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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

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DATE: Office: NEBRASKA SERVICE CENTER

MAY 03 2011

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 residing in a household. She seeks to employ the beneficiary permanently in the United States as a live-in housekeeper pursuant to section 203(b)(3) of the *Immigration and Nationality Act (the Act)*, 8 U.S.C. § 1153(b)(3). As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

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 above regulation sets forth the requirement that a petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. *See* 8 C.F.R. § 204.5(d). The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 30, 2001. It lists the proffered wage as \$7.66 per hour based on a 40 hour workweek, which equates to \$15,932.80 per year. The position requires 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).¹

¹ 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).

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, she claimed to have worked for the petitioner since August 1997. However, on appeal, counsel states "The beneficiary does not have W-2 forms as of present so none were submitted."

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 30, 2001 and onwards.

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 next examines 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, 881 (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's household does not exist as an entity apart from individuals in that unit. *See generally Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the petitioner's adjusted gross income, assets and personal liabilities are considered when determining her ability to pay. Individuals report income and expenses on their individual (Form 1040) federal tax return each year. In addition, individual petitioners 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.

In this case, the petitioner and her spouse had two dependants from 2001 through 2003, no dependents in 2004 and 2005 and one dependent in 2006 and 2007. IRS Forms 1040, U.S. Individual Income Tax Return, reflecting their adjusted gross income are listed in the table below:

2001 Line 33	2002 Line 35	2003 Line 34	2004 Line 36	2005 Line 37	2006 Line 37	2007 Line 37
\$105,523	\$162,867	\$86,165	\$66,224	\$1,414,275	\$41,067	\$66,710

On January 9, 2009, the director requested, in part, that the petitioner submit a list of recurring household expenses. The petitioner's response dated February 4, 2009 shows the petitioner's estimated household expenses to be \$6,650 per month, which equates to \$79,800 per year.

Therefore, for the years 2003, 2004, 2006, and 2007, the petitioner did not have sufficient net income to pay the proffered wage. It is noted that the record is devoid of evidence of the petitioner's liquid assets, if any, that could have been used to pay the proffered wage in any of the relevant years. 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)).

On appeal, counsel states the applicable federal regulations and internal USCIS policy does not require or even permit the Service to inquire beyond the net income if the net income is sufficient to cover the prevailing wage.² Counsel provides no evidence to support this assertion.

Counsel argues that using the USCIS issued Poverty Guidelines, it has been determined that a sponsoring petitioner must have earned at least \$27,562 to support a family of four at 125% of the federal poverty line and that the 2003 guideline amounts would have been much lower. Counsel indicates that even using the higher 2009 amount illustrates the fallacy of holding that a petitioner with a net income of \$86,165 cannot afford to pay a wage of \$15,932.80 to an employee. However, counsel's argument does not account for the fact that this petitioner specifically outlined and

² Counsel submits a Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004). With regard to the May 4, 2004 memorandum, the AAO first looks to the Act, agency regulations, precedent decision of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). USCIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

reported annual household expenses of \$79,800 per year. After considering the petitioner's net income less annual household expenses, it is again determined she has not established she had the ability to pay the beneficiary the proffered wage of \$15,932.80 in those years identified above.

Counsel indicates that the Board of Immigration Appeals has held that an important consideration for ability to pay is the petitioner's stability and expectations of continued increases in business and profits and argues that the decision in *Matter of Sonegawa, supra*, should be followed in this case. Counsel argues that examination of the petitioner's previously submitted taxes clearly show that the petitioner has the expectation of both stable and possible increased business and profits. Counsel states that the petitioner has shown that the family income has remained stable throughout the past six years in addition to showing an increase in profit from 2006 to 2007.

In some cases, USCIS may 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, supra*. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, the petitioner has not submitted any evidence demonstrating that uncharacteristic losses or other circumstances similar to *Sonegawa* are relevant. In four separate years the petitioner did not have sufficient net income to pay her claimed household expenses and the proffered wage. The record does not contain any evidence that these wages could have been paid with any liquid assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner must demonstrate that, on the priority date of April 30, 2001, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the USDOL and submitted with the petition. *Matter of Wing's Tea House, supra*.

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, Madany 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 750 at #14 specifies the minimum requirement for this position of live-in housekeeper is three months experience in the job offered.

At Part B, Statement of Qualifications of Alien, of the Form ETA 750, the beneficiary listed her job experience and signed her name on April 24, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. At #15 where the beneficiary is required to "List all jobs [she] held during the last three (3) years" and to "Also, list any other jobs related to the other jobs related to the occupation for which the alien is seeking certification...", the beneficiary stated that her first job was for the petitioner beginning in August 1997. Her purported experience with the petitioner is not credible because no documentation was submitted such as Forms W-2 or IRS Form 1099-MISC, Miscellaneous Income, substantiating that she was actually employed and paid by the petitioner at any time.

The record contains a letter of employment dated January 16, 2008 from [REDACTED] from Los Angeles, California, who states the beneficiary worked in her home as a live-in housekeeper from September 3, 1996 to December 3, 1996, on a full time basis as a housekeeper. However, that job was not listed by the beneficiary as qualifying experience on the Form ETA 750. Therefore, the beneficiary's April 24, 2001 statement on the Form ETA 750B does not support the employment certified by Ms. Wei in her January 16, 2008 letter. *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 USDOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. It is determined the petitioner has not established the beneficiary attained the required three months experience as a live-in housekeeper prior to the priority date of the labor certification. The appeal is dismissed for this additional reason.

A 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.