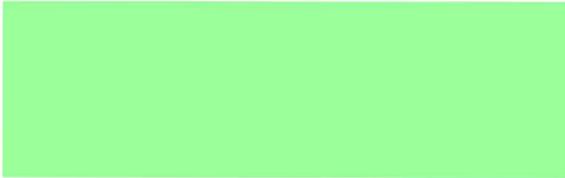


(b)(6)

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

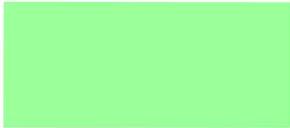


Date: **APR 26 2012**

Office: NEBRASKA SERVICE CENTER

FILE: 

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,

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 farm owner and operator. He seeks to employ the beneficiary permanently in the United States as a farmworker, dairy animals. 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 the beneficiary met the required two years of experience in the job offered or a related occupation as stated on Form ETA 750. 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.

At issue in this case is whether the petitioner established that the beneficiary possessed the required experience for the offered position by the priority date. The AAO will also assess 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.

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 AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *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.<sup>1</sup>

The evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. The petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the April 30, 2001 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

---

<sup>1</sup> 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).

The labor certification states that the offered position requires two years of experience in the offered position or in a related occupation of working with livestock.

Part B, Item 15 of the labor certification states that the beneficiary qualifies for the offered position based on experience as an Agricultural Laborer with [REDACTED] in Lynden, WA from 1990 to 1991. Part B also states that the beneficiary worked as a Farm Worker, Ranch Hand with [REDACTED] in Mexico from 1980 to 1989. The beneficiary also stated that he has worked for the petitioner as a Farmworker, Dairy Animals since 1993.<sup>2</sup> No other experience is listed.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(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.

The record contains the following items in as evidence of the beneficiary's prior experience:

- An undated experience letter from [REDACTED] stating that he employed the beneficiary for seven years. The letter does not state the beneficiary's title, provide the signer's address or title, or state whether the beneficiary was employed on a full time basis. Therefore, the letter does not meet the requirements of 8 C.F.R. § 204.5(1)(3).
- A second letter dated May 13, 2008 from [REDACTED] stating that he employed the beneficiary on a part time basis "at a very young age" and full time until 1986. He also states that the beneficiary worked for him on a part time basis from 1986 to 1987. This letter does not state the beneficiary's title, provide the signer's address or title, or state when the beneficiary began working for him on a full time basis. Additionally, it does not include the hours per week worked by the beneficiary on a part time basis. Therefore, the letter does not meet the requirements of 8 C.F.R. § 204.5(1)(3).
- An undated letter from [REDACTED] President of the [REDACTED] on [REDACTED] letterhead stating that the beneficiary worked as a milker for [REDACTED]. The letter does not include the dates the

---

<sup>2</sup> The record shows that the beneficiary, pursuant to an order of voluntary departure, departed the United States on April 30, 1995. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

beneficiary was employed or whether the beneficiary worked on a full time basis. Additionally, the letter is not from a former employer or trainer for this position, and therefore does not meet the requirements of 8 C.F.R. § 204.5(l)(3).

- An undated letter from [REDACTED] stating that the beneficiary worked for him starting in 1989 on a full time basis for three years. This employer is not included on Form ETA 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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.
- A letter dated May 13, 2008 from [REDACTED] stating that the beneficiary worked for him on a part time basis from 1986 to December 1987, and on a full time basis until January 1989. The letter does not include the beneficiary's job title, job duties, or provide the title and address of the signer. This letter contradicts the previous letter from the signer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, as stated above, in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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. Since the claimed employment with [REDACTED] is not listed on the labor certification and the record does not contain an explanation of the inconsistencies between the two letters or contain independent, objective evidence of the claimed employment. For these reasons, this claimed employment is also insufficient.
- An affidavit from the beneficiary stating that he started to work for his father, [REDACTED] on a full time basis starting in June 1984. He also stated that he worked for [REDACTED] on a part time basis from April 1986 to December 1987, and on a full time basis from December 1987 to January 1989. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

For the reasons stated above, the evidence in the record is not sufficient to establish that the beneficiary possessed the two years of experience in the offered position or in a related occupation by the priority date as required by the terms of the labor certification. Therefore, the petition must be denied for this reason.

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date.

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 the 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$40,487.04 per year (180 hours per month at \$12.78 per hour, plus 56 hours of overtime at \$19.17 per hour). On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since 1993.

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, 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'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 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. In the instant case, the petitioner established that it

employed and paid the beneficiary the partial wages from the priority date in 2001 onwards. The W-2 forms issued by the petitioner to the beneficiary reflect the following wages:

- W-2 wages for 2001: \$23,559.17.
- W-2 wages for 2002: \$25,378.66.
- W-2 wages for 2003: \$27,315.16.
- W-2 wages for 2004: \$29,599.58.
- W-2 wages for 2005: \$31,917.34.
- W-2 wages for 2006: \$31,210.16.

Therefore, the petitioner established that it did not pay the beneficiary the full proffered wage in any relevant year, but it did pay partial wages from 2001 and 2006. Therefore, the petitioner must show that it had the ability to pay the beneficiary the difference between with proffered wage of \$40,487.04 per year and the wages paid to the beneficiary, which is \$16,927.87 for 2001, \$15,108.38 for 2002, \$13,171.88 for 2003, \$10,887.46 for 2004, \$8,569.70 for 2005, and \$9,276.88 for 2006.

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 (1<sup>st</sup> 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 owns and operates a dairy farm. Similar to a sole proprietorship, the petitioner's adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner's ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss From Farming, and are carried forward to the first page of the tax return. See <http://www.irs.gov/publications/p225/ch03.html> (accessed December 21, 2011). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. See *Ubeda*, 539 F. Supp. 647.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner 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 the instant case, the petitioner supported a family of two from 2001 to 2006. The petitioner's tax returns reflect the following AGI:

- 2001 = \$55,613.00<sup>3</sup>
- 2002 = -\$77,693.00<sup>4</sup>
- 2003 = -\$163,476.00<sup>5</sup>
- 2004 = -\$48,350.00<sup>6</sup>
- 2005 = \$39,825.00.<sup>7</sup>
- 2006 = -\$177,317.00<sup>8</sup>

The petitioner also claimed that he has monthly expenses of \$1,354.50 (\$16,254 per year).

For 2001 and 2005, the petitioner demonstrated his ability to pay the proffered wage while also paying his household expenses. However, the petitioner reported a negative adjusted gross income in all other relevant years, and therefore did not demonstrate his ability to pay his own expenses or the proffered wage. Therefore, the petitioner's AGI is not sufficient to establish his ability to pay the proffered wage in 2002, 2003, 2004, and 2006.

In response to the Request for Evidence issued by the director on November 28, 2007, the petitioner supplemented the IRS Forms 1040 that had been submitted with the petition with W-2 forms for the beneficiary for 2001, 2002, 2003, 2004, 2005, and 2006, income statements from 2001-2006, a list of the petitioner's monthly expenses, and a letter dated December 20, 2007 from [REDACTED] reflecting the petitioner's present balance and total deposited in the past year.

Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of the owner of the business are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The letter from [REDACTED] is also insufficient evidence of the petitioner's ability to pay the proffered wage. As mentioned above, the letter is dated December 20, 2007, and states the account number, date the account was opened, the presence balance, and the total funds deposited in the past

---

<sup>3</sup> AGI as reflected on IRS Form 1040, U.S. Individual Income Tax Return, Line 33.

<sup>4</sup> AGI as reflected on IRS Form 1040, Line 35.

<sup>5</sup> AGI as reflected on IRS Form 1040, Line 34.

<sup>6</sup> AGI as reflected on IRS Form 1040, Line 36.

<sup>7</sup> AGI as reflected on IRS Form 1040, Line 37.

<sup>8</sup> AGI as reflected on IRS Form 1040, Line 37.

year. As in the instant case, where the petitioner has not established its ability to pay the proffered wage (2002, 2003, 2004, and 2006), the petitioner's statements must show an initial average annual balance, in the year of the priority date, exceeding the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage or the difference between the proffered wage and the wages paid to the beneficiary. The letter provided by the petitioner's bank does not serve as sufficient evidence of the petitioner's ability to pay the difference between the proffered wage and the wages paid to the beneficiary. The funds available on December 20, 2007, the date the letter was signed, does not show the petitioner's ability to pay the proffered wage in 2002, 2003, 2004, and 2006. Therefore, the petitioner has not established its continuing ability to pay the proffered wage from the priority date.

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 (Reg'l Comm'r 1967). 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 such 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 was only able to show sufficient wages paid and/or adjusted gross income for two of the six years considered. There is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service. In addition, the petitioner had negative AGI for 2002, 2003, 2004, and 2006, and was unable to establish ability to pay based on wages paid, AGI, and/or liquid assets for four of the six years considered. Thus, assessing the totality of the circumstances in this individual case, it

(b)(6)

Page 9

is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

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.