

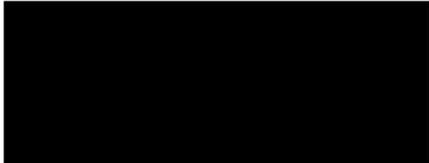
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

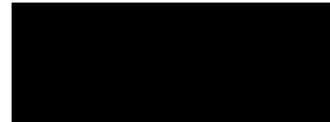


U.S. Citizenship  
and Immigration  
Services



B6

DATE: JUL 20 2011 Office: NEBRASKA SERVICE CENTER



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:

SELF-REPRESENTED

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.

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 The director's decision will be withdrawn and the matter remanded for further consideration and a new decision.

The petitioner is a household. It seeks to employ the beneficiary permanently in the United States as a live-out house worker. 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 the petition was based on a bona fide job offer but rather that a pre-existing familial relationship may have affected the labor certification process. 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 May 22, 2009 denial, the issue in this case is whether or not the petition was based on a bona fide job offer and whether a pre-existing familial relationship may have affected the labor certification process.

The director issued a Request for Evidence (RFE) in which he noted that a previously submitted Form I-130, Petition for Alien Relative, filed on behalf of the beneficiary, showed that that petition was filed by the beneficiary's brother who is also the petitioner in the instant matter. Hence, the director requested that the petitioner submit verifiable documentary evidence that a bona fide job opportunity exists and was open to qualified U.S. workers. The director specifically requested that the petitioner indicate whether the petitioner clearly informed the DOL at the time of the application in the instant case of the familial status of the beneficiary, and that she was already the beneficiary of a petition for an alien relative of a U.S. citizen. In response to the RFE, the petitioner indicated that he informed the DOL of the familial status of the beneficiary but did not inform the DOL about the petition for an alien relative.

In the decision, the director determined that because the beneficiary of the instant petition is also the beneficiary of a family-based petition, and the beneficiary lives with and is a dependent of, the petitioner, and the beneficiary is currently employed by the petitioner as a live-in house worker, United States Citizenship and Immigration Services (USCIS) could not accept the statement made by the petitioner on the labor certification that the job opportunity was and is open to any qualified U.S. worker. The director found that the familial relationship of the petitioner to the beneficiary invalidates the bona fide job offer to qualified U.S. workers upon which the petition is based. Consequently, the director denied the petition.

On appeal, the petitioner asserts that although he has filed a Form I-130 petition on behalf of his sister, the beneficiary in the instant case, there is no such law against it and that that action should not invalidate the labor certification.

Upon review of the record, the AAO has determined that the petitioner properly responded to the RFE issued by the director and that it does not appear that the petitioner misrepresented the fact of the familial relationship to the DOL. The Form ETA 750 does not appear to have been improvidently approved by the DOL. Therefore, the director's decision with respect to the familial relationship issue is withdrawn, and the AAO will remand the case to the director for further action.

The petition may not be approved; however, as the record does not establish that the petitioner has the continuing ability to pay the proffered wage as of the priority date.

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 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 July 15, 2002. The proffered wage as stated on the Form ETA 750 is \$7.64 per hour (\$15,891.20 per year). The Form ETA 750 states that the position requires three months 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.<sup>1</sup>

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<sup>1</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 petitioner must establish that its 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 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. The proffered wage is \$15,891.20.

The record of proceeding contains copies of the beneficiary's [REDACTED]. The petitioner does not however provide copies of IRS Forms W-2 or Forms 1099-MISC to corroborate the information contained in the Forms 1040. The sole proprietor indicated that the beneficiary was paid in cash. There is no indication on the petitioner's income tax returns that demonstrate that he incurred any wage or salary expenses. These inconsistencies call into question the petitioner's claimed employment of the beneficiary from [REDACTED] and the credibility of the Forms 1040. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms 1040 as persuasive evidence of wages paid to the beneficiary. Regardless, there is no indication of what portion of the beneficiary's income was derived from her employment with the petitioner.

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 (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 personal liabilities are considered as part of his ability to pay. Individuals report income and expenses on their individual (Form 1040) federal tax return each year. Any business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Individuals must show that they can cover their existing business 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. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> 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 individual's IRS Forms 1040 reflect his adjusted gross income (AGI) amounts as follows:

- In 2002, the proprietor's IRS Form 1040 stated AGI of \$128,403.00.
- In [REDACTED] the petitioner's IRS Form 1040 stated AGI of \$135,693.00.
- In [REDACTED] the petitioner's IRS Form 1040 stated AGI of \$137,084.00.
- In [REDACTED] the petitioner's IRS Form 1040 stated AGI of \$133,844.00.
- In [REDACTED] the petitioner's IRS Form 1040 stated AGI of \$143,178.00.
- In [REDACTED] the petitioner's IRS Form 1040 stated AGI of \$161,186.00.
- In [REDACTED] the petitioner's IRS Form 1040 stated AGI of \$153,644.00

Although the petitioner's adjusted gross income amounts for [REDACTED] exceed the proffered wage amounts, in order to determine the sole proprietor's ability to pay the proffered wage, his monthly expenses as well as the proffered wage amounts must be subtracted from the adjusted gross income amount. In addition, the petitioner must show that he can sustain himself and his dependents. The petitioner claims 6 dependents on his individual tax returns for [REDACTED]

[REDACTED] Although the petitioner indicates on appeal that he mistakenly listed the beneficiary as a dependent on all of his tax returns, and submits a copy of IRS Forms 1040X amending the tax returns to show that the beneficiary is no longer listed as a dependent, this information is not persuasive. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). In addition, there is no evidence in the record to show that the petitioner's amended tax returns were received and certified by the Internal Revenue Service as such. 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)).

The petitioner indicated that his monthly expenses consisted of mortgage payment (\$1,600.00 per month), credit card payments (\$100.00 per month), food (\$250.00 per week), swimming pool maintenance (\$50.00 per week), and automobile expenses (\$100.00 per week). The petitioner also submitted copies of utility bills showing expenses for water (\$106.08 per month), gas (\$41.31 per month), electric \$47.38 per month, and AT&T (\$40.11 per month). Total average monthly expenses were \$3,534.88 or \$42,418.56 yearly.

Although it appears from the record that the petitioner has demonstrated its ability to pay the proffered wage minus his recurring household expenses; it does not appear that the petitioner listed all of his expenses. For example, the sole proprietor listed three children as dependants but failed to list medical insurance expenses, education expenses, or child care expenses. Furthermore, the petitioner failed to list as expenses cable, transportation, life insurance, and clothing. Finally, the shareholder omitted his charitable contributions from his list of recurring household expenses. Accordingly, the list of the petitioner's household expenses appears inaccurate as it pertains to the relevant time period and, thus, brings into question the petitioner's ability to pay the proffered wage for those years. Regardless, it is highly unlikely that the petitioner has not incurred such expenses as education expenses, transportation expenses, cable expenses, mortgage insurance, life insurance, health insurance, cable, and internet service having three dependent children and two dependent adults listed on his tax returns. Without an accurate listing of all of the petitioner's expenses, the AAO is unable to determine whether he has established its ability to pay the proffered wage.

The record also does not contain any evidence of the petitioner's ability to pay the proffered wage in 2009 or 2010.

As the record does not establish that the petitioner has the ability to pay the proffered wage as of the priority date, the petition will be remanded in order for the director to resolve the issue.

On remand, the director should direct the petitioner to resolve the inconsistencies found in the record concerning his monthly and annual household expenses. The director may request any additional evidence considered pertinent to the petitioner's ability to pay the proffered wage during the relevant years. As noted above, the regulation 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. On remand, the director should also direct the petitioner to address the authenticity of the tax records submitted as evidence on appeal. The documents lack credibility under the circumstances. The director shall give the petitioner a reasonable period of time to respond to the request for evidence. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.