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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



U.S. Citizenship and Immigration Services

PUBLIC COPY



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Date: APR 25 2011 Office: TEXAS SERVICE CENTER FILE: [Redacted] SRC 07 272 54601

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

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 \$630. 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,

Kerai S. Paulos for

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 farm owner and operator. He seeks to employ the beneficiary permanently in the United States as a farm laborer. 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 determined that the petitioner had not established that he had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's December 19, 2008, denial, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of work experience stated on the labor certification. The director also determined that the petitioner had not established 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)(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. 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 other 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 AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *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

The first issue set forth in the director's denial is whether or not the beneficiary met the education, training or experience requirements required in the labor certification. The petitioner must

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).

demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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, the labor certification application was accepted on March 16, 2004.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, *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). According to the plain terms of the labor certification, the applicant must have 19 years of experience in a related occupation.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(B) *Skilled Workers*. If the petition is for a skilled worker, it must be accompanied by evidence that the alien meets the educational, training and experience, and any other requirements of the labor certification

(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 certificate

On the labor certification, the beneficiary claimed nine years of experience in farm and ranch work for the petitioner and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury.

The petitioner indicated on Form ETA 750 that the position required a minimum of 19 years of experience in a position related to the proffered position of farm laborer. However, the petitioner failed to provide any regulatory-required evidence of the beneficiary's work experience. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). It is also noted that under Line 14 of the Form ETA 750 the petitioner placed an "X" in each of the boxes for Grade School, High School and College education. It is not clear whether these "X's" indicate that these levels of education are required to perform the offered job.

Thus, the petitioner has not established that the beneficiary is qualified for the proffered job.

The second issue to be considered is whether the petitioner has established his ability to pay the proffered wage.

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.

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).

Here, the Form ETA 750 was accepted on March 16, 2004. The proffered wage as stated on the Form ETA 750 is \$6.01 per hour (\$12,500.80 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on March 15, 2004, the beneficiary claimed to have worked for the petitioner since 1993.

The petitioner must establish that his 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 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 instant case, the petitioner has not established that he paid the beneficiary any wages from the priority date through 2007. Therefore, the petitioner must establish that he can pay the full proffered wage of \$12,500.80 per year from 2004 through 2007.²

On appeal, counsel asserts that the petitioner is currently paying the beneficiary \$8.75 per hour, which is more than the proffered wage. Counsel summarizes the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), as stating that the petitioner's ability to pay the proffered wage has been established "if credible evidence shows that Beneficiary is currently employed and has been paid the proffered wage by the petitioner in the past." Counsel urges USCIS to consider the wage rate paid in 2008 as satisfying that particular method of demonstrating a petitioning entity's ability to pay the proffered wage.

The Yates Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is March 16, 2004. Thus, the petitioner must show its ability to pay the proffered wage not only in 2008, when counsel claims the petitioner actually paid more than the proffered wage rate, but it must also show its continuing ability to pay the proffered wage from 2004 through 2007. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability

² Cancelled checks provided on appeal establish that the petitioner paid the beneficiary \$4,550 in October, November and December in 2008. Thus, in 2008, the petitioner would be required to establish that he can pay the difference between the wages actually paid to the beneficiary and the proffered wage, that is, \$7,950.80.

to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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). 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 owns and operates a cattle farm. Similar to a sole proprietorship, the petitioner's adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner's ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss From Farming, and are carried forward to the first page of the tax return. *See* <http://www.irs.gov/publications/p225/ch03.html> (accessed April 10, 2011). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. *See Ubeda*, 539 F. Supp. 647.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner 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 supported a family of two. The petitioner's tax returns reflect the following income:

- 2004 = \$1,198³
- 2005 = \$17,653⁴
- 2006 = \$31,237⁵
- 2007 = \$-10,072⁶

³ AGI as reflected on IRS Form 1040, U.S. Individual Income Tax Return, Line 36.

⁴ AGI as reflected on IRS Form 1040, Line 37.

⁵ Sum of AGI of \$23,725, as reflected on IRS Form 1040, Line 37, and non-taxable Social Security benefits of \$7,512 as reflected on Line 20a.

⁶ Sum of AGI of \$-17,836, as reflected on IRS Form 1040, Line 37, and non-taxable Social Security

However, in response to the director's August 18, 2008, Request for Evidence (RFE), the petitioner also claimed the following personal expenses:

- 2004 = \$3,437 per month (\$41,244 per year)
- 2005 = \$4,501 per month (\$54,012 per year)
- 2006 = \$3,446 per month (\$41,352 per year)
- 2007 = \$4,133 per month (\$49,596 per year)

On appeal, the petitioner claimed that his monthly household expenses for 2007 were actually \$2,196 (\$26,352 annually). However, the petitioner did not explain the significant discrepancy between this estimate and his previous estimate. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Regardless, it is improbable that the petitioner could support himself and his family on a deficit, which is what remains after reducing his income from 2004 through 2007 by the proffered wage and the petitioner's claimed personal expenses. Therefore, the petitioner's net income is not sufficient to establish his ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has proven sufficient income and assets to establish the ability to pay the proffered wage.

On appeal, counsel submitted the petitioner's financial statements as of November 13, 2008. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of the petitioner compiled into standard form. The unsupported representations of the petitioner are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Additionally, it is noted that the petitioner's claimed assets include livestock, farm equipment and numerous pieces of real estate. The petitioner implied that these items should be considered in determining the petitioner's ability to pay the proffered wage. However, the petitioner has not established that these items are readily liquefiable, and it is unlikely that the petitioner would sell

benefits of \$7,764 as reflected on Line 20a.

such assets to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. 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). Finally, the value of these assets has not been established nor have they been balanced against any debts secured by them. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record of proceeding contains bank statements from the petitioner's personal and household checking accounts covering the period 2004 through 2007.⁷ As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on its AGI, the petitioner's bank statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The sum of the average annual checking account balances in 2004, totaling \$20,375.79, is sufficient to pay the proffered wage in 2004. However, in 2005, the petitioner would not have established its ability to pay the proffered wage, because the difference of -\$17,723.38 between the 2005 and 2004 average annual balances (\$2,652.41-\$20,375.79), plus the \$7,874.99 in unused funds from the previous year (the difference in 2005 between the average annual balance and the proffered wage), does not exceed the proffered wage. Thus, the petitioner's cash assets as reflected in his checking accounts do not establish the petitioner's continuing ability to pay the proffered wage.

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 (Reg'l Comm'r 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

⁷ From 2004 through 2007, the petitioner's "household account" reflected average annual balances of \$3,919.46, \$2,652.41, \$438.48 and \$599.28, respectively. In 2004, 2006 and 2007, the petitioner's personal checking account reflected annual average balances of \$16,456.33, \$11,174.83 and \$9,385.42, respectively. Statements from the petitioner's personal account for 2005 were not provided.

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. As in *Sonegawa*, 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 claims to have been in business for "several decades" and appears to employ just one worker, the beneficiary. The petitioner claims to have employed the beneficiary since 1993, but has provided documentation of the beneficiary's pay for just a three-month period in 2008. Further, the petitioner has not established the historical growth of his cattle farm since its inception and has not established his reputation in the cattle farming industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that the petition requires less than two years of training or experience such that the beneficiary may be found qualified for classification as an unskilled worker.⁸ Here, the Form I-140 was filed on September 13, 2007. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for an unskilled worker. The regulation at 8 C.F.R. § 204.5(i)(2) defines 'other worker' as a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

On appeal, counsel asserts that the petitioner made an error in completing the ETA Form 750 and that no experience is required for the job. Counsel further asserts that the requirements for the proffered position were approved by the DOL and, therefore, that USCIS should "pardon [the petitioner's] simple error in completing the ETA 750 application." However, DOL's certification of the Form ETA 750 does not supersede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of the whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A) of the Act and 8 C.F.R. § 204.5.

⁸ 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).

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.

In this case, the petitioner requested the other worker classification on the Form I-140. However, the Form ETA 750 states that an applicant must have at least 19 years of experience in a related job. 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.⁹ 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.

⁹ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683.