

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

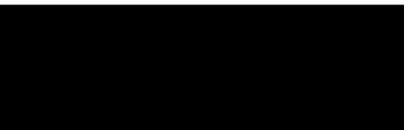
**PUBLIC COPY**

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

B6



Date:

**APR 27 2011**

Office: TEXAS SERVICE CENTER

FILE:

SRC 07 236 51757

IN RE:

Petitioner:

Beneficiary:

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:

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,

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. He seeks to employ the beneficiary permanently in the United States as a "Live-In-Domestic" employee. 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 August 14, 2008 denial, 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 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 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the 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 \$300 per week (\$15,600 per year). The Form ETA 750 states that the position requires

six years of grade school education, six years of high school, three months experience in the proffered profession or three months experience in the related occupation of “babysitter.”

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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is an individual. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner.<sup>2</sup>

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. 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 he 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 employed and paid the beneficiary the full proffered wage from the priority April 30, 2001 priority date onwards. The petitioner did, however, present evidence that he employed the

---

<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).

<sup>2</sup> Under 20 C.F.R. §§ 656.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” *See Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). As the beneficiary shares the same name as the petitioning individual, it appears that the beneficiary is related, which calls into question the *bona fide* nature of the job offer. This issue must be addressed in any further filings.

beneficiary and paid her some wages during the requisite period. Thus, it will be necessary for the petitioner to establish that he has had the ability to pay the beneficiary the difference between the proffered wage and wages actually paid to the beneficiary during years in which it is established that the petitioner paid the beneficiary wages. The wages paid and the difference between those wages and the full proffered wage are set forth below:

- 2007 W-2 Form - \$12,000<sup>3</sup>
- 2007 Form 1099 - \$4,800

---

<sup>3</sup> The petitioner submitted copies of the front side of 52 personal checks he states he wrote to the beneficiary for wages between July 23, 2007 and August 29, 2008. The petitioner did not, however, submit copies of the backs of those checks showing that they had actually been negotiated by the banking institution they were drawn on (Chevy Chase Bank). The checks are, therefore, of little evidentiary value and do not establish wages paid to the beneficiary. The petitioner submitted copies of the front side of checks made payable to the Internal Revenue Service and the Comptroller of Maryland in April 2008, July 2008 and a check to the Comptroller of Maryland in August 2007. Again, the copies did not contain copies of the back of the checks showing they were, in fact, negotiated by the bank they were drawn on. They are of little evidentiary value. The checks presented do not establish wages paid to the beneficiary during the requisite period. It is noted that the petitioner submitted copies of the beneficiary's personal income tax returns (2004, 2005 and 2007) showing business income for the beneficiary providing babysitter/housekeeper services. The 2006 tax returns shows income of \$16,800 for babysitter/housekeeper services, but does not list where that income was earned. The 2005 tax return shows business receipts of \$16,800 and lists "Oscar Reyes" as her business name. The 2004 tax return shows business receipts of \$10,000 for babysitter services, but does not list where those receipts were earned. While the tax returns provide some evidence that the beneficiary earned money for babysitter/housekeeping services, absent a valid W-2 Form or Form 1099 that the petitioner issued to the beneficiary for these years, the tax returns alone do not establish that the sums received and reported by her were paid to her by the petitioner. Additionally, the director in his RFE requested that the petitioner submit evidence of any wages paid to the beneficiary. Petitioner's counsel did not submit any evidence of pay to the beneficiary until on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

- The wages paid to the beneficiary (\$16,800) in 2007 exceed the proffered wage of \$15,600.<sup>4</sup> The petitioner must establish the ability to pay the full proffered wage in all other relevant years.

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 (1<sup>st</sup> 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).

As set forth above, the priority date in this instance is 2001. The record closed with the receipt by the director of the petitioner's response to the director's request for evidence. The petitioner's response is dated April 11, 2008.<sup>5</sup> As of that date, the petitioner's 2006 tax return was the most recent return available. Thus the present record must establish the petitioner's ability to pay the full proffered wage in 2001, 2002, 2003, 2004, 2005 and 2006. While the petitioner did not submit a copy of his 2007 tax return, as previously stated, he did submit copies of a W-2 Form and Form 1099 for 2007 stating wages exceeding the proffered wage in that year.

The petitioner is an individual. Therefore the individual's adjusted gross income, assets and liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their IRS Form 1040 federal tax return each year. Individuals must show that they can cover their existing expenses as well as 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. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In the instant case, the petitioner's 2001 through 2006 federal tax returns show he supports a family of five. The petitioner's tax returns reflect the following information for the following years:

- Petitioner's adjusted gross income (Form 1040, line 33) in 2001 was \$61,864.

---

<sup>4</sup> To conclude that the petitioner could pay the proffered wage in 2007, the record should include required prescribed evidence pursuant to 8 C.F.R. § 204.5(g)(2) in the form of the petitioner's 2007 federal tax return, or an audited financial statement for that year.

<sup>5</sup> Whether the petitioner's 2007 return was available by this date is unclear. The petitioner, however, did not submit this return on appeal. The 2007 return should have been available by the date that the appeal was submitted.

- Petitioner's adjusted gross income (Form 1040, line 35) in 2002 was \$66,575.
- Petitioner's adjusted gross income (Form 1040, line 34) in 2003 was \$66,754.
- Petitioner's adjusted gross income (Form 1040, line 36) in 2004 was \$70,881.
- Petitioner's adjusted gross income (Form 1040, line 37) in 2005 was \$61,864.
- Petitioner's adjusted gross income (Form 1040, line 37) in 2006 was \$73,468.

While in the years 2001 through 2006, the petitioner's tax returns state adjusted gross income exceeding the proffered wage, as previously noted, however, the petitioner must establish sufficient adjusted gross income or other liquid assets to pay the proffered wage plus the normal living expenses of the individual petitioner and his four dependents. In the director's March 14, 2008 request for evidence, the director asked, in part, that the petitioner provide a statement of his family monthly living expenses. In response to that request, the petitioner submitted a financial statement showing monthly living expenses of \$5,435.52 (\$65,226.24 per year).<sup>6</sup> Thus, assuming those living expenses were the same for years 2001 through 2006, or an average of living expenses for years 2001 through 2006,<sup>7</sup> it will be necessary for the petitioner to establish his ability to pay the proffered wage (\$15,600) plus those annual living expenses in each year from 2001 through 2006, a total of \$80,826.24. The petitioner's adjusted gross income is insufficient to pay that sum in any year since the 2001 priority date.

On appeal, counsel asserts the record establishes the petitioner's ability to pay the proffered wage. Counsel submitted, on appeal, bank records for the petitioner stating that the petitioner has liquid assets with which to pay the proffered wage if needed.

The petitioner submitted 2008 bank records and some records from 2007 from the Chevy Chase Bank showing that the petitioner had a mutual fund account, personal checking and savings accounts, and three custodial accounts in the names of his children. Even if these 2007 and 2008 accounts were considered, statements submitted do not establish that the funds contained therein were available or even existed from 2001 through 2006 and do not establish the petitioner's ability to pay the proffered wage in those years.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See*

---

<sup>6</sup> In the director's August 14, 2008 decision, the director stated the petitioner's individual household expenses were listed as \$5,557.52 per month (\$66,690.24 per year). It is unclear why the director's figures differ from those by the AAO which were taken from the petitioner's financial statement.

<sup>7</sup> The director noted the individual household expenses as \$5,557.52 per month (\$66,690.24 per year) for the entire relevant period. The petitioner did not indicate on appeal that the expenses were different in any year.

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).<sup>8</sup> USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a worker or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not stated any uncharacteristic expenditures or losses he incurred which adversely affected his income. There are no other factors in the record which would establish the petitioner's ability to pay the proffered wage from the priority date onward. 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 beneficiary has three months of experience in the proffered profession or three months experience in the related occupation of "Babysitter" as of the April 30, 2001 priority date as required by the ETA 750. As previously stated, the petitioner must demonstrate that, on the priority date, the beneficiary had the 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). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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) (the AAO reviews appeals on a de novo basis).

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

(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

---

<sup>8</sup> 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.

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.

The ETA 750 lists the beneficiary's experience as working as a babysitter for Ana Mana de Montenegro in El Salvador from January 1997 until February 1998. The record does not, however, provide documentation from that employer attesting to the required experience and which complies with the requirements of 8 C.F.R. § 204.5(1)(3). The director requested such evidence in his RFE. Nothing shows that the petitioner submitted any evidence of the beneficiary's prior experience despite this request. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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.