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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 26 2011

IN RE:

Petitioner:

[Redacted]

Beneficiary:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a household. It seeks to employ the beneficiary permanently in the United States as a housekeeper pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish the ability to pay the proffered wage as well as to sustain her household expenses from the priority date through the present, and therefore, denied the petition.

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.

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

As set forth in the director's February 7, 2009 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 as well as to sustain her household during the period.

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 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

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).

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 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 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 March 3, 2004. The proffered wage as stated on the Form ETA 750 is \$16.03 per hour (\$33,342.40 per year). On the Form ETA 750B signed by the beneficiary on February 11, 2004, she did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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. In the instant case, the petitioner did not claim that she employed and paid the beneficiary for any period since the priority date and did not provide any documentary evidence showing that the petitioner paid the beneficiary any compensation for her services. Therefore, the petitioner failed to demonstrate that she paid the beneficiary the proffered wage from the priority date to the present, and thus, failed to establish her ability to pay the proffered wage through examination of wages actually paid to the beneficiary.

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

The petitioner in the instant matter is a household. Therefore the household's adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay the proffered wage. A household reports their income on the individual income tax return each year. For a household, USCIS considers net income to be the figure shown on line 37², Adjusted Gross Income, of the household's Form 1040 U.S. Individual Income Tax Return. The household must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, the household must show that they can sustain themselves and their dependents. *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.

The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the petitioning household for 2004 through 2008. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

- In 2004, the Form 1040 stated adjusted gross income of \$62,516.
- In 2005, the Form 1040 stated adjusted gross income of \$59,699.
- In 2006, the Form 1040 stated adjusted gross income of \$60,794.
- In 2007, the Form 1040 stated adjusted gross income of \$74,218.
- In 2008, the Form 1040 stated adjusted gross income of \$78,158.

In response to the director's request for evidence (RFE) dated December 17, 2008, counsel submitted a statement of monthly expenses dated January 5, 2009 from the petitioner stating that the petitioner's household spends \$2,837.53 per month. On appeal, the petitioner asserts that the monthly expense statement dated January 5, 2009 is for her 2007 household expenses only and submitted additional monthly expenses statements for 2004, 2005 and 2006.

The 2004 monthly expenses statement shows that the petitioner's household spent a total of \$1,014.22 per month (approximately \$12,170.64 per year) in 2004 including \$634.70 for rent,

² The line for adjusted gross income on Form 1040 varies every year, however, it is Line 36 for 2004, and Line 37 for 2005, 2006, 2007 and 2008.

\$32.95 for electricity, \$125 for food, \$25 for clothing, laundry cleaner, \$93.57 for cable and telephone, and \$103 for credit card. However, the petitioner's individual income tax return for her 2004 Schedule A shows that the petitioner spent a total of \$24,247 in 2004 including \$5,041 on taxes, \$16,519 on gifts to charity, and \$2,687 on unreimbursed employee expenses. None of the items listed in each statement overlapped. Therefore, the AAO finds that the statement provided by the petitioner for her 2004 expenses does not cover all expenses for that year. The reasonable total expenses the petitioner's household spent in 2004 should be \$36,417.64.³ Thus, the AAO will not accept the petitioner's monthly expenses statement for 2004, but rather the figure calculated by this office as the proper amount for the petitioner's living expenses in 2004.

The 2005 monthly expenses statement shows that the petitioner's household paid rent of \$663.26 per month until July 5 (approximately \$4,642.82 in 2005) and mortgage of \$1,461.22 from September 1, 2005 (approximately \$5,844.88 in the year), \$31.98 for electricity, \$150 for food, \$30 for clothing, laundry cleaner, \$95.77 until July 5 and \$120 from August 5 for cable and telephone, and \$158 for credit card, totaling \$16,197.85 for the year. However, the petitioner's Schedule A to her individual income tax return for 2005 shows that the petitioner spent a total of \$35,085 in 2005 including taxes of \$5,864, mortgage interests and points of \$2,197, gifts to charity of \$17,244 and unreimbursed employee expenses of \$9,780. The only item on the Schedule A that overlapped with the petitioner's monthly expenses statement is the mortgage interests. Since mortgage paid covers the principal repayment, mortgage interests paid and points paid, it is concluded that the petitioner's total expenses on mortgage should be considered instead of mortgage interests paid. Therefore, the AAO finds that the statement provided by the petitioner for 2005 expenses does not cover all expenses she spent that year. The reasonable total expenses the petitioner's household spent in 2005 should be \$49,085.85.⁴ Thus, the AAO will not accept the petitioner's monthly expenses statement for 2005, but rather the figure calculated by this office as the proper amount for the petitioner's living expenses in 2005.

The 2006 monthly expenses statement shows that the petitioner's household spent a total of 2,184.62 per month (approximately \$26,215.44 per year) in 2006 including \$1,558.75 for rent, \$55.08 for electricity and gas, \$51.77 for water, \$150 for food, \$30 gasoline, \$30 for clothing, laundry cleaner, \$109.02 for cable and telephone, and \$200 for credit card. However, the petitioner's Schedule A to her individual income tax return for 2006 shows that the petitioner spent a total of \$37,443 in 2006 including \$5,336 on taxes, \$21,081 on gifts to charity, and \$11,026 on unreimbursed employee expenses. None of the items listed in each statement overlapped. Therefore, the AAO finds that the statement provided by the petitioner for her 2006 expenses does not cover all expenses she spent that year. The reasonable total expenses the

³ The total amount of \$12,170.64 claimed in the petitioner's living expenses statement for the year 2004 plus the total itemized expenses of \$24,247 reported on Schedule A to the Form 1040.

⁴ The total itemized expenses of \$35,085 reported on Schedule A to the Form 1040 minus mortgage interests of \$2,197 reported on Schedule A since it overlaps with the mortgage payments claimed in the petitioner's monthly expenses statement and then plus the total amount of \$16,197.85 claimed in the petitioner's living expenses statement for the year 2005.

petitioner's household spent in 2006 should be \$63,658.44.⁵ Thus, the AAO will not accept the petitioner's monthly expenses statement for 2006, but rather the figure calculated by this office as the proper amount for the petitioner's living expenses in 2006.

The 2007 monthly expenses statement dated January 5, 2009 shows that the petitioner's household spent a total of 2,837.53 per month (approximately \$34,050.36 per year) in 2007 including \$1,424.66 for home mortgage, \$70 for electricity, \$150 for gas, \$75 for water, \$200 for food, \$40 gasoline, \$40 for clothing, laundry cleaner, \$130 for cable and telephone, \$122.87 for car insurance and \$585 for credit card. The petitioner's Schedule A to her individual income tax return for 2007 shows that the petitioner spent a total of \$44,656 in 2007 including medical and dental expenses of \$700, taxes of \$6,404, mortgage interests of \$12,551, gifts to charity of \$20,131 and unreimbursed employee expenses of \$4,870. The only item in the Schedule A overlapping with the petitioner's monthly expenses statement is the mortgage interests. Since mortgage payment covers the principal repayment, mortgage interests paid and points paid, it is concluded that the petitioner's total expenses on mortgage should be considered instead of mortgage interests paid. Therefore, the AAO finds that the statement provided by the petitioner for 2007 expenses does not cover all expenses she spent that year. The reasonable total expenses the petitioner's household spent in 2007 should be \$66,155.36.⁶ Thus, the AAO will not accept the petitioner's monthly expenses statement for 2007, but rather the figure calculated by this office as the proper amount for the petitioner's living expenses in 2007.

Counsel did not submit a monthly expenses statement for 2008. Without such a statement, the AAO cannot determine whether the petitioning household had sufficient adjusted gross income to pay the proffered wage as well as to cover the household's living expenses for 2008. However, the petitioner's Schedule A to her individual income tax return for 2008 shows that the petitioner spent a total of \$50,883 on possible deductible items in 2007 including taxes of \$6,497, mortgage interests of \$12,352, gifts to charity of \$20,958 and unreimbursed employee expenses of \$11,076. While expenses on possible deductible items do not cover all living expenses spent by the petitioning household, the AAO finds that the petitioning household spent at least \$50,883 for the petitioner's living expenses in 2008.

As previously indicated, the petitioner had adjusted gross income of \$62,516 in 2004. While it was sufficient to pay the beneficiary the proffered wage of \$33,342.40 for that year, the balance of \$26,098.36 after covering the petitioning household's living expenses of \$36,417.64 from the adjusted gross income was not sufficient to pay the beneficiary the proffered wage that year. The petitioner had adjusted gross income of \$59,699 in 2005. However, the balance of \$10,613.15 after covering the petitioning household's living expenses of \$49,085.85 from the

⁵ The total amount of \$26,215.44 claimed in the petitioner's living expenses statement for the year 2006 plus the total itemized expenses of \$37,443 reported on Schedule A to the Form 1040.

⁶ The total itemized expenses of \$35,085 reported on Schedule A to the Form 1040 minus mortgage interests of \$2,197 reported on Schedule A since it overlaps with the mortgage payments claimed in the petitioner's monthly expenses statement and then plus the total amount of \$16,197.85 claimed in the petitioner's living expenses statement for the year 2005.

adjusted gross income was not sufficient to pay the beneficiary the proffered wage that year. The petitioner had adjusted gross income of \$60,794 in 2006 which was insufficient to cover the petitioning household's living expenses of \$63,658.44 even without considering payment of the proffered wage to the beneficiary. The petitioner had adjusted gross income of \$74,218 in 2007. However, the balance of \$8,062.64 after covering the petitioning household's living expenses of \$66,155.36 from the adjusted gross income was not sufficient to pay the beneficiary the proffered wage that year. The petitioner had adjusted gross income of \$78,158 in 2008 and counsel did not submit the statement of the petitioning household's living expenses for 2008. Without such a statement, the AAO cannot determine whether the petitioning household had sufficient adjusted gross income to cover the household's living expenses as well as to pay the beneficiary the proffered wage for 2008. However, the petitioner's tax return for 2008 shows that the balance of \$27,275 after covering the petitioning household's partial living expenses of \$50,883 reported on Schedule A from the adjusted gross income was not sufficient to pay the beneficiary the proffered wage that year although the expenses reported on Schedule A do not cover complete living expenses for the petitioning household for 2008.

USCIS considers the individual employer's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the petitioner submitted documents trying to show that the petitioner had some rental income in 2005 and 2006. Rental income should be reported on Line 17, Rental real estate, royalties, partnerships, S corporations, trusts, etc. of the Form 1040, and therefore, it is already included in adjusted gross income which has already been fully considered as the petitioner's net income in this case. Besides, the petitioner reported a loss from rental real estate for 2005 and 2006. Therefore, counsel failed to establish that the petitioner had liquefiable assets to establish the ability to pay.

The record of proceeding contains bank statements from the petitioner's bank accounts. If the accounts represent what appears to be the household's checking account, these funds are most likely shown on the petitioning household's returns and expenses statements as income and expenses. However, if the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the petitioning household to pay the proffered wage and/or personal expenses. The record contains bank statements for the petitioning household's savings account for August and December 2004, with an average monthly balance of \$10,683.13. The average balance is not sufficient to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for a year. However, the balance of \$9,639.70 at the end of 2004 can be considered as the petitioner's extra liquefiable assets in determining the petitioner's ability to pay the proffered wage for 2004. As previously discussed, the petitioner had a short of \$7,244.04 to pay the beneficiary the proffered wage with the balance of \$26,098.36 after covering the petitioning household's living expenses of \$36,417.64 from the adjusted gross income was not sufficient to pay the beneficiary the proffered wage that year. Adding the balance of \$9,639.70 in the petitioner's saving account at the end of year 2004 to the balance of \$26,098.36 after covering the petitioning household's living expenses of \$36,417.64 from the adjusted gross income, the petitioner had sufficient funds to pay the beneficiary the proffered wage of \$33,342.40 for 2004. Therefore, the petitioner established her ability to pay the beneficiary the proffered wage as well as to cover her household's living expenses for 2004. However, the

record does not contain any bank statements from the petitioner's saving account for 2005 through 2008 and thus, the petitioner failed to establish her ability to pay with extra liquefiable assets in her saving account for these years.

USCIS may also 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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 [REDACTED], 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.

The statements of the petitioning household's living expenses for 2004 through 2007 are not complete and thus are not acceptable as primary evidence in determining the petitioner's ability to pay. With the AAO's calculated figures of the petitioning household's living expenses, the petitioner failed to establish her ability to pay the proffered wage as well as to cover her family's living expenses for four of five years from 2005 through 2008. Therefore, it is concluded that the petitioner's adjusted gross income for 2005 through 2008 was insufficient to cover her family's living expenses as well as to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioning household has not established that she had the continuing ability to pay the proffered wage as well as to support the household for all relevant years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2004, the petitioner failed to establish its continuing ability to pay the proffered wage for all the years 2005 through the present.

Counsel's assertions and evidence submitted on appeal cannot overcome the ground of denial in the director's February 7, 2009 decision. The petitioner failed to establish that she had the

continuing ability to pay the proffered wage as well as to support her household beginning on the priority date and continues to the present. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.