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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

NOV 16 2010

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter was before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a household. It 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 an other, unskilled 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 establish the ability to pay the proffered wage as well as to sustain his household expenses from the priority date through the present, and therefore, denied the petition.

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.

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.¹

As set forth in the director's January 6, 2009 denial, the primary 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 as well as to sustain his household during the period.

Section 203(b)(3)(A)(iii) of 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 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

¹ 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 AAO notes that the petitioner filed a motion to reconsider with the director prior to the instant appeal on the basis of ineffective assistance of counsel and will adjudicate the instant appeal on its merits.

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 October 22, 2004. The proffered wage as stated on the Form ETA 750 is \$400 per week (\$20,800 per year). On the petition, the petitioner claims his occupation as real estate investments but did not provide his annual income. On the Form ETA 750B signed by the beneficiary on October 8, 2004, she claimed to have worked for the petitioner in the proffered position since August 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the 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, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the letter dated November 17, 2008 which responded to the director's request for evidence (RFE), the petitioner stated that "[the beneficiary] received a salary in excess of the minimum wage at the rate of about \$100.00 a day during the years of: half of 2005, 2006, 2007, until her departure a few months ago. She no longer works for us." However, the petitioner did not submit any documentary evidence such as the beneficiary's W-2 or 1099 forms, or paystubs for any relevant years showing that the petitioner paid the beneficiary a full or partial proffered wage. 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 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. 1998) (citing *Matter*

of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner failed to demonstrate that it paid the beneficiary the proffered wage from the year of priority date to the present, and thus, the petitioner failed to establish its ability to pay the proffered wage through examination of wages actually paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner in the instant matter is an individual employer. Therefore the individual's adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay the proffered wage. An individual reports his and his household's income on their individual (Form 1040) federal tax return each year. The individual employer must show that he can pay the proffered wage out of his adjusted gross income or other available funds. In addition, he must show that he can sustain himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The petitioner provided a statement of his household's monthly expenses. The household expenses include utilities (\$1,500), telephone (\$150), food and clothing (\$300), medical/dental expenses (\$250), transportation/gasoline (\$200), credit cards (\$2,000) and others (\$200), totaling \$4,600 per month. While the petitioner did not include house mortgage payments, he did not provide any evidenced showing that he paid off the home mortgage for his residential house. The statement did not indicate number of the family members and the record does not contain any documentary evidence to support the contents of the statement, therefore, it is not clear whether the statement reflects the real financial situation for the individual employer's family. Accordingly, the AAO cannot accept this statement as primary evidence in determining the petitioner's ability to pay the proffered wage and to sustain themselves.

In response to the director's RFE, the petitioner stated that he was not willing to provide copies of his income tax returns, but could state that they exceeded a six-figure amount that was paid to IRS for years 2004-2007. The assertions of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without the individual employer's tax returns, the AAO cannot determine whether the household's gross adjusted income was sufficient to pay the beneficiary the proffered wage as well as to sustain the family for these relevant years.

USCIS considers the individual employer's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the petitioner submitted a copy of portfolio summary as of June 30, 2007 as evidence that the petitioner had sufficient liquefiable assets to pay the beneficiary the proffered wage as well as to sustain his family for these relevant years. However, the balance in this investment account on June 30, 2007 cannot establish the petitioner's ability to pay the proffered wage at the ends of 2004 and every subsequent year. On appeal, the petitioner submitted this portfolio summary again. As of that date, the statements for 2007 and 2008 should have been available. However, the petitioner declined to submit more recent statements for the investment accounts. It is not clear whether the petitioner had sufficient balances in that account at the end of 2007, 2008 and 2009 to pay the beneficiary the proffered wage and to sustain his family's living expenses. In addition, the statement indicates that the investment account is under [REDACTED]. The record does not contain any documents about the family trust. Without any further documentary evidence, it is not clear whether the funds or balances in the investment account under the trust are liquefiable, i.e. are available for the individual employer to pay the beneficiary the proffered wage. Therefore, the AAO cannot conclude that the petitioner had sufficient liquefiable assets to pay the beneficiary the proffered wage and also to sustain his family living expenses for these years from 2004 to the present.

On appeal, the petitioner also submitted a letter dated February 3, 2009 from Bank of America stating that [REDACTED] has a checking account with balance over \$25,000 on the opening date and current date since 2004. However, the petitioner did not submit the bank statements of his checking account from 2004 to the present. While USCIS may consider the individual employer's personal checking account as part of evidence of his ability to pay the proffered wage, we cannot rely on a letter from a banker in determining the petitioner's ability to pay the proffered wage. Further, the letter shows the amount in the checking account on the opening date and current date. The amount on a certain date cannot show the continuing ability to pay the proffered wage from the priority date to the present. Without the bank statements, it is not clear whether the checking account is for the individual employer's real estate investment business or personal usage. If the account is a business checking account, it is most likely shown on Schedule C of the petitioner's returns as gross receipts and expenses. Therefore, the balance in the business checking account cannot be considered as the petitioner's liquefiable assets other than the adjusted gross income in determining the petitioner's ability to pay the proffered wage as well as to cover his existing business expenses and their household living expenses. Therefore, the petitioner failed to establish his ability to pay the beneficiary the proffered wage as well as to sustain his family living expenses with the letter from the bank.

USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee 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 failed to establish that he paid the beneficiary the proffered wage from the priority date to the present; the petitioner declined to provide his tax returns to establish his ability to pay the proffered wage as well as to sustain his family living; the petitioner failed to establish that he had other liquefiable assets to pay the proffered wage and to cover his family's living expenses for all these relevant years with the portfolio summary for his family trust's investment account and the letter from his bank. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that all these years were uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage as well as to support his family for all relevant years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2004, the petitioner failed to establish its continuing ability to pay the proffered wage for the years 2004 through the present.

Counsel's assertions and evidence submitted on appeal cannot overcome the ground of denial in the director's January 6, 2009 decision. The petitioner failed to establish that it had the continuing ability to pay the proffered wage as well as to support his family beginning on the priority date and continues to the present. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.