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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals(AAO)
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U.S. Citizenship
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Office: NEBRASKA SERVICE CENTER

Date **MAR 10 2011**

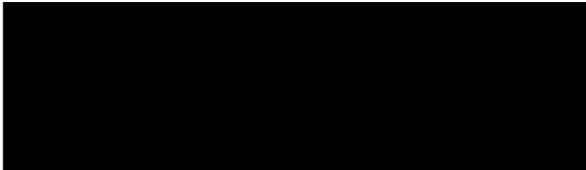
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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,

Kerrie S. Poulos for

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. She seeks to employ the beneficiary permanently in the United States as a domestic day 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 she 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 18, 2010, 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 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. 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 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, Application for Alien Employment Certification, 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 her Form ETA 750, Application for Alien Employment Certification, 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 \$1,859.83 per month (\$22,317.96 per year). The Form ETA 750 states that the position requires the completion of grade school and high school, and three 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

On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked as a domestic day worker for the petitioner at [REDACTED] San Francisco, California, since August 1992.

The petitioner must establish that her job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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 she 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 has not established that she employed and paid the beneficiary the full proffered wage, but she did establish that she paid partial wages in 2008² and 2009.³ Since the proffered wage is \$22,317.96 per year, the petitioner must establish that she can pay the difference between the wages actually paid to the beneficiary and the proffered wage, that is:

- \$22,317.96 in 2001 through 2007.
- \$8,315.40 in 2008.

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 \$14,002.56

³ \$5,795.68

- \$16,522.28 in 2009.

If the petitioner does not establish that she 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).

The petitioner is an individual. Therefore, her adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay. Individuals must show that they can 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 (7th Cir. 1983).

The record before the director closed on January 21, 2010, with the receipt by the director of the petitioner's response to the Request for Evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available in the record of proceedings.

In the instant case, the petitioner supported a family of nine from 2001 through 2005, a family of eight in 2006 and 2007, and a family of seven in 2008. The petitioner's tax returns reflect the following adjusted gross income:

- 2001 = \$29,578⁴
- 2002 = \$26,945⁵
- 2003 = \$24,178⁶
- 2004 = \$37,327⁷
- 2005 = \$-65,441⁸
- 2006 = \$243,022
- 2007 = \$306,500
- 2008 = \$143,531

⁴ IRS Form 1040, line 33

⁵ IRS Form 1040, line 35

⁶ IRS Form 1040, line 34

⁷ IRS Form 1040, line 36

⁸ IRS Form 1040, line 37

In all years except 2005, the petitioner's adjusted gross income covers the difference between the proffered wage and the wages actually paid to the beneficiary. However, the petitioner also claimed monthly expenses of over \$62,416 (\$748,992 annually). It is improbable that the petitioner could support herself and her family on a deficit, which is what remains after reducing her adjusted gross income by the proffered wage and her claimed personal expenses.

On appeal, the petitioner asserts that she and her husband had additional income in 2008 that was not considered by the director. The petitioner submitted a certification dated April 1, 2010, from her parent, [REDACTED], who stated, "for the last ten years (2000-2009), I have been bequeathing [to the petitioner] monetary gifts in the aggregate amount of \$100,000.00 annually." The petitioner also submitted a letter dated April 1, 2010, from [REDACTED] [REDACTED] stated that in February 2008, the company extended a personal loan "in the amount of U.S. \$150,000 against his receivables from the company," to the petitioner's husband, who is [REDACTED]. Finally, the petitioner provided a letter dated April 1, 2010, from her Father-in-Law, [REDACTED] [REDACTED] who stated that he "granted several zero-interest loans" totaling \$250,000 to the petitioner's husband in 2008.⁹

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the loans received by the petitioner's husband in 2008 cannot be considered in determining the petitioner's ability to pay the proffered wage in prior years. However, even if these loans were considered additional income of the petitioner in 2008, in addition to the annual gifts from [REDACTED] to the petitioner from 2000 to 2009, the petitioner would still have insufficient income to pay the proffered wage and cover her household expenses in each relevant year.

In addition, USCIS records indicate that the petitioner has filed Form I-140 petitions for two other domestic worker beneficiaries. The petitioner would need to demonstrate her ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has failed to establish her ability to pay these proffered wages.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of her 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).¹⁰ USCIS may consider such factors as any

⁹ USCIS will give less weight to loans and debt as a means of paying a salary since the debts will increase the petitioner's liabilities and will not improve her overall financial position.

¹⁰ 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

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.

In the instant case, the petitioner's adjusted gross income, even when supplemented by significant loans and gifts, is significantly less than her claimed household expenses. The petitioner has not established any uncharacteristic expenditures or losses and has not established that the beneficiary is replacing a former household worker or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that she 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 to perform the duties of the proffered position. 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*, 299 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 reviews appeals on a de novo basis).

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). 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 petitioner indicated on the Form ETA 750 that the position requires the completion of grade school and high school, and three months of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(i)(3) provides:

(ii) *Other documentation—*

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience and other requirements of the labor certificate

The beneficiary listed her attendance at Amlan Municipal High School in the Philippines on Form ETA 750B, but she did not list her dates of attendance there or any degrees or certificates or degrees received. The petitioner has failed to provide any evidence of the beneficiary's completion of grade school or high school, such as transcripts, certificates or degrees. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the petitioner has not established that the beneficiary has completed grade school and high school as required for the proffered position.

Furthermore, the petitioner and beneficiary have submitted conflicting statements regarding the beneficiary's work experience. On the section of the Form ETA 750 eliciting information of her work experience, the beneficiary claimed to have worked as a domestic day worker for the petitioner at [REDACTED] since August 1992. However, on a Form G-325A, Biographic Information, signed by the beneficiary on August 15, 2007, she claimed to have worked for the petitioner in San Francisco since August 1996. In an employment letter dated January 15, 2010, the petitioner stated that the beneficiary worked for her as a domestic day worker in the Philippines for an undisclosed period of time starting in August 1992, and did not work for her again until 2008. In another employment letter also dated January 15, 2010, the petitioner stated that the beneficiary's "Specific dates of Employment" for her in San Francisco were from "August 1992 to present." Further, in a letter dated April 19, 2010, the petitioner stated that the beneficiary "did not work for me until May 19, 2008," and did not mention any previous period of employment.

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). The petitioner has not explained the discrepancies between her own statements and those of the beneficiary regarding the beneficiary's claimed work experience. Therefore, the petitioner has not established that the beneficiary has the three months of prior work experience required for the proffered position.

The petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.¹¹ 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.

¹¹ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683.