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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

MAR 01 2011

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

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,

Kenneth S. Poulos for

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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 personal and home care aide. 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 February 9, 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.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour, which equates to \$16,640.00 per year. The Form ETA 750 states that the position requires six months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The 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. The record contains a cash voucher dated November 30, 2008, showing that the petitioner paid the beneficiary \$1,900.00 in salary in November 2008.²

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 (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*

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).

² The record before the director closed on December 31, 2008 upon receipt of the petitioner's response to a Request for Evidence (RFE) dated November 20, 2008. As of that date, the petitioner's federal tax returns for 2008 were not yet due. Therefore, the petitioner must establish that it can pay the full proffered wage in 2001, 2002, 2003, 2004, 2005, 2006 and 2007.

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); *Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The evidence in the record of proceeding shows that 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 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 *Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the petitioner supports himself and a family of six (his spouse, two sons, a parent and an aunt). The record includes the petitioner's Internal Revenue Service (IRS) Forms 1040 for 2001 through 2007 reflecting the petitioner's adjusted gross income (AGI), as well as a listing of the petitioner's household expenses (HHE) provided by the petitioner in response to the director's Request for Evidence (RFE) dated November 20, 2008,³ as shown in the table below:

<u>YEAR</u>	<u>AGI(\$)</u>	<u>HHE(\$)</u>	<u>DIFFERENCE(\$)</u> ⁴
2001	68,435	107,136.00	<22,558.33>
2002	68,375	107,136.00	<25,335.95>
2003	74,566	107,136.00	<20,668.71>
2004	119,948	107,136.00	22,471.33
2005	180,385	107,136.00	80,203.42
2006	181,426	107,136.00	77,719.00
2007	164,039	107,136.00	56,903.00

Therefore, for the years 2004, 2005, 2006 and 2007, the sole proprietor has established his ability to pay the beneficiary the proffered wage after reducing his AGI by his HHE. For the years 2001, 2002

³ On appeal, counsel argues that the expenses listed by the petitioner were for the year 2007 and should be reduced due to inflation rates for the years 2001 through 2006. We reject this contention. If the petitioner's HHE submitted in response to the director's RFE were not representative of his actual HHE in 2001, 2002, 2003, 2004, 2005 and 2006, the petitioner was required to provide independent, objective evidence of his actual HHE for each of those years. 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). We note that even if we accepted counsel's contention that the HHE should have been reduced due to inflation rates, the petitioner would not have established its ability to pay the proffered wage in 2001, 2002 and 2003 after reducing his AGI by his revised HHE.

⁴ The difference is what remains after subtracting the sole proprietor's HHE from his AGI. The symbols <a number> indicate a negative number.

and 2003, the sole proprietor has not established sufficient AGI to pay the beneficiary the proffered wage after reducing his AGI by his HHE.

On appeal, counsel states that the sole proprietor purchased two vehicles in 2004 for which the finance charges and insurance costs should be subtracted from the sole proprietor's HHE in the years prior to the purchases of those vehicles, thereby reducing the sole proprietor's HHE by \$54,155.64 yearly in 2001, 2002 and 2003. In support of this assertion, counsel submits copies of payment and insurance statements regarding the vehicles.⁵ Counsel has failed to submit any evidence to establish the sole proprietor's expenses for vehicles (payments and insurance) in 2001, 2002 and 2003 prior to the purchase of new vehicles.⁶ Therefore, counsel's assertions do not establish the petitioner's ability to pay the proffered wage in 2001, 2002 and 2003. The record also contains a Bank of America Statement for the period October 28, 2008 through November 26, 2008, indicating that the sole proprietor had a principal balance on an account totaling \$498,955.00. However, this is the amount due on the petitioner's line of credit and, therefore, does not constitute funds available to the petitioner to pay the proffered wage. Further, a 2008 statement does not establish the petitioner's ability to pay the proffered wage in earlier years.⁷

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 (BIA 1967).⁸ 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.

⁵ It is noted that the insurance costs calculated by counsel are bi-yearly, not monthly, and therefore, the calculations of counsel are incorrect.

⁶ Without documentary evidence to support this claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁷ A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

⁸ 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 petitioner has failed to submit evidence of uncharacteristic expenditures or losses, has not established that the beneficiary is replacing a former household worker, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the proffered position.⁹

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). As previously noted, here, the labor certification application was accepted on April 27, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of personal and home health care aide. The Form ETA 750A states that the applicant must have six months of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A.¹⁰ The beneficiary set forth her credentials on Form ETA 750B and signed her name on April 26, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she did not list any prior work experience.¹¹ However, the record

⁹An 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 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

¹⁰ Item 14 does not list any education or training requirements, and Item 15 of Form ETA 750A does not reflect any special requirements.

¹¹ On a Form G-325A, Biographic Information sheet, contained in the record of proceedings, signed by the beneficiary under penalty of perjury on January 8, 2008, the beneficiary indicated she had worked for the petitioner as a home care attendant from June 2001 until the date she signed the Form G-325A.

includes a letter dated April 25, 2001, from [REDACTED], located at [REDACTED], stating that it had employed the beneficiary full-time as a caretaker from June 7, 2000 to April 2, 2001. This experience was not certified on the Form ETA 750B. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The inconsistencies in the beneficiary's representations regarding her prior work experience have not been resolved.

The AAO concludes, based on the above discussion, that the petitioner has also failed to establish the beneficiary's qualifications for the proffered position. Therefore, the petition will also be denied for this reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.