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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 2 6 2013 OFFICE: TEXAS SERVICE CENTER FILE

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

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.

Thank you,

Ron Rosenberg
Acting 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 The director's decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with below.

The petitioner is an individual. He seeks to employ the beneficiary permanently in the United States as a nanny.[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that he was a U.S. employer capable of petitioning for an immigrant worker. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 October 20, 2010 denial, the issue in this case is whether or not the petitioner is a U.S. employer capable of petitioning for an immigrant worker.

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]

Petitioner Eligibility to Sponsor an Immigrant Worker

The director notified the petitioner, by issuing a Request for Evidence (RFE) on August 2, 2010, that documentation of the petitioner's residency was required to document that the petitioner was a U.S. employer. The petitioner responded on August 24, 2010, however, the petitioner did not provide a statement or any evidence regarding his residency. 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, the petitioner declined to provide copies of his birth certificate or naturalization certificate establishing his residency.[3] The residency information would have

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[1] 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.

[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).

[3] On appeal, counsel argues that the petitioner "was or should have been known to the Service" based on the petitioner's own immigrant visa. Counsel's argument, however, demonstrates the need for the information requested by the director in his RFE, as the information referenced by counsel

demonstrated that the petitioner was a U.S. employer, capable of petitioning to sponsor an immigrant worker. 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).

Whether the petitioner is a U.S. employer is material to the benefit sought, as only a U.S. employer may petition for an immigrant worker. Form I-140, Petition for Immigrant Worker, may only be filed by a U.S. employer. 8 C.F.R. § 204.5(c) ("[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section ... 203(b)(3)"). This applies equally for skilled workers. 8 C.F.R. § 204.5(l)(1) ("any United States employer may file a petition on Form I-140 for classification of an alien under [Immigration and Nationality Act] section 203(b)(3) as a skilled worker.")

Prior to filing Form I-140, the U.S. employer must obtain a labor certification. INA § 203(b)(3)(C) ("Labor certification required. An immigrant visa may not be issued to an immigrant ... until the consular officer is in receipt of a determination made by the Secretary of Labor"); 8 C.F.R. §204.5(a)(2) (I-140 petition must be accompanied by an approved individual labor certification).

As the Form I-140 can only be approved in this circumstance if it is accompanied by an approved labor certification, USCIS may rely on the definition of employer utilized by the Department of Labor (DOL) during the permanent labor certification process. An employer permitted to utilize the labor certification process is a "person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States." 20 C.F.R § 656.3 (definition of "Employer"). An employer "must possess a valid Federal Employer Identification Number (FEIN)." *Id.* Further, DOL excludes certain entities from the definition of an employer, including "[p]ersons who are temporarily in the United States." *Id.* Thus, an employer eligible to obtain a labor certification for permanent employment on behalf of a foreign worker must be physically located in the U.S. not on a temporary basis, and possess a FEIN.

In the record before the director, it was unclear whether the petitioner had met the permanence criteria. Evidence in the record suggested that the petitioner may not be a U.S. employer,[4] which lead the director to request clarification from the petitioner. The petitioner chose not to respond to the director's request for proof of his status in the United States. On appeal, the petitioner has provided a copy of his Form I-551, Permanent Resident Card, documenting that the petitioner became a lawful permanent resident on August 2, 2006, prior to sponsoring the beneficiary and

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would have indicated that the petitioner may not be a U.S. employer, as discussed herein.

[4] For example, the petitioner's 2008 individual income tax return lists an Individual Taxpayer Identification Number (ITIN), beginning with a "9," for the petitioner's child, rather than a Social Security number, indicating that the petitioner may not have been a U.S. citizen when that child was born. An ITIN is a tax processing number only available for certain nonresident and resident aliens, their spouses, and dependents who cannot get a Social Security Number (SSN). It is a 9-digit number, beginning with the number "9." *See* http://www.irs.gov/Individuals/International-Taxpayers/Taxpayer-Identification-Numbers-(TIN) (last accessed September 17, 2012).

filing the labor certification on March 2, 2009. Therefore, the petitioner is not temporarily in the United States, as he has the ability to remain indefinitely and to naturalize once eligible.[5] The director's decision will be withdrawn with regard to the stated basis for the decision of failure to establish that the petitioner was a U.S. employer, however, the petition will be remanded as the petitioner failed to establish that the beneficiary was qualified for the offered position as of the priority date.

Beneficiary's Qualifications for the Offered Position

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date, which here is March 2, 2009. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). *See also, Madany* 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).

In the instant case, the labor certification states that the offered position requires 24 months of experience in the offered position, Nanny. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The director's RFE gave notice to the petitioner that he had not provided this regulatory required evidence with the petition.

On the labor certification, the beneficiary claimed experience as a Nanny, stating that she was self-employed in that occupation from March 1, 2004, to March 2, 2009. The petitioner did not provide the regulatory prescribed evidence of this experience in the initial filing or in response to the director's RFE. Therefore, the AAO will not consider this claimed experience as there is no evidence in the record to corroborate the beneficiary's self-employment as a nanny.

The beneficiary did not claim employment with the petitioner on the labor certification, filed March 2, 2009, however, the petitioner later provided a Form 1099 issued by the petitioner to the beneficiary for work performed in 2009. 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. Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the

[5] The petitioner's permanent resident card was issued on a ten-year basis, not a conditional two-year basis.

beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[6] Specifically, in response to question J.21, which asks, "Did the alien gain any of the

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[6] 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .
>
> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
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> > (i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.
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> > (ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
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> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
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> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
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> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> > (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> > (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
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> (4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by

qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[7] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that she did not have employment experience with the petitioner. In response to question J.23, the petitioner indicates that the beneficiary is not employed by the petitioner. As the Form 1099 documents nonemployee compensation paid by the petitioner to the beneficiary during 2009, it casts doubt on the experience claimed by the beneficiary and the assertions made by the petitioner and beneficiary. *Matter of Ho*, 19 I&N at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

The beneficiary also claimed experience based on employment with an individual household ("Household") as a Nanny from March 1, 2002, to February 28, 2004. The job duties listed on the labor certification for this claimed experience are a verbatim copy of the duties of the offered position. The beneficiary attested on the labor certification that she was employed one (1) hour per week. The record

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> the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.
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> (5) For purposes of this paragraph (i):
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> > (i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
> > (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[7] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
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> . . .
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> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

contains what appears to be a form affidavit, partially typed and partially handwritten, from the Household employer. That letter states that the beneficiary was employed from March 2002 to February 2004 as a Babysitter. The letter states that the beneficiary's duties included "[t]o care for my son[,] feed him, clean my house and buy groceries every once a week."[8] The affidavit was notarized on November 11, 2008. The affidavit confirms that the beneficiary worked for this employer as a babysitter "every once a week." The affidavit conflicts with the claimed job title and job duties provided by the beneficiary on the labor certification, which the beneficiary signed under penalty of perjury. Therefore, the experience described by this affidavit does not document that the beneficiary is qualified for the position offered, as the experience appears to be in a different position, babysitter, with lesser responsibilities than the position offered, nanny.

Further, the inconsistencies between the evidence provided and the labor certification must be clarified with independent, objective evidence in any further filings before it may be considered to be credible. *See Matter of Ho*, 19 I&N at 591-92. Even if the AAO were to consider this experience in evaluating the beneficiary's qualifications, the beneficiary claimed employment of one (1) hour per week, which falls far short of the 24 months of experience as a Nanny required on the labor certification.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. As the petitioner has not had an opportunity to address this issue, the petition will be remanded to the director in consideration of the foregoing. The director shall request evidence relevant to this issue on remand.

Ability to Pay

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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.

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[8] The job duties for the offered position vary significantly from this employment experience, focusing on the social, medical, and educational needs of a child, and do not include cleaning, or grocery shopping.

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 (Acting Reg'l Comm'r 1977).

Here, as noted above, the ETA Form 9089 was accepted on March 2, 2009. The proffered wage as stated on the ETA Form 9089 is $8.87 per hour ($18,449.60) per year.

The evidence in the record of proceeding shows that the petitioner is an individual. On the ETA Form 9089, signed by the beneficiary on February 1, 2010, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that his 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'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 he 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. As noted above, the labor certification was filed March 2, 2009, and signed February 1, 2010. On the labor certification, the beneficiary indicated she was self-employed as of the date of filing the labor certification, and did not indicate prior employment with the petitioner. The instant I-140 petition was filed May 2, 2010, the director issued a Request for Evidence (RFE) on August 2, 2010, and the petitioner responded to the RFE on August 24, 2010. However, with the petitioner's response to the RFE, the petitioner provided a Form 1099-Misc issued for 2009 indicating that the petitioner paid the beneficiary $16,900 in "nonemployee compensation." This potentially conflicts with the information provided by the beneficiary on the labor certification that she was not employed with the petitioner. The petitioner must address this inconsistency in any further filings. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> [i]t 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.

In the instant case, even if the petitioner is able to overcome the inconsistency in the record, the petitioner still has not established that he employed and paid the beneficiary the full proffered wage from the priority date in 2009 onwards.

If the petitioner does not establish that he 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).

As noted above, 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).

The record before the director closed on August 24, 2010, with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2010 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2009 would have been the most recent return available. The petitioner did not provide a copy of his 2009 individual tax return, however, a copy of the petitioner's 2008 individual tax return is in the record.[9] Therefore, the petitioner did not document that his Adjusted Gross Income was sufficient to pay the proffered wage to the beneficiary from the priority date, March 2, 2009, onward.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See*

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[9] As the petitioner's 2008 income tax return covers a period of time prior to the priority date, it will not be considered as evidence of the petitioner's ability to pay the proffered wage from the priority date, March 2, 2009, or onward; however, it will be considered below in an analysis of the totality of the circumstances.

Matter of Sonegawa, 12 I&N Dec. 612 (Reg'l Comm'r 1967).[10] USCIS may consider such factors as 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.

The AAO notes that the petitioner provided a copy of his 2008 individual income tax return, which indicates that he supports a family of four (4), and that his adjusted gross income (AGI) in 2008 was $124,059.[11] The petitioner provided a "Monthly Budget" in response to the director's RFE, in which he indicated the following monthly expenses:

- Rent: none
- Mortgage: none
- Car payments: none
- Food: $1,000
- Child care: $1,538
- Medical: $1,000
- Insurance: $800
- Utilities: $1,000

The total of the petitioner's stated monthly expenses is $5,338, or $64,056 annually. However, the petitioner's estimate of monthly expenses does not appear to include all of the expenses for his family of four (4). The petitioner's estimate did not include taxes; however, the petitioner's 2008 federal income tax return reflects significant real estate taxes of $6,877. The petitioner's estimate stated annual medical expenses of $12,000; however, the petitioner's 2008 federal income tax return reflects substantially more medical expenses of $27,859. Further, the petitioner's 2008 federal income tax return reflects other "job expenses and certain miscellaneous deductions" of $16,800, which do not appear to be accounted for in the petitioner's statement of monthly expenses. In addition, the petitioner claimed above the line deductions to his income based on losses from "rental real estate, royalties, partnerships, S corporations, trusts, etc.;" these expenses do not appear to be

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[10] 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, 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.

[11] Line 37 on Form 1040.

reflected in the petitioner's statement of expenses. The itemized expenses listed on the petitioner's tax return equals $70,076 in expenses relevant just to his income tax. The petitioner provided only the statement of expenses, and did not provide any independent, objective evidence to corroborate the claimed estimate. The conflict between the tax return, which must be signed by the filer under the penalty of perjury, and this unsworn statement, casts doubt on the petitioner's estimate of monthly expenses. *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.

Based upon the discrepancies with the sole proprietor's estimated expenses, it is not clear that the petitioner's self-estimate is accurate; the petitioner's monthly expenses would appear to be higher than the expenses set forth in the petitioner's statement of expenses. The petitioner must resolve this issue with independent, objective evidence to establish his expenses beginning with the priority date and for each year thereafter. *Id.* at 591-92. The director shall request evidence relevant to this issue on remand, as well as the petitioner's 2009, 2010, and 2011 tax returns in order to establish the petitioner's continuing ability to pay the beneficiary's proffered wage from the priority date onward.

In the instant case, the petitioner provided only a single tax return, for the year prior to the priority date. Without the tax return to cover the year of the priority date and accurate expenses, a determination of whether the petitioner can pay the beneficiary's proffered wage cannot be made. As the petitioner has not had an opportunity to address this issue, the petition will be remanded to the director in consideration of the foregoing.

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).

Conclusion

In summary, the director's decision is withdrawn as to the stated basis for the decision of failure to establish that the petitioner was a U.S. employer, as the petitioner has demonstrated, on appeal, that he is a permanent resident and therefore capable of petitioning for an immigrant worker. However, the petition cannot be approved on the record before the AAO, therefore, the case will be remanded to the director to consider the issues discussed above, including that the petitioner failed to establish his ability to pay the proffered wage to the beneficiary from the priority date onward, and the petitioner has not established that the beneficiary possessed the minimum qualifications for the position offered as required on the labor certification as of the priority date.

Accordingly, the director's decision of October 20, 2010, denying the petition, will be withdrawn. The petition will be remanded to the director for the consideration of these issues, and any other issue the director deems appropriate. In addition the evidence to be requested, noted above, the director may request any additional evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

In visa petition proceedings, the burden of proof rests entirely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of October 20, 2010, is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.