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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 06 2011

FILE:



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 residing in a private household. She seeks to employ the beneficiary permanently in the United States as caregiver. 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 (the DOL). The director determined that the petitioner had not established that it 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 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 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 unavailable.

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 June 18, 2004. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004).¹

Accompanying the petition and the labor certification, counsel submitted, *inter alia*, the petitioner's federal income tax return (Form 1040) for 2004; approximately 42 bank checking accounts statements for the periods May 12, 2004 to November 9, 2007, and December 12, 2007; and an undated tabulation and listing of the petitioner's family's monthly expenses-\$1,553.311; and an affidavit from [REDACTED] (the petitioner's son) dated January 7, 2008, in which he stated that he gives his mother an "allowance" of \$5,000.00 per month which "is sufficient to pay for the salary of a full time caregiver with an hourly rate of \$12.50."

On December 19, 2008, the director issued a request for additional evidence (RFE) and requested, *inter alia*, that the petitioner submit evidence of her ability to pay the proffered wage from the priority date. The director requested the petitioner's "2005-2007 U.S. tax returns or audited financial statements."

Additionally, the director's requested the petitioner's monthly recurring household expenses for 2004 through 2007, including but not limited to the following items: mortgage or rent payments; automobile payments; installment loans; credit card payments; household expenses and utility expenses. The director instructed that if the petitioner to provide evidence of the petitioner's current assets such as cash and investments accounts for 2004-2007.

Regarding the beneficiary, the director requested evidence of any wages or compensation (i.e. Wage and Tax Statements (W-2), or 1099-MISC Statements) the petitioner paid the beneficiary for all applicable years, that is, 2004-2007.

In response, on January 29, 2009, counsel submitted, *inter alia*: a cover letter dated January 29, 2009; approximately 42 bank checking accounts statements for the periods May 12, 2004 to November 9, 2007, and December 12, 2007; and dated tabulations and listings of the petitioner's family's monthly expenses which are respectively in 2004-\$1,093.67; 2005-\$1,063.61; 2006-\$1,049.37; and 2007-\$1,074.09; and the petitioner's federal income tax return (Form 1040) for 2007. The petitioner does not address why the monthly expenses claimed in response to the RFE are substantially lower than the expenses claimed in the tabulation submitted with the original petition.

On appeal, counsel submitted a legal brief; the dated and undated tabulations and listings of the petitioner's family's monthly expenses mentioned above; an affidavit from the petitioner made April 26, 2009, concerning the wages paid to the beneficiary by the petitioner from 2004 to 2008; the beneficiary's unsigned and undated Form 1040X Amended U.S. Individual Income Tax Returns for 2004, 2005, 2006, 2007, and 2008; the affidavit from [REDACTED] (the petitioner's son) dated

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).

January 7, 2008; and approximately 15 bank checking accounts statements for the period November 7, 2008, to January 12, 2009.

As noted, on appeal, the petitioner submitted an affidavit made April 26, 2009, concerning wages reputedly paid to the beneficiary from 2004 to 2008, in which the petitioner declared that she had paid the beneficiary the proffered wage. Although both the director and AAO requested substantiation of the compensation allegedly paid to the beneficiary, as noted below, persuasive evidence of the payments were not made. If United States Citizenship and Immigration Services (USCIS) fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th 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).

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. However, when the director requested such evidence of wages or compensation (i.e. Wage and Tax Statements, or 1099-MISC Statements) the petitioner paid the beneficiary, the petitioner did not respond to his request. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On January 11, 2011, the AAO issued a RFE and requested that the petitioner submit evidence of wages or compensation she paid the beneficiary in 2004 through 2008. The AAO indicated acceptable documentary evidence of such payment would be W-2 or 1099-MISC Statements; cancelled checks to the beneficiary evidencing wage payments; cash receipts; the beneficiary's bank deposits; or other verifiable evidence of wage/salary/compensation paid by the petitioner to the beneficiary from 2004 to the present date. No response was made by the petitioner to this request.

The beneficiary reputedly operates a caregiver business, as a sole proprietor, and therefore, files a Form 1040, Schedule C each year. Additionally, the AAO requested copies of the beneficiary's amended Form 1040X personal federal tax returns from 2004 through 2008 that would show receipt by the beneficiary each year of \$26,000.00 in the occupation of care giver. The tax filings for each year were requested with the beneficiary signature and dates they were signed, or evidence the amended returns were filed with the IRS. Prior to this request, the petitioner had submitted the beneficiary's unsigned and undated Form 1040X "Amended U.S. Individual Income Tax Returns" for 2004, 2005, 2006, 2007, and 2008 which provide information concerning the original and amended adjusted gross income reported in each year, but not the gross receipts reported by the beneficiary on her Form 1040, Schedule C, Line 1. Provided below is a tabulation of the adjusted gross incomes, the amended adjusted gross incomes, the original Form 1040, Schedules C gross business receipts, and the amended Form 1040X, Schedules C gross business receipts figures as provided by counsel in response to the AAO's request. When the information requested was not submitted, the tabulation indicates that fact. No explanation was provided by counsel for the failure to submit all the required information necessary to evaluate the petitioner's case.

Forms 1040 and 1040X

	AGI Form 1040 (The original return filed)	Original AGI As shown on Amended 1040X ²	AGI Amended 1040X	Proffered Wage	Original Schedule C Gross Receipts	Amended Schedule C Gross Receipts
2004	Not Submitted	\$3,784	\$16,237	\$26,000	Not submitted	\$26,000
2005	Not Submitted	\$3,694	\$15,590	\$26,000	Not submitted	\$26,000
2006	Not Submitted	\$4,856	\$16,008	\$26,000	Not submitted	\$26,000
2007	Not Submitted	\$6,653	\$15,761	\$26,000	\$16,200	\$26,000
2008	Not Submitted	\$9,303	\$11,533	\$26,000	\$23,600	\$26,000

As stated, the beneficiary's original personal federal income tax (Forms 1040) returns for 2004 through 2008 were not submitted to the director. Therefore, the AAO requested the beneficiary's tax *return* transcripts for Forms 1040 tax returns originally filed by the beneficiary and tax *account* transcripts that would show any later adjustments for tax returns filed in 2004 through 2008. An incomplete response was made by the petitioner to this request as illustrated above.

The petitioner³ provided information concerning the beneficiary's amended return transcript and account transcript for 2008 and the beneficiary's amended return transcript for 2007. As can be observed in the above tabulation, the petitioner did not provide evidence through the beneficiary's tax returns of the receipt by the beneficiary of a salary at least equal to the proffered wage in 2004 to 2006. In 2007, according to the beneficiary's amended return transcript for 2007, the beneficiary only received \$16,200.00 as compensation as caregiver in 2007. If the beneficiary, as she stated in her tax returns in the record, was an independent providing caregiver services to the petitioner, she would have received 1099-MISC statements from the petitioner since 2002, but none were submitted by the petitioner. The AAO in its RFE issued January 11, 2001, requested W-2, 1099-MISC

² The Form 1040X does not separately list the Schedule C, Line 1, gross receipts receipt by the beneficiary in her caregiver business.

³ Presumably, the beneficiary did not submit to the petitioner either her original 1040 tax returns, or the 1040X Forms she allegedly filed for the years 2004 to 2006.

statements, cancelled checks, the beneficiary's bank deposits, or other verifiable evidence of the payment of \$26,000.00 per year reputedly paid the beneficiary by the petitioner. No such evidence was submitted. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms 1040X⁴ and other evidence as persuasive evidence of compensation paid to the beneficiary by the petitioner.

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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

Overall, the record is not persuasive in establishing that the beneficiary was paid wages by the petitioner at any time from 2004 to 2008. Not only is the record devoid of Forms W-2 or 1099-MISC, or other evidence of the payment of wages by the petitioner, it appears that any wages paid to the beneficiary, and reported as wages by the beneficiary, were not truly paid by the petitioner. As noted in his affidavit, the petitioner's son has allegedly been giving money to his mother for the purpose of paying the beneficiary. Assuming this is true, which has not been established, it cannot be concluded that the petitioner is truly paying the beneficiary. Instead, if anyone is paying the proffered wage, it is the petitioner's son, who is not a petitioner. In an analogous case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The evidence in the record of proceeding shows that the petitioner resides in a household. On the Form ETA 750B, signed by the beneficiary on April 28, 2004, the beneficiary did claim to work for the petitioner since May 2002.

Counsel states on appeal that the sole proprietor is not required to pay the proffered wage until the beneficiary adjusts to permanent residency. However, the petitioner must establish that its job offer to

⁴ On appeal, counsel asserts that the beneficiary's Form 1040 federal income returns for 2004 through 2008 demonstrate that the beneficiary received \$26,000.00 per year, but no original tax returns were submitted, and no tax return for 2008 was received into evidence. There is an inconsistency between the beneficiary's original personal income tax statements and her amendments, such that the AAO required substantiation of the beneficiary's income which was not submitted. Under the circumstances, the AAO cannot determine the truth or falsity of the petitioner's claims. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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, 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).

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 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner is an individual. Unlike a corporation, a household does not exist as an entity apart from individuals in the household. 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 also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Individual petitioners 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, 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, her 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 petitioner is single. The petitioner's tax returns reflect the following information for the following years:

	<u>2004</u>	<u>2005</u>
Petitioner's adjusted gross income (Form 1040)	\$49,659.00 ⁵	Not submitted
	<u>2006</u>	<u>2007</u>
Petitioner's adjusted gross income (Form 1040)	Not submitted	\$3,756.00

In 2004, 2005, 2005 and 2007, the petitioner's adjusted gross income noted above fails to cover the proffered wage of \$26,000.00.

Additionally, counsel submitted listings of the petitioner's monthly expenses which are respectively in 2004-\$1,093.67 (\$13,124.04 yearly); 2005-\$1,063.61 (\$12,763.32 yearly); 2006-\$1,049.37 (\$12,592.44 yearly); and 2007-\$1,074.09 (\$12,889.08 yearly).⁶ The AAO notes that the petitioner's Forms 1040, Schedule A for 2004 states the following total deductions: 44,089.00.⁷ It appears that the petitioner has substantially under-stated her yearly personal expenses for 2004.

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

On appeal, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel has submitted approximately 42 bank checking accounts statements for the periods May 12, 2004 to November 9, 2007, and December 12, 2007, held in various names, i.e. the petitioner, [REDACTED]. It unclear whose checking account statement statements are submitted by counsel, or what claim the petitioner has on this account, since she does not appear to have any, after 2004, substantial sources of income. Assuming for the sake of argument, that the amounts in the checking account are relevant here, counsel's reliance on the monthly closing balances in the petitioner's bank account is misplaced. First, bank statements are not among the three

⁵ According to Statement 1 of the petitioner's Form 1040, the bulk of her income was derived from director's fees from "John Hancock" in the amount of \$35,000.00. This compensation was not repeated in 2007,

⁶ In 2004 through 2007, the petitioner stated she had six expense items for the period: food, electric, gas, telephone, cable utilities expenses, and credit card charges. In 2003, in addition to the foregoing, the petitioner stated she had homeowner's and automobile insurance costs.

⁷ Itemized deductions stated on the Schedules A for 2004 are, medical and dental; sales, income, real estate taxes; home mortgage interest and points; and "other" expenses.

types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

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 Sonogawa*, 12 I&N Dec. 612. 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. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee 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 is as an individual residing in a household. After 2004, in which she received a substantial director's fee, her income was only nominal such that, according to her son, she received a living expense allowance for her subsistence. There is no evidence that the petitioner has savings or other assets sufficient to pay the prevailing wage. There is no evidence that the son is legally obligated to continue these payments or to pay the beneficiary's wage. Only a limited analysis following the case of *Matter of Sonogawa* can be accomplished under the circumstances of this case. There is a paucity of information concerning the petitioner's finances. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.