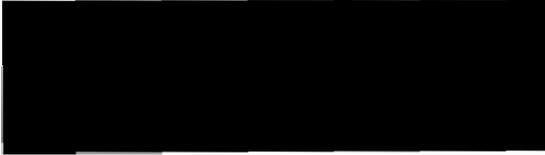




U.S. Citizenship  
and Immigration  
Services

**PUBLIC**

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



B6

FILE: WAC 05 155 55741 Office: CALIFORNIA SERVICE CENTER Date: **MAR 14 2007**

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a private home. It seeks to employ the beneficiary permanently in the United States as a household domestic worker. Although a complete form is required by statute and regulation, only the front page of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary met the experience requirements of the labor certification. The director further determined that the petitioner had not provided an original and complete certified labor certification in support of the petition. He 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 14, 2006 denial, the issues in this case are 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, whether or not the beneficiary met the experience requirements as of the priority date, and whether or not the petitioner submitted a certified individual labor certification in support of the petition.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1(2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

Under normal circumstances, the AAO would reject an appeal that did not include a certified labor certification from DOL. However, in the instant case, it appears that the petitioner does have a certified labor certification, but has not submitted the entire labor certification.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial

statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 12, 2001. Since the petitioner failed to provide the entire labor certification, the AAO cannot determine the amount of the proffered wage as stated on the Form ETA 750 and, therefore, is unable to determine if the petitioner had the ability to pay the beneficiary the proffered wage from the priority date and continuing to the present.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes the petitioner's statement, a list of the petitioner's monthly personal expenses, and a copy of the front page of the labor certification.

Other relevant evidence in the record includes: copies of the first two pages of the petitioner's 2001 through 2004 Forms 1040. U.S. Individual Income Tax Returns, and an affidavit, dated December 12, 2005, from the beneficiary's prior employer. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage or to the beneficiary's experience.

The petitioner's 2001 through 2004 Forms 1040 reflect adjusted gross incomes of \$329,567, \$304,433, \$345,544, and \$354,872, respectively.

The petitioner's list of personal monthly expenses amounted to a total of \$6,342 per month or \$76,104 per year.

The affidavit from [REDACTED] states that the beneficiary was employed by her from March 1997 through April 1999. The beneficiary's job duties consisted of house work such as cleaning, dusting, sweeping, laundry, dish washing, cooking, babysitting, and grocery shopping. The beneficiary worked Monday through Thursday from 7:00 a.m. until 3:30 p.m. and was paid \$200 per week with free room and board.

On appeal, the petitioner states:

We have met the requirements of 8 C.F.R. § 204.1(l)(3)(ii)(D) in that the alien was employed for two years performing the same work in which we are seeking certification. However, because she was paid in cash we don't have cancelled checks to submit. (Please refer to previously submitted affidavit from former employer.)

---

<sup>1</sup> 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).

It should be noted that the date shown on the I-140 as the date of arrival to the U.S. should be April 13, 1997 instead of April 13, 1999. The latter date is the date which the alien began working for the petitioner.

Also included with this appeal is a copy of the monthly expense statement issued by the petitioner.

Finally, the DOL has issued a certified labor certification on this case (please [see the] attached final determination letter for DOL.) Therefore, we have also met the requirements of 8 C.F.R. § 204.5(1)(3)(i).

The petitioner must establish that its 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner failed to provide the entire ETA 750. Therefore, the AAO is unable to determine if the petitioner employed the beneficiary in the pertinent years, 2001 through the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the entire relevant period of analysis, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record indicates that the petitioner is an individual. Therefore the petitioner's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Individual petitioners must show that they can 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.

In the instant case, the petitioner supported a family of three. While the adjusted gross incomes of \$329,567, \$304,433, \$345,544, and \$354,872, respectively, for the petitioner in 2001 through 2004 appear to indicate that the petitioner has established her ability to pay the proffered wage and support a family of three, without the

entire labor certification, the AAO has no way of determining the wage offered to the beneficiary, and, therefore, cannot consider that the petitioner's ability to pay the proffered wage has been established.

The petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The remaining issue in this cases consists of whether the petitioner has established that the beneficiary met the experience requirements of the labor certification at the priority date, April 12, 2001.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, the petitioner has failed to submit the entire labor certification; and, therefore, the AAO cannot ascertain the requirements necessary to perform the job duties (again, not known) of the position.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

The record of proceeding contains an affidavit from the beneficiary's prior employer, the beneficiary's aunt, who claims she employed the beneficiary from March 1997 through April 1999. ■■■■■ states that the beneficiary did house work such as cleaning, dusting, sweeping, laundry, dish washing, cooking, babysitting, and grocery shopping. The director denied the petition explaining that the affidavit was not supported by documentary evidence.

On appeal, the petitioner states that since the beneficiary was paid in cash, there were no cancelled checks to submit as proof of the beneficiary's prior employment.

The regulation at 8 C.F.R. § 103.2 provides guidance in evidentiary matters. It states in pertinent part:

(b) *Evidence and processing—*

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable

and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

If the AAO were to consider the affidavit from [REDACTED] as proof that the beneficiary met the experience requirement of the labor certification, the AAO would need verifiable and credible evidence of the beneficiary's employment such as additional affidavits from other persons (preferably not from other family members), documentation showing that the beneficiary was living at the address of [REDACTED] during 1997 through 1999, tax returns for the beneficiary for those years, bank deposits showing consistent amounts entered during 1997 through 1999, etc.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

*Initial evidence.* (1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (**except for labor certifications from the Department of Labor**) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If

such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

(Emphasis added.)

Again, it should be noted that among the appellate authorities delegated to the AAO are appeals from denials of petitions for immigrant visa classification based on employment, **“except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act.”** 8 C.F.R. § 103.1(f)(3)(iii)(B)(2003 ed.). (Emphasis added.)

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.