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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090



U.S. Citizenship  
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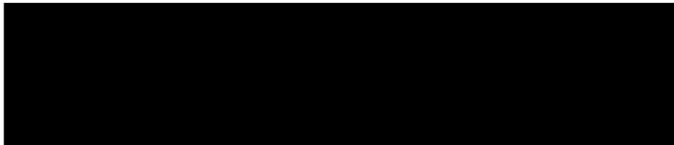
JUL 20 2011

IN RE: Petitioner:  
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:



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 an individual. He seeks to employ the beneficiary permanently in the United States as a housekeeper as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 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. On February 18, 2011, the AAO issued a Notice of Intent to Deny and Request for Evidence (NOID/RFE) noting additional deficiencies in the record of proceeding. The AAO noted its intent to deny the petition because the position as certified by the DOL may not be classified as one for an unskilled worker and because it does not appear likely that the petitioner intends to employ the beneficiary in the proffered position and according to the terms and conditions set forth on the labor certification.<sup>1</sup>

#### *Classification of the Beneficiary as an Unskilled Worker*

As a threshold issue, the petition must be denied because the beneficiary may not be classified as an unskilled worker. 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>2</sup>

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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(i) of the Act, 8

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<sup>1</sup> It is noted that the AAO is satisfied based on the petitioner's response to its NOID/RFE that the petitioner would qualify as an employer which has a location in the United States to which a worker may be referred for employment despite his frequent travel to Thailand.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on February 15, 2008. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for "any other worker (requiring less than two years of training or experience)."

In response to the AAO's NOID/RFE, counsel submits an "amended" Form I-140 in which Part 2.e. is ticked to indicate that the petition is for a skilled worker or professional. Counsel asserts that the petitioner made a "typographical error" on Form I-140 and that the petitioner intended to check Part 2.e. indicating that it was filing the petition for a skilled worker.

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the position requires two years of work experience in the job offered. However, the petitioner requested the unskilled worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The evidence submitted does not establish that the beneficiary may be found qualified for classification as an unskilled worker, and the petition must be denied for this additional reason. 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 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145.

#### *Ability to Pay the Proffered Wage*

The second issue in this matter is whether the petitioner has established that he had the continuing ability to pay the proffered wage as of the priority date.

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 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 May 1, 2001. The proffered wage as stated on the Form ETA 750 is \$27,747.20 per year (\$13.34 per hour). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 20, 2001, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that his job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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, 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 director requested in his January 26, 2009 request for evidence that the petitioner submit any Forms W-2 issued to the beneficiary if she had been employed by him any time after May 1, 2001. In response, the petitioner did not submit any Forms W-2. The AAO similarly requested evidence of wages paid to the beneficiary in its NOID/RFE. The AAO requested the beneficiary's personal federal income tax returns from 2001 to present along with written/printed indicia of compensation from the petitioner paid to the beneficiary.

In response to the AAO's request, counsel submitted for the first time a set of "receipts" purportedly representing wages paid to the beneficiary from January 16, 2006 to December 31, 2010. Counsel claims that "[s]ince 2006, the Petitioner has paid the Beneficiary in cash and had the Beneficiary sign a receipt." However, counsel did not corroborate these internally-generated receipts with the beneficiary's personal federal income tax returns. Counsel also did not submit any Forms 1099-MISC, cancelled checks, the beneficiary's bank statements showing the deposit of the wages, or any other evidence establishing that these receipts truly represent wages paid to the beneficiary over a five year period. The receipts alone, without corroboration, are not credible evidence of wages paid to the beneficiary. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has not established that he employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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).

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 supports himself. The petitioner's tax returns reflect the following information for the following years:

Petitioner's 2001 adjusted gross income:

\$88,701.00

Petitioner's 2002 adjusted gross income:	\$133,179.00
Petitioner's 2003 adjusted gross income (Form 1040, line 34):	\$178,111.04
Petitioner's 2004 adjusted gross income (Form 1040, line 36):	\$173,052.00
Petitioner's 2005 adjusted gross income (Form 1040, line 37):	\$121,296.00 <sup>3</sup>
Petitioner's 2006 adjusted gross income (Form 1040, line 37):	\$9,318.00 <sup>4</sup>
Petitioner's 2007 adjusted gross income:	\$100,672.00 <sup>5</sup>
Petitioner's 2008 adjusted gross income:	\$130,156.00
Petitioner's 2009 adjusted gross income:	\$130,125.00

It is noted that the petitioner did not submit tax returns for 2001 or 2002. Instead, the petitioner submitted tax transcripts. The regulation at 8 C.F.R. § 204.5(g)(2) states that "[e]vidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The regulation does not list tax transcripts as one of three types of evidence permitted to establish a petitioner's ability to pay the proffered wage. While tax transcripts may be used to corroborate submitted tax returns, they may not replace copies of the actual tax returns, which are required by the regulation. Tax transcripts do not contain all of the data which USCIS needs to fully evaluate a petitioner's ability to pay the proffered wage, such as an individual petitioner's schedule A, which is discussed *infra*. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Accordingly, the 2001 and 2002 tax transcripts will only be considered generally.

In response to the director's request for evidence, the petitioner submitted a list of household expenses totaling \$4,675.00 per month. On March 18, 2001, in response to the AAO's NOID/RFE, the petitioner claimed additional monthly expenses pertaining to his home in Thailand as follows: \$1,180.00 (2006); \$1,200.00 (2007); \$1,275.00 (2008); and \$1,350.00 (2009).

<sup>3</sup> Lines 7 through 26 of the petitioner's 2005 tax return are obscured by copies of the petitioner's Forms W-2. Therefore, as a complete tax return has not been submitted for USCIS review, the petitioner's evidence of ability to pay the proffered wage for 2005 is incomplete.

<sup>4</sup> In 2006, the petitioner claims to have had foreign income which was properly excluded from his adjusted gross income. This income is typically described in Form 2555, Foreign Earned Income, which is filed with the Form 1040. Although the first page of the petitioner's 2006 Form 1040 indicates that he had \$86,400.00 in foreign income, the petitioner did not submit a Form 2555 or any evidence of this income. Once again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Accordingly, the AAO will not consider this claimed foreign income for 2006 in evaluating the petitioner's ability to pay the proffered wage.

<sup>5</sup> In 2007, 2008, and 2009, the petitioner claims to have had foreign income which was properly excluded from his adjusted gross income. As the tax returns were accompanied by credible Forms 2555, this foreign income will be considered in this matter.

However, when compared to other evidence in the record, it is clear that the petitioner's claimed monthly expenses have been understated. For example, in 2008, the petitioner itemized his deductions on his Form 1040 and attached a Schedule A. Schedule A lists \$37,251.00 in home mortgage interest and \$7,536.00 in real estate taxes. However, the petitioner's list of monthly expenses entirely omits this real estate tax obligation of approximately \$628.00 per month. If it had been listed, this would have been the second largest obligation on the list. Such a substantial omission undermines the credibility of the list of expenses. Moreover, as noted by the AAO in its NOID/RFE, the petitioner failed to list any expenses for clothing in his list of expenses, which is also unrealistic. The petitioner also failed to list any wages paid to the beneficiary, which undermines the credibility of both the list of monthly expenses and the petitioner's claim to have employed and compensated the beneficiary. Accordingly, the AAO declines to accept the petitioner's lists of household expenses. 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. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Finally, counsel submits evidence of the petitioner's personal assets. On appeal, counsel submitted evidence that, from 2007 through 2008, the petitioner maintained a balance in his 401(k) of over \$100,000.00. Counsel also submitted evidence of liquid assets in bank accounts in Thailand. The petitioner claims assets held in Thai baht of \$25,970.02 in 2006, \$32,918.65 in 2007, and \$41,236.73 in 2008. However, the record is devoid of asset evidence from the priority date in 2001 through 2005.

In view of the above, the AAO concludes that the petitioner has failed to establish his continuing ability to pay the proffered wage since 2001. The petitioner failed to submit complete tax returns for 2001 and 2002. The tax transcripts provided for 2001 and 2002 omit material facts that are needed to properly evaluate the petitioner's claims. For example, the tax transcripts do not include data from the petitioner's Schedules A. In view of the inconsistencies between the Schedules A in the record for later tax years and the petitioner's lists of monthly expenses, it is imperative that the petitioner submit the required evidence. Accordingly, the petitioner has not established his ability to pay the wage in 2001 and 2002.

Moreover, the petitioner failed to submit a complete tax return for 2005. The obscured tax return is of scant value, especially in view of the inconsistencies noted above. The obscured tax return also hides line 21 of the return, which is the line on which any foreign income exclusion would have been inserted, which is material in this case. Accordingly, the petitioner has not established his ability to pay the wage in 2005.

Furthermore, the petitioner failed to submit a complete tax return for 2006. As noted above, although the petitioner claims to have had substantial foreign income in 2006 which was omitted from his AGI, the petitioner failed to submit a copy of the Form 2555 or other credible evidence of this income. Therefore, the AAO will only consider his 2006 AGI, which was substantially below the proffered wage, i.e. \$9,318.00. It is improbable that the petitioner could have supported himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage and his purported reasonable household expenses. Although the petitioner claims to have had assets in Thailand in 2006 of \$25,970.02, these would not have been sufficient to pay the proffered wage of \$27,747.20. While counsel claims on appeal that the petitioner had 401(k) assets in 2006, the record does not contain corroborating evidence from 2006. The account statements begin in 2007. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the petitioner has failed to establish his ability to pay the wage in 2006.

Finally, due to the unreliability of the petitioner's claimed monthly household expenses, it cannot be concluded that the petitioner established his ability to pay the proffered wage for any of the other years in question. Although the petitioner had substantial income and/or assets in 2003, 2004, 2007, 2008, and 2009, it cannot be concluded that these assets would have been sufficient to support the petitioner, who maintained homes in the United States and Thailand, given that the list of household expenses is inconsistent with other evidence in the record and omits substantial recurring expenses. *See supra*. Once again, 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. at 591-592.

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 Matter of Sonogawa*, 12 I&N Dec. 612.<sup>6</sup> USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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<sup>6</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.

In the instant case, the AAO did consider the petitioner's foreign assets and income. However, 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 record contains substantial gaps in evidence and material inconsistencies which render it impossible to conclude that the petitioner more likely than not had the continuing ability to pay the proffered wage since the priority date.

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.