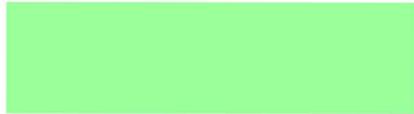


(b)(6)

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



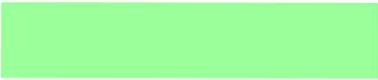
U.S. Citizenship
and Immigration
Services



Date: **APR 03 2012**

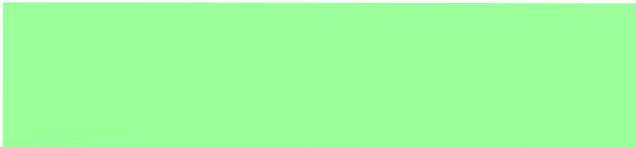
Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
 Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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 domestic cook. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the evidence did not establish that the beneficiary was qualified for the proffered position. The director also determined that the petitioner had not established that he had the ability to pay the beneficiary the proffered wage in 2005 and 2006. 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 November 21, 2008 denial, at issue in this case is whether the evidence establishes that the beneficiary had the requisite work experience as of the priority date and whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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.

In his decision, the director found that the petitioner failed to establish that the beneficiary is qualified for the offered position. At issue is whether the beneficiary met the minimum requirements of the labor certification as of the priority date. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (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

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). Counsel indicated on Form I-290B that he would submit a brief/and or additional evidence to the AAO within 30 days. However, no brief or additional evidence has been received.

may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 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).

In the instant case, the labor certification states that the offered position requires two years of experience in the proffered job of domestic cook. The duties of the proffered job listed on the labor certification include: "plan menus, purchase food and cook and serve meals in domestic household." On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook/steward from August 1987 to September 1989 for the [REDACTED]

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). With the petition, the petitioner submitted a letter from [REDACTED]. According to his letter, Mr. [REDACTED] was previously the administrator of the [REDACTED] and [REDACTED], which are no longer in business. The letter states that the beneficiary worked as a cook and general kitchen help at these organizations from January 2000 to March 2003. In his decision, the director indicated that this experience will not be considered because it was not included on Form ETA 750. The director noted that the Form ETA 750 does not provide any employment information for the beneficiary between January 2000 and April 2002 and states that the beneficiary was a self-employed maintenance worker between May 2002 through the date he signed the Form ETA 750 on October 10, 2002.

In response to the director's request for evidence (RFE) dated March 17, 2008, the petitioner submitted a second letter dated April 2, 2008 from [REDACTED] confirming that the beneficiary was employed as a cook with [REDACTED] from January 2000 to March 2003. The letter details the beneficiary's duties as cook, but Mr. [REDACTED] does not include the duties of general kitchen help that were referenced in his first letter. The director noted that the petitioner must resolve any inconsistencies in the record with independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, in response to the RFE, the petitioner submitted a letter dated April 3, 2008 from the beneficiary, stating that he was employed as a cook with [REDACTED] from January 2000 to March 2003, and that he held a second job as a self-employed maintenance worker in [REDACTED] Florida from May 2002 to October 2002.²

On appeal, counsel states that USCIS provided no rationale to disregard the experience letters from [REDACTED] and asserts that the experience with [REDACTED] should be considered as evidence of the beneficiary's qualifications for the proffered position. However, in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta

² The beneficiary's letter is self-serving and does not provide independent, objective evidence of his prior work experience. *See id.*

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. On appeal, the petitioner has not resolved the inconsistencies in the beneficiary's employment experience with independent, objective evidence, such as IRS Forms W-2 or 1099, payroll records, paystubs and/or tax returns to verify the beneficiary's prior employment with [REDACTED]. Therefore, this experience cannot be considered in the determination of the beneficiary's qualifications for the proffered position.

The petitioner also submitted a letter dated April 2, 2008, from [REDACTED] Crewing Manager of the [REDACTED] in response to the director's RFE. The letter states that the beneficiary was employed as a cook with [REDACTED] from August 4, 1987 to September 8, 1989. In his decision, the director found that the letter submitted as evidence of the beneficiary's employment with the [REDACTED] did not indicate whether the position was full-time or part-time and it did not contain adequate detail regarding the beneficiary's duties. The director found that it was not evident that the letter was signed by the employer. On appeal, counsel does not specifically address the director's findings regarding the beneficiary's experience with [REDACTED]. Counsel states the beneficiary did submit ample evidence of his qualifying experience and that the appeal will be supplemented with additional evidence. No additional evidence has been received by the AAO. 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)).³

The AAO concurs with the director's finding that the petitioner has not established that the beneficiary has the experience required for the proffered position.

The director also determined that the petitioner had not established that he had the ability to pay the beneficiary the proffered wage in 2005 and 2006. 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,

³ The AAO also notes that letter from [REDACTED] does not verify the beneficiary's two years of prior experience as a *domestic* cook as required by the terms of the labor certification.

was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on November 25, 2002. The Form ETA 750 states that the position requires two years of experience as a domestic cook. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, or \$24,689.60 annually.

The evidence in the record of proceeding shows that the petitioner is an individual. On the Form ETA 750B, signed by the beneficiary on October 10, 2002, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that his 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'l Comm'r 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'l Comm'r 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 he 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 he employed and paid the beneficiary the full proffered wage from the priority date on November 25, 2002 onwards.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

As mentioned above, the petitioner in this case is an individual. Therefore the individual's adjusted gross income (AGI), assets and liabilities are also considered as part of the petitioner's ability to pay.⁴ Individuals report income and expenses on their IRS Form 1040 federal tax return each year. 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 Ubeda 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 a family of two. The petitioner's tax returns reflect the following information for the following years:

<u>Tax Year</u>	<u>Petitioner's AGI⁵</u>
2002	\$257,138
2003	\$157,982
2004	\$160,162
2005	\$-1,226,404
2006	\$-976,020
2007	\$521,072

In 2005 and 2006, the petitioner's AGI of \$-1,226,404 and \$-976,020, respectively, fails to cover the proffered wage of \$24,689.60. The record does not contain evidence of the petitioner's household expenses for 2005 and 2006. However, given the petitioner's negative AGI in those years, the petitioner has not established that he could support himself and his wife and pay the proffered wage in 2005 and 2006.

On appeal, counsel asserts that the director erred in failing to apply *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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 id.*⁶ USCIS may consider such factors as any uncharacteristic

⁴ As noted by the director, the petitioner did not submit evidence of his assets and liabilities in 2005 and 2006. Instead, he provided evidence of his assets from 2008. Further, the petitioner's unaudited financial statement for 2008 does not establish his ability to pay the wage in 2005 and 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited.

⁵ AGI is shown on IRS Form 1040, U.S. Individual Income Tax Return, at line 35 (2002), line 34 (2003), line 36 (2004) and line 37 (2005-2007).

⁶ 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

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 asserts that the net losses accrued by the petitioner in 2005 and 2006 were solely due to a one-time event of non-income related accounting losses generated by capital losses in the sale of [REDACTED]. However, Part II of Schedule D, Capital Gains and Losses, of the petitioner's IRS Forms 1040 for tax years 2005 and 2006 reflect the following regarding the petitioner's sales of shares of [REDACTED].

Tax Year	Number of Analex Shares	Date Sold	Gain or (loss)
2005	2000	May 20, 2005	\$2,008
2005	20,000	May 17, 2005	\$56,142
2005	10,000	June 10, 2005	\$31,043
2005	11,800	July 27, 2005	\$36,895
2005	10,200	July 28, 2005	\$31,705
2005	10,450	July 29, 2005	\$32,523
2005	225	Aug. 1, 2005	\$670
2005	10,800	Sept. 23, 2005	\$26,470
2005	2,200	Nov. 2, 2005	\$7,933
2006	5000	June 2, 2006	\$1,484
2006	36,295	Nov. 2, 2006	\$72,364
2006	18,500	Nov. 3, 2006	\$31,114
			<u><u>\$330,351</u></u>

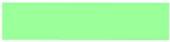
The petitioner's tax returns do not support his statement that his negative AGI in 2005 and 2006 was due solely to the sales of shares of the [REDACTED]. To the contrary, the petitioner had a total long-term capital gain of \$330,351 from the sales in 2005 and 2006.

Thus, the petitioner's explanation for his negative AGI in 2005 and 2006 is not supported by the evidence. Further, the petitioner indicated on Form I-140 that the proffered position is a new one and, therefore, it does not appear that the petitioner is replacing a former household worker. 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.

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.

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.

(b)(6)



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ORDER: The appeal is dismissed.