alleged employment with [redacted] family. 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. at 591.

On motion, counsel submits [redacted] third letter dated September 17, 2010. This third letter states in pertinent part that:

> This letter is written to verify the employment of [the beneficiary].
>
> [The beneficiary] has been employed by my family on a part-time basis since February 13 of 1999 when she worked for us for eight hours per week. Beginning on January 12, 2000, she began to work for us for fifteen hours per week and continues to be employed by us for the same number of hours. [The beneficiary] helps our family with all of their daily necessities. She performs all of the housework (ironing, laundry, house cleaning, supervising kitchen activities such as cooking and serving meals). When my three children (now aged eighteen, sixteen and ten) were younger, [the beneficiary] also monitored their activities. Her duties with the children included but were not limited to, participating with

> the children in their play activities, assisting them with dressing and bathing, and accompanying them outside of the house on activities. Now [the beneficiary]'s primary role is that of housekeeper and cook.

[redacted] third letter provides inconsistent information with her first letter. While the first letter is not dated, both [redacted] second and third letters confirm that the beneficiary started working for the family in February 1999. The first letter states that the beneficiary has worked for the family for the past five years. If it is the fact that the beneficiary started working for the family in February 1999, then it is necessarily concluded that the [redacted] first letter was written after February 2004. The [redacted] first letter states that the beneficiary works for the family **every Saturday** as a childcare provider (emphasis added). The third letter indicates that the beneficiary worked eight hours per week from February 13, 1999, but fifteen hours per week from January 12, 2000 through the present. The statement of working eight hours per week in the third letter is consistent with the statement of working every Saturday in the first letter. However, the statement in the third letter that the beneficiary worked fifteen hours per week is inconsistent with the employer's statement in her first letter. It is unlikely for the beneficiary to work fifteen hours for the family on Saturday and further January 12, 2000 is not a Saturday. According to the third letter, the beneficiary had already worked for the family fifteen hours per week on weekdays, not Saturdays, when the employer issued her first letter at earliest in February 2004. However, the [redacted] first letter clearly expresses that the beneficiary worked for them every Saturday and the second letter dated May 5, 2008 does not indicate anything about the beneficiary's fifteen hours per week.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve this inconsistency. Without independent objective evidence, such as housekeeping or a babysitting employment agreement between [redacted] and the beneficiary, payroll records, both the employer's and employee's tax returns and their supplements or attachments showing that the beneficiary worked certain hours per week and were paid at the rate described in the employment agreement, the AAO cannot accept [redacted] letters as primary evidence to establish the beneficiary's qualifications.

In addition, even though the petitioner could have submitted independent objective evidence to support the contents of [redacted] third letter, the beneficiary would have worked for [redacted] family for about eight months on a full-time basis prior to the priority date,[1] and therefore, the petitioner would still have failed to establish that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date.

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[1] The beneficiary worked about 352 hours during the period from February 13, 1999 before January 12, 2000 (8 hours X 44 weeks) and 1,005 hours during the period from January 12, 2000 to prior to the priority date of April 30, 2001 (15 hours X 67 weeks), totaling 1,357 hours (approximately eight full-time months based on 40 hours per week).

On motion, the petitioner submits [redacted] September 17, 2010 letter for the first time. In this letter, [redacted] verify that the beneficiary worked for their household as a secondary housekeeper for two days per week from January 1991 through November 1998. The letter also states that the beneficiary's tasks included keeping their five bedroom home clean and occasionally keeping an eye on their daughter. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on motion to reopen or reconsider the dismissal of subsequent appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The AAO further notes that none of the experience claimed in these experience letters is supported by the beneficiary's statement on the Form ETA 750B. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. In the instant matter, without support from the beneficiary's statement on the Form ETA 750B or independent objective evidence, the AAO cannot give the full evidentiary weight to any of the experience letters submitted in the record.

The record does not contain regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date, and therefore, the petitioner failed to establish that the beneficiary is qualified for the proffered position.

Upon a careful review and discussion above, the AAO finds that the petitioner failed to demonstrate that the beneficiary possessed two years of experience in the job offered with regulatory-prescribed evidence and also failed to resolve the inconsistencies concerning the beneficiary's employment with [redacted] family with independent objective evidence. It is also noted that the record does not contain any documentary evidence showing that the beneficiary met the minimum educational requirements set forth on the Form ETA 750, i.e. completion of six years of grade school studies.

The petitioner's assertions on motion cannot be concluded to outweigh the evidence presented in the record. The petitioner failed to submit sufficient evidence to establish the beneficiary's education, training and experience qualifications for the proffered position in this matter (i.e. six years of grade school and two years of experience in the job offered). Therefore, the petition will remain denied on this ground.

Beyond the director's decision and counsel's assertions on appeal and motion, the AAO has identified additional grounds of ineligibility and will discuss these issues below. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 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). The petitioner must also 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $395 per week ($20,540 per year). On the petition, the petitioner claims that it is an individual. The beneficiary did not claim to have worked for the petitioner on the Form ETA 750B.

The petitioner must establish that the job offer to the beneficiary is realistic. 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, 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 she 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 matter, the record does not contain any documentary evidence showing that the petitioner employed and paid the beneficiary during the relevant years. Therefore, the petitioner failed to establish his ability to pay the proffered wage through the examination of wages actually paid to the beneficiary from the priority date to the present.

If the petitioner does not establish that she 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 (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).

The petitioner is an individual. Therefore the household's adjusted gross income, assets and liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their IRS Form 1040 federal tax return each year. Individuals must show that they can cover their existing expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals 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 the instant case, the petitioner supports a household of four. The petitioner submitted copies of his Form 1040 U.S. Individual Income Tax Return for 2002 through 2006.[2] The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

- In 2002, the Form 1040 stated adjusted gross income[3] of $1,523,912.
- In 2003, the Form 1040 stated adjusted gross income of $603,361.
- In 2004, the Form 1040 stated adjusted gross income of $1,353,537.
- In 2005, the Form 1040 stated adjusted gross income of $1,437,589.
- In 2006, the Form 1040 stated adjusted gross income of $1,271,176.

[2] The petitioner did not submit a complete copy of her tax returns, but the first two pages only for these years.

[3] The adjusted gross income is reflected on line 35 of the Form 1040 for 2002, but on line 34 for 2003, line 36 for 2004, or line 37 for 2005 and 2006.

While the petitioner's individual income tax returns for 2002 through 2006 reflect a significant adjusted gross income, the AAO cannot determine whether the petitioner had sufficient adjusted gross income to establish his ability to pay the beneficiary the proffered wage and support his family of four for these years because the petitioner did not submit any statements of his family's living expenses.

The priority date in the instant matter is April 30, 2001. The petitioner must establish his ability to pay the proffered wage from the year of the priority date. There is no regulatory-prescribed ability to pay evidence covering 2001. However, the record does not contain any documentary evidence showing that the petitioner paid the beneficiary the full proffered wage or that the petitioner had sufficient adjusted gross income to pay the proffered wage and to cover his family's living expenses in 2001. Therefore, the petitioner failed to establish his ability to pay the proffered wage and to cover his family's living expenses for 2001 because he did not submit his individual income tax return for that year.

In addition, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in his January 24, 2008 RFE, the petitioner declined to provide copies of its individual income tax return for 2001, the year of the priority date. 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. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

For 2007 onwards, the petitioner did not submit his individual income tax returns. Without the tax returns, the AAO cannot determine whether the petitioner's household had sufficient adjusted gross income to pay the proffered wage and sustain themselves in 2007 through the present. The record before the AAO closed on September 20, 2010 with the receipt by this office of the instant motion to reopen and reconsider. As of that date the petitioner's federal tax returns for 2007 through 2009 should have been available. However, the petitioner did not submit his individual income tax returns for these years, nor did counsel explain why these tax returns were not submitted. The petitioner must establish his ability to pay the proffered wage and to sustain his family as of the priority date and until the beneficiary obtains lawful permanent residence. 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 must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the petitioner failed to establish the ability to pay the proffered wage and sustain his family for 2007 through 2009 because he failed to submit his tax returns or other regulatory-prescribed evidence of his ability to pay the proffered wage for these years.

Further, the petitioner must establish that the job offer to the beneficiary 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages. Therefore, the petitioner also failed to establish that the job offer to the beneficiary was realistic as of the priority date and in 2007 through the present.

The AAO notes that the duties set forth on the Form ETA 750A for the full-time proffered position consist of two parts: housekeeping and childcare. As previously quoted, item 13 describes the job duties as follows:

> Supervises and coordinate kitchen activities such as cooking, serving meals, cleaning, washing and ironing, also monitor two children ages 11 and 15 years, observe and monitors play activities prepares and serves meals, assist children to dress, and bathe, accompanies children on walks or other outings, washing and irons their clothes, keep their quarters clean ... etc.

The plain language indicates that the petitioner had two children aged 11 and 15 at the time when the underlying labor certification application was filed with DOL in April 2001. The petitioner's individual tax returns for 2002 through 2006 show that the family has two children as dependents. The instant petition was filed in April 2007. As of this date, the children must be at least 17 and 21 years old respectively. They were 21 and 25 when the instant motion was filed with the AAO. It is unlikely that 21 and 25 year-old boys or at least 17 and 21 year-old boys still need their childcare giver to observe and monitor their play activities, to prepare and serve meals, to assist them in dressing, bathing, to accompany them on walks or other outings and to clean their quarters. The petitioner did not verify whether these children are still living with their parents on appeal and motion. If the children no longer need care, the part of duties related to childcare then became moot and the job offer to the beneficiary becomes at least partially unrealistic and not *bona fide*. Further, the AAO finds that it is doubtful that the petitioner needs a full-time housekeeper working for his family of two for 40 hours per week to perform housekeeping duties only. The job offer to the beneficiary for a full-time housekeeper and childcare giver position might be realistic at the time when the labor certification application was filed with DOL in 2001, however, the petitioner failed to establish that the full-time housekeeper job offer was still existing, realistic and *bona fide* when the instant petition was filed with USCIS in 2007 or at least when the instant motion was filed with the AAO in 2010.

In addition, the petitioner has not employed the beneficiary in the proffered position for any period since he offered the beneficiary the full-time housekeeper job in 2001 despite the fact that the beneficiary has been allegedly working in a similar position for another family on a part-time basis and holds a legal authorization document to work in the United States. The current laws and regulations do not require that the petitioner employ the beneficiary in the proffered position during the labor certification and immigrant petition processing. However, documentary evidence that the petitioner has employed or has been employing the beneficiary in the proffered position at a salary equal to or greater than the proffered wage will be considered *prima facie*

proof that the job is *bona fide*. In the instant matter, the record does not contain such *prima facie* evidence, nor does the petitioner establish that his job offer to the beneficiary was realistic and *bona fide* one as of the priority date, or that it continues to be so until the present.

After reviewing counsel's assertions and evidence submitted in the record, the AAO finds that there is insufficient evidence in the record to determine whether a *bona fide* job offer exists because the children have grown up and no longer need childcare services. Should this matter be pursued further, the question of whether a bona fide job opportunity exists must be resolved. Therefore, the petition cannot be approved.

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 motion is granted. The petition remains denied.