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U.S. Citizenship  
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FILE:

Office: NEBRASKA SERVICE CENTER

Date:

OCT 08 2010

IN RE:

Petitioner:

Beneficiary:

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

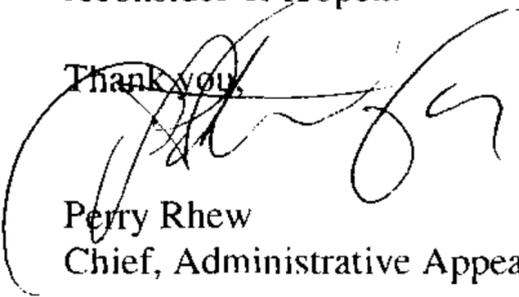
ON BEHALF OF PETITIONER:

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

The petitioner is a private individual. She seeks to employ the beneficiary permanently in the United States as a maid/housekeeper. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to submit evidence to demonstrate its ability to pay the proffered wage. 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 September 12, 2008 denial, the issue in this case is whether the petitioner demonstrated the ability to pay the proffered wage. On appeal, the AAO has identified an additional issue: whether the petition was filed under the correct category as the labor certification requires three year of experience, however, the petition was filed as one for an "other worker" instead of for a "skilled worker."

The AAO maintains plenary power to review each appeal on a *de novo* basis. *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.<sup>1</sup>

The petitioner failed to establish its ability to pay the proffered wage, 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 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

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<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).

qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour for 52.5 hours per week and \$15 for 16.5 hours of overtime work per week (\$40,170 per year).<sup>2</sup>

The evidence in the record of proceeding indicates that the petitioner is a private individual. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary stated that she began working for the petitioner in June 1998 as a housekeeper with duties including caring for two children, preparing and serving specific meals, and providing religious instruction for the children.

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, 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. The petitioner submitted no evidence that it paid any wages to the beneficiary from the stated June 1998 date of employment or from the time of the priority date.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at \*6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054

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<sup>2</sup> The director stated that the proffered wage would be \$20,800, but that figure is based on a 40 hour work week instead of the 52.5 regular hour plus 16.5 overtime hour work week indicated on the Form ETA 750 as the regular total hours per week.

(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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts*, 558 F.3d at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

The petitioner is an individual. Therefore the individual's adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay. Individuals report income and expenses on the Form 1040 federal tax return each year. Individuals must show that they can cover their existing personal expenses and support any dependents as well as pay the proffered wage out of their adjusted gross income or other available funds. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> 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.

In the instant case, the petitioner submitted information for the following years. The tax returns show that the husband and wife support two dependent children.

Year	AGI	Household Expenses <sup>3</sup>	Remainder available to pay proffered wage
2006	\$85,455	\$79,958	\$5,497
2005	\$46,472	\$66,128	-\$19,656
2004	\$48,313	\$59,345	-\$11,032
2003	\$53,373	\$54,679	-\$1,306
2002	\$49,162	\$51,317	-\$2,155
2001	\$35,931	\$43,867	-\$7,936

Based on the foregoing, the petitioner cannot establish the ability to pay the proffered wage for any of the years from the priority date onward. We will consider an individual's total income or AGI, reflected on the Form 1040 as a whole. *See Ubeda*, 539 F.Supp. 647. The petitioner's AGI in 2001 is less than the proffered wage. As the chart above shows, after subtracting the household expenses and mortgage payments, the remaining income is less than the proffered wage in every year. The petitioner's household expenses alone exceeds the AGI five of six years prior to even considering the proffered wage. As a result, the petitioner has not established its ability to pay the proffered wage for any of the relevant years.<sup>4</sup>

The petitioner also provided bank statements covering the period December 9, 2006 to January 31, 2007 for three accounts. The petitioner also submitted a statement from a personal banker with HSBC stating the balance in the three accounts on April 9, 2007. This information is only useful in determining the funds available to the petitioner on that particular day and cannot prove the

<sup>3</sup> The listed household expenses include education, groceries, utilities, gas, clothing, car payments, insurance, travel expenses, and other miscellaneous as shown on the May 22, 2008 statement submitted by the petitioner in response to the director's request for evidence. The petitioner submitted its mortgage payment history for 2001 to 2003. The figures from 2004 to 2006 come from the May 22, 2008 statement and include both categories "Mortgage payments (principal only)" and "Mortgage interest." We note that the petitioner's payments noted on the May 22, 2008 statement are less than that reflected on the mortgage payment history submitted.

<sup>4</sup> The director's decision states that the petitioner could establish its ability to pay in 2006. This, however, is incorrect as the director did not include the stated number of hours and overtime in the wage calculation. As demonstrated above, the individual AGI is insufficient to pay the wage after subtracting out all expenses.

petitioner's ability to pay the proffered wage or support household expenses at any earlier date from the 2001 priority date onwards.

The petitioner also submitted the tax returns for [REDACTED] companies run by the petitioner's husband. Any income that the husband received from [REDACTED] would be reflected on the petitioner's individual Form 1040 and considered in the analysis above.

On appeal, counsel states that the AGI does not reflect all funds available to the petitioner as certain income "that includes tax refunds that is not taxable" could be used by the petitioner in paying the proffered wage. The petitioner presented no evidence of other funds available to pay the proffered wage outside of what is reflected on the tax return and the documents discussed above. The assertions of counsel 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).

Counsel also posits on appeal that the petitioner has access to a \$150,000 line of credit that should be considered in the petitioner's ability to pay the proffered wage. Counsel correctly states that "if the petitioner wishes to rely on a line of credit as evidence of financial ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position." The petitioner submitted no such evidence. 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)). As a result, we are unable to consider that line of credit as a viable source of financing for the proffered wage.<sup>5</sup>

USCIS may 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

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<sup>5</sup> USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position.

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.

Here, although not a business, the petitioner's totality of the circumstances would not establish the ability to pay. The petitioner submitted no evidence of wages paid to the beneficiary.<sup>6</sup> The petitioner's AGI was less than the household expenses presented in all but one year at issue and the AGI was less than the proffered wage in 2001 and was only slightly higher than the proffered wage in 2002 through 2005. Thus, viewing the totality of the circumstances, the petitioner has not demonstrated its ability to pay the proffered wage and pay its individual household expenses. *Ubeda*, 539 F. Supp. 647.

In addition to the issue of the petitioner's ability to pay, the petitioner filed the petition under the incorrect category. 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 (9<sup>th</sup> 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).

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 nature, for which qualified workers are not available in the United States. 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.

Here, the Form I-140 was filed on May 3, 2007. On Part 2.g. of the Form I-140, the petitioner indicated that they were filing the petition for an other worker and not 2.e. for a skilled worker.

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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<sup>6</sup> Several tax returns in the record identify other parties as childcare providers on Form 2441 instead of the beneficiary.

In this case, the labor certification indicates that three years of experience as a housekeeper is required for the proffered position. However, the petitioner requested the other worker classification on the Form I-140, which states that it is for unskilled workers which would need to be supported by a labor certification that does not require a bachelor's degree and at least two years of experience. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition, request the proper classification, submit the proper fee, and required documentation.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.