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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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[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date:

JAN 10 2011

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

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:

[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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a general houseworker. 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 it 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 September 10, 2008 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.

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 October 2, 2002. The proffered wage as stated on the Form ETA 750 is \$11.45 per hour, which equates to \$23,816 per year. The Form ETA 750 states that the position requires six years of grade school education and four years of high school education.

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

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.

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); *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).

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 petitioner is a private household. The petitioner's adjusted gross income, assets and personal liabilities are considered in the determination of the petitioner's ability to pay. Individual petitioners must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, they 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 (7th Cir. 1983).²

In the instant case, the private household consists of the petitioner, his spouse and one dependent (the petitioner's sister). The petitioner's Internal Revenue Service (IRS) Forms 1040, U.S. Individual Tax Returns, reflect the following:

<u>YEAR</u>	<u>ADJUSTED GROSS INCOME (AGI) (\$)</u> ³
2002	14,615
2003	-1,135
2004	65,177
2005	76,533
2006	70,325
2007	71,313

The petitioner's AGI fails to cover the proffered wage in 2002 and 2003. It is improbable that the petitioner could support himself and his family on a deficit, which is what remains in 2002 and 2003 after reducing his AGI by the amount required to pay the beneficiary the proffered wage. In each of the years 2004, 2005, 2006 and 2007, the proffered wage of \$23,816 equals more than 30% of the petitioner's AGI.⁴ The petitioner has failed to submit a full accounting of his household expenses, and, therefore, the AAO cannot determine if he can pay the beneficiary the proffered wage and cover all of his expenses in all relevant years based on the petitioner's AGI and submitted expenses.⁵

² 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.

³ AGI is listed on IRS Form 1040 line 35 (2002), line 34 (2003), line 36 (2004), and line 37 (2005 - 2007).

⁴ 36.5% in 2004, 31.1% in 2005, 33.9% in 2006, and 33.4% in 2007.

⁵ On July 31, 2008, the director issued a Request for Evidence (RFE), asking the petitioner, in part, to submit a full accounting of his monthly household expenses including, but not limited to, "housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, homeowner, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses." In a response received on September 2, 2008, the petitioner submitted two Verizon monthly statements (dated July and August 2008), three Dominion Power statements (dated June, July and August 2008), three Washington Gas statements (dated June, July and August 2008), and one Arlington County water/sewer/refuse statement (dated March 2008). On appeal, the petitioner also submits a Verizon statement (dated October 2008), a Washington Gas statement

On appeal, counsel asserts that the petitioner has the capacity to pay the beneficiary the proffered wage “not only because he has a stable and revenue-generating business, but also because of his strong financial portfolio and personal assets solely registered under his name.” In support of these assertions, counsel submits:

- First Union account statements for April 25, 2002 through May 24, 2002 showing a closing balance of \$8,587.66; for June 25, 2002 through July 24, 2002 showing a closing balance of \$4,376.44; and, for January 28, 2003 through February 24, 2003 showing a closing balance of \$7,915.23.
- Wachovia Securities CAP account statements for November 30, 2002 showing an account value of \$122,310.84; and for December 31, 2002 showing an account value of \$122,355.57.
- [REDACTED] account (cash and money fund and mutual funds) statement for November 2003 showing an account value of \$97,059.75.
- [REDACTED] statements for October 2003 showing an account value of \$477,360.36; November 2003 showing an account value of \$483,833.39; December 2007 showing an account value of \$749,913.12; and, August 2008 showing an account value of \$666,054.46.

Based on the above, the petitioner has established sufficient personal assets to establish its ability to pay the beneficiary the proffered wage in 2002, 2003, 2007 and 2008. However, it has not established sufficient personal assets to pay the beneficiary the proffered wage in 2004, 2005 and 2006.

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

(dated September 2008), and photocopies of the front of three checks made out by the petitioner to Washington Gas (dated January and May 2002) and Dominion Virginia Power (dated July 2002). The petitioner has failed to submit any additional recurring monthly expenses as requested in the RFE. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 *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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner has not established that it had the continuing ability to pay the proffered wage.

Based on the evidence submitted, the AAO affirms the decision of the director. The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Further, beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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. 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 six years of grade school and four years of high school education.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's education, she did not list any entries regarding her grade school education.

As previously indicated, the Form ETA 750 states that the position requires six years of grade school education, and four years of high school education. The record does not include evidence of the beneficiary's education.⁶

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(D) states that 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 certification. In this case, the evidence does not demonstrate that the beneficiary has the six years of grade school and four years of high school education required for the proffered position. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

⁶ The director requested the petitioner to submit evidence of the beneficiary's qualifications in his RFE, dated July 31, 2008; however, the petitioner failed to submit any such evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).