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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



B6

FILE:



Office: TEXAS SERVICE CENTER

Date:

JAN 10 2011

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,

Kerian S. Pollock for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and a subsequent motion to reopen was dismissed by the director because it was unsupported by additional evidence or arguments. The case 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 housekeeper. 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 April 24, 2008, denial, the single 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 July 24, 2007. The proffered wage as stated on the Form ETA 750 is \$7.49 per hour (\$15,579.20 per year). The Form ETA 750 states that the position requires three months of experience in the job offered.

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 evidence in the record of proceeding shows that the petitioner is a private household. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked as a housekeeper for [REDACTED] from December 1999 to April 2000 and for the petitioner since January 2001.

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 beneficiary claimed to have worked for the petitioner since January 2001; however, the petitioner did not provide any evidence that he paid the beneficiary the full proffered wage subsequent to the priority date in 2001.

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 an individual, therefore the adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay. 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 (7th 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 supported a family of three in 2001, and a family of four since 2002. The proprietor's tax returns² reflect the following income:

- 2001 = \$21,402
- 2002 = \$24,997
- 2003 = \$39,822
- 2004 = \$57,281
- 2005 = \$58,646
- 2006 = \$66,991
- 2007 = \$79,339

However, the petitioner also claimed the following monthly personal expenses:

- 2001 = \$1,410 per month (\$16,920 per year)
- 2002 = \$1,510 per month (\$18,120 per year)
- 2003 = \$1,565 per month (\$18,780 per year)
- 2004 = \$1,635 per month (\$19,260 per year)
- 2005 = \$1,789.20 per month (\$21,470.40 per year)
- 2006 = \$1,807.20 per month (\$21,686.40 per year)
- 2007 = \$1,828.19 per month (\$21,938.28 per year)

It was improbable that the petitioner could support himself and his family on a deficit, which is what remained after reducing the adjusted gross income in 2001 and 2002 by the proffered wage and the petitioner's claimed personal expenses. Accordingly, the director denied the petition because the petitioner had failed to establish his ability to pay the proffered wage.

On appeal, counsel states that the petitioner "had substantial equity" in real estate that should have been considered in determining the petitioner's ability to pay the proffered wage. However, real estate is not a readily liquefiable asset and it is unlikely that the petitioner would sell such assets to pay the beneficiary's wage. Further, if the petitioner plans to borrow against his equity in the property to pay the proffered wage, USCIS will give less weight to loans and debt as a means of

² Adjusted Gross Income as reflected on IRS Form 1040, U.S. Individual Income Tax Return, Line 33 (2001), Line 35 (2002), Line 34 (2003), Line 36 (2004), and Line 37 (2005, 2006 and 2007).

paying salary since the debts will increase the petitioner's liabilities and will not improve his overall financial position.³ Further, the petitioner has not provided evidence that he is able to obtain such a loan. USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

On appeal, counsel asserts that the petitioner suffered a work-related injury in 1995 "and in December 2001 he had surgery to ameliorate the effects of the accident. As a result of the accident and subsequent surgery, his income was significantly lower in 2001 and 2002."

In a Notice of Derogatory Information (NDI), dated September 29, 2010, the AAO noted that the petitioner's summary of expenses did not claim any expenses for clothing, childcare, or school, nor did the summary include medical expenses, gifts to charity and unreimbursed employee expenses that the petitioner had claimed on his IRS Forms 1040, Schedule A. In response to the NDI, the petitioner amended his personal expenses to the following:

- 2001 = \$20,926
- 2002 = \$21,406
- 2003 = \$23,097
- 2004 = \$23,072
- 2005 = \$24,120.40
- 2006 = \$24,678.40
- 2007 = \$26,059.28

In the NDI, the petitioner was specifically requested to provide "independent, objective evidence of your family's household living expenses from 2001 through 2007." However, in response the petitioner has provided only copies of three electric bills. 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 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).

The petitioner also stated in response to the NDI that he and his wife had received vocational rehabilitation benefits and temporary total disability benefits in 2001, 2002, 2006 and 2007 that were not reflected on their Form 1040 tax return. Combined with the income reflected above, the petitioner had the following income:

- 2001 = \$43,727
- 2002 = \$38,297
- 2003 = \$39,822
- 2004 = \$57,281

³ A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

- 2005 = \$58,646
- 2006 = \$106,991
- 2007 = \$79,339⁴

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 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 evidence provided confirms counsel's assertion that the petitioner's income in 2001 and 2002 was significantly reduced due to a personal injury and that the petitioner's adjusted gross income, as detailed above, has grown steadily since then. However, the petitioner has provided two summaries of his personal expenses that differ significantly from each other. Despite the AAO's specific request for evidence, the petitioner failed to provide independent, objective evidence of his household expenses. 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.

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.

⁴ The petitioner claimed additional income of \$4,739.70 in 2007; but as this amount was listed on a Form W-2, Wage and Tax Statement, issued to the petitioner, it must be assumed that this was taxable income that was reflected in the tax records detailed above.