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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

[redacted]

B6

DATE: JUL 18 2012 OFFICE: TEXAS 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual.[1] She seeks to employ the beneficiary permanently in the United States as a Domestic Cook. 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 (DOL). 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.

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 September 21, 2009, denial, the single issue in this case is whether or not the petitioner has 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 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, Application for Alien 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 Form ETA 750, Application for Alien Employment Certification, as certified

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[1] The Form I-140, Part 1, lists the person filing the petition as [redacted] All references hereafter shall be to "the petitioner" or to the initial signatory, [redacted] for simplicity.

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).

Here, the Form ETA 750 was accepted on April 29, 2001. The proffered wage as stated on the Form ETA 750 is $8.52 per hour ($17,721.60 per year). The Form ETA 750 states that the position requires eight (8) years of grade school education, and two (2) years of work experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The evidence in the record of proceeding shows that the petitioner is an individual. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary claimed to work for the petitioner full-time since June 1986.

The petitioner must establish that her 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States 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'l Comm'r 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 case, the petitioner has not established that she employed and paid the beneficiary the full proffered wage from the priority date onwards. The record does not contain evidence that the petitioner paid the beneficiary any wages. The petitioner submitted the beneficiary's personal income tax returns for the years 2007 and 2008, however, the tax returns do not contain a Form W-2 or a Form 1099 to show that the petitioner paid the beneficiary the income she declared on the tax returns.

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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 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).

The petitioner also submitted the petitioner's personal income tax return for 2005, and an unsigned, unidentified table of monthly expenses. Both of the beneficiary's tax returns list wages, salaries and tips of $3,600 for each year.[3] The petitioner's personal income tax return for 2005 is in the record; however, the wages reputedly paid to the beneficiary are not indicated on this return. The petitioner's expenses sheet lists total monthly expenses of $5,461.00 (equating to an annual rate of $65,532) which includes a line item amount of $600.00 for "Domestic Help."[4] Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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 family of two (2). The petitioner's tax return for 2005 indicates that the petitioner's adjusted gross income (Form 1040, line 37) of $88,930 may cover the proffered wage of $17,721.60. The petitioner has submitted a sheet of expenses which indicates

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[3] The beneficiary self-prepared the tax returns and listed her occupation as "Cleaner." This discrepancy casts doubt on whether the beneficiary was employed by the petitioner, or in the occupation specified on the Form ETA 750 and Form I-140. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner must address this issue in any further filings.

[4] No explanation is provided indicating whether this accounts for the wages paid to the beneficiary, or to another employee. However, this would equate to only $7,200 in wages annually, therefore, even if the AAO accepted this as evidence of wages paid, it would not document the petitioner's ability to pay the proffered wage.

monthly expenses of $5,461 ($65,532), leaving $23,398 after expenses, or $5,676.40 after paying the beneficiary's salary. While it appears based on the petitioner's self-estimated expenses that the petitioner could pay the proffered wage and personal expenses in 2005, there is no evidence in the record to establish that the petitioner could have paid the proffered wage to the beneficiary for the years 2001 to 2004, and 2006 to 2009. The director requested in a Request for Evidence that the petitioner submit its 2001 to 2004 and 2006 to 2008 tax returns. The director noted that the petitioner's failure to submit these documents in his decision. 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). The petitioner failed to submit these documents on appeal. Accordingly, the record lacks any regulatory prescribed evidence for the years 2001, 2002, 2003, 2004, 2006, 2007, and 2008. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, counsel asserts that "[the director] denied the Petition for failing to provide documents that were not specifically requested in the Request for Evidence of June 11, 2009."[5] The documents referenced by counsel are the petitioner's tax returns, which are required evidence under 8 C.F.R. § 204.5(g)(2), as discussed above. Therefore, whether the documents were listed in the Request for Evidence does not alter their necessity.[6] The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record before the director closed on July 16, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. However, the record only contains the petitioner's 2005 tax return.

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Accordingly, the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of her adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[7] USCIS may consider such factors as

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[5] Counsel indicates that "[a]dditional argument will be provided in Petitioner's brief." However, no brief was received with the Form I-290B or subsequently.

[6] The director's Request for Evidence, dated June 11, 2009, asked for the beneficiary's W-2 or 1099 statements, *or* the petitioner's tax returns, *or* the beneficiary's tax returns. Counsel did not provide sufficient evidence from the three categories in response for all of the relevant years in question, or sufficient evidence to establish the petitioner's ability to pay the proffered wage.

[7] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case,

any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner provided a single year's tax return which listed an income slightly in excess of the petitioner's self-estimated expenses and the beneficiary's proffered wage; the beneficiary's tax returns for two years showed wages significantly less than the proffered wage and are not clearly attributable to the petitioner; and a statement of household expenses which left the petitioner with little to no income after paying the beneficiary's proffered wage and personal expenses. The petitioner failed to submit regulatory prescribed evidence for the years 2001, 2002, 2003, 2004, 2006, 2007, and 2008. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that she had the 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.

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the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.