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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

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 26 2011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private individual. It seeks to employ the beneficiary permanently in the United States as a children's tutor (live-in). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 March 3, 2009 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.

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

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 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

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).

priority date, which is the date the ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on January 10, 2006.² The proffered wage as stated on the Form ETA 750 is \$9.01 per hour (\$18,740 per year). The ETA Form 9089 states that the position requires one year of experience as a children's tutor.

The evidence in the record of proceeding indicates that the petitioner is a private individual. On the ETA Form 9089, signed by the beneficiary on July 6, 2007, the beneficiary did not state that she ever worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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

² The beneficiary shares the same surname as the petitioner's wife. The Form ETA 9089 specifically asks in Section C.9, "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien." The petitioner checked the "No" box in response to this question. 20 C.F.R. § 656.17(l) states in pertinent part:

- (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

* * *

- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

In any further filings, the petitioner should address what relationship, if any, the petitioner has to the beneficiary. "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).

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. In the instant case, the petitioner submitted no evidence that it ever employed or paid the beneficiary any wages.

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, 881 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash,

neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

The petitioner is an individual. Therefore the individual's adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay. Individuals report income and expenses on Form 1040 federal tax return each year. Individuals must show that they can cover their existing personal expenses and support any dependents as well as pay the proffered wage out of their adjusted gross income or other available funds. *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 submitted tax information for the following years, which reflect that he has a spouse and supports two dependents:

Year	AGI	Estimated Household Expenses	Remainder
2006	\$39,367	\$26,407	\$12,960
2007	\$30,867	\$26,407	\$4,460

We will consider a sole proprietor's total income or AGI, reflected on the Form 1040 as a whole. *See Ubeda*, 539 F.Supp. 647. In response to the director's Request for Evidence ("RFE"), the petitioner submitted a letter through counsel stating that the average monthly household expenses are \$2,200 (\$26,407 per year). The petitioner's AGI, less the household expenses, does not leave enough funds to pay the entire proffered wage to the beneficiary. The petitioner, however, also submitted documentation with its response to the RFE that demonstrates a much higher annual expense. Specifically, the petitioner submitted local tax assessments for two properties in the amount of \$2,610.52 and \$1,798.77, a May 2008 mortgage statement showing monthly payments of \$1,953.74 (the August 2007 mortgage statement indicates a monthly payment of \$1,949.93), a winter 2008 electric bill showing two monthly charges of \$123.69 and \$113.55, a summer 2008 gas bill showing successive monthly charges of \$194.97 and \$108.95, a May 2008 telephone bill for \$131.11, an April 2008 cable bill for \$55.72, and a quarterly water bill for \$84.51. These charges annualized are \$33,672 and do not include food, entertainment, or clothing expenses; as the director noted in his decision, the mortgage payment alone is \$23,444.88 per year. Therefore, the petitioner's

self-estimated expenses are in question. "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). "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Id.* at 591. Whichever estimate is used, the petitioner's or the AAO's partial calculation, the petitioner cannot demonstrate that he can pay the proffered wage and pay the household expenses.

On appeal, counsel does not challenge the director's assessment or calculation of the mortgage payments and his expenses, but instead states that the petitioner's AGI should be modified to consider the expenses pertaining to real property and rental income that were "already . . . deducted from the total income" and that certain childcare expenses evidenced on the Forms 1040 would not have been incurred on top of the beneficiary's salary. The petitioner recorded rental real estate, royalties, partnerships, S corporations as a loss on its tax return, which served to reduce its AGI and taxable income. The petitioner cannot now claim these amounts as available funds to pay the proffered wage.

The Form 2441 provided with the 2006 Form 1040 states that the petitioner paid an individual \$6,000 to care for the dependent children. The Form 2441 provided with the 2007 Form 1040 states that the petitioner paid an individual \$5,000 to care for the dependent children and YMCA Childcare \$1,740 during that year. The childcare expenses incurred in 2007, added to the remainder of the petitioner's AGI after household expenses are deducted, is less than the proffered wage for the beneficiary. Further, without resolution of the petitioner's actual household expenses, the AAO cannot accurately determine how much of the petitioner's AGI would remain to cover the proffered wage alone or in consideration with other assets or childcare expenses for either 2006 or 2007.

In response to the director's RFE, the petitioner submitted a statement demonstrating that it holds a \$100,000 life insurance policy, IRA accounts in the amount of \$6,249 and \$11,619, and the front page of one [REDACTED] statement covering the period April 5, 2008 to May 6, 2008 showing that the petitioner had \$11,332.46 in a checking account and \$48,305.66 in a savings account. As the director noted, the life insurance benefit and IRA accounts are not liquefiable so cannot be used to demonstrate the ability to pay the proffered wage. Also, one 2008 bank statement is not sufficient to demonstrate that the petitioner consistently had money available to pay the proffered wage from the 2006 priority date onward. On appeal, the petitioner submitted the front pages of three bank statements from [REDACTED] covering the period December 5, 2008 through March 5, 2009 demonstrating that it had over \$54,000 in a savings account and between \$13,924.72 and \$19,320.99 in a checking account. The bank statements submitted cover only part of 2008 and 2009, so are insufficient alone to establish the petitioner's ability to pay the proffered wage in 2006 or 2007. Counsel states that the interest payments reflected on the petitioner's 2006 and 2007 tax returns from [REDACTED] demonstrate that the petitioner held significant amounts during those years as well. Although the high interest payments do indicate a potential large amount of investment or cash in the account, without copies of the bank statements, we are unable to determine the total amount of funds available, how the assets were held, whether the principal amount was accessible to the

petitioner without penalty, the interest rate, or any other information about the principal amount to be able to determine that it was available 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 (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.

Here, although not a business, the petitioner's totality of the circumstances would not establish the ability to pay. The petitioner submitted no evidence of wages paid to the beneficiary. The tax returns in the record indicate that the petitioner had insufficient AGI for both years to cover household expenses and the proffered wage and presented contradictory information concerning the amount of its household expenses. Although the petitioner submitted evidence of high personal assets held in a bank account in 2008, evidence of similar holdings for 2006 or 2007 was not submitted. The petitioner must establish its ability to pay from the priority date onward. The petitioner submitted no evidence to liken its situation to the one in *Sonogawa* including evidence of its reputation, unusual expenses, or one off year. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it 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.