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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

B6

FILE:

Office: TEXAS SERVICE CENTER

Date:

SEP 01 2010

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, with a fee of \$585. 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.

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is an individual who seeks to employ the beneficiary permanently in the United States as a child care provider. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition pursuant to 8 C.F.R. § 103.2(b)(8)(ii),¹ since the petitioner did not submit any documentation other than the approved Form ETA 750 to support 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 issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(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 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

¹ Title 8 of Code of Federal Regulation section 103.2(b)(8)(ii) states: "If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS."

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 ETA Form 750 was accepted for processing by the Department of Labor (DOL) on July 19, 2004. The rate of pay or the proffered wage specified on the Form ETA 750 is \$7 per hour or \$14,560 per year. Further, the Form ETA 750 states that the position requires a minimum of 1 year experience in the job offered.

To prove that she has the ability to pay \$7/hour or \$14,560/year beginning on July 19, 2004, the petitioner submits the following evidence on appeal:

- A letter stating that the petitioner has a dental practice and that her 2007 gross income was \$302,652;
- A copy of her 2007 individual tax return;

The evidence in the record of proceeding shows that [REDACTED] is the petitioner. On the Form I-140 petition, [REDACTED] indicates that she is a dentist and that her annual income is \$268,822.

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

The 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

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).

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 this case, no evidence of record indicates that the petitioner employed or paid the beneficiary during the qualifying period, on or after the priority date.

When the petitioner does not establish that it employed or 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).

The petitioner, as noted above, is an individual who seeks to employ the beneficiary as a child care provider for her children. Individuals such as the petitioner in this case report income on the individual (Form 1040) federal tax return each year. Thus, to meet their burden of proving by a preponderance of the evidence that they have the ability to pay the proffered wage, such individuals must show they can cover their personal expenses as well as pay the proffered wage out of their adjusted gross income or other available funds such as from their personal checking or savings account. They also must show they can sustain themselves and their dependents.

According to the tax return in the record, the petitioner in this case is married with two dependent children. Her adjusted gross income in 2007 is \$209,808, but no evidence is submitted to reveal her personal expenses in 2007. The petitioner also fails to submit her tax returns for the years 2004 through 2006 along with evidence regarding her monthly or yearly expenses for those years. The record contains no evidence to prove that the petitioner has the ability to pay the beneficiary's wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO concludes that the petitioner does not have the ability to pay the salary offered as of the priority date and continuing to present.

Finally, 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, supra*. However, the petitioner in this case is not in the business of hiring or employing child care providers. The petitioner, as stated earlier, is an individual who seeks to permanently employ the beneficiary in the United States as a child care provider. Therefore, the AAO finds that *Sonogawa* is not relevant and does not apply to the petitioner's situation.

The director also stated in his decision that the petitioner did not submit evidence establishing the beneficiary's qualifications.

On appeal, the petitioner submits the following evidence to show that the beneficiary meets the minimum requirements to perform the duties of the position as of the priority date: an affidavit issued by the beneficiary in which the beneficiary claims she had her own child-care business in India from November 2002 to November 2006 and copies of the beneficiary's tax assessments in India for the periods 2006-2007 and 2007-2008.

The assessments relate to years after the beneficiary indicates she stopped the employment in November 2006, and do not corroborate the beneficiary's affidavit of work. Further, the record does not sufficiently explain how the beneficiary had a child care business from 2002 to 2006, when it appears that she attended to children in a private household. Without a more adequate explanation of her one year experience in the business of child care, the petitioner has not established that the beneficiary is qualified to perform the duties of the position. 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)).

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.