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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



B7

DATE: FEB 14 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

50283

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:

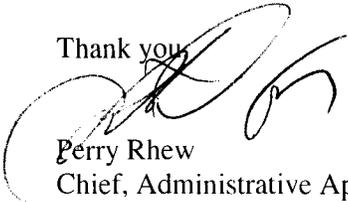


INSTRUCTIONS:

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 your 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. The Administrative Appeals Office (AAO) summarily dismissed the appeal. Counsel filed a motion for reconsideration. The AAO hereby grants the motion for reconsideration and withdraws its initial decision on appeal. The petition remains denied and the appeal will be dismissed as set forth below.

The petitioner is an individual householder. She seeks to employ the beneficiary permanently in the United States as a nanny/ child care provider pursuant to Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification² approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish that the beneficiary possessed the required experience and denied the petition accordingly.

On appeal, counsel submits additional evidence and maintains that the petitioner demonstrated that the beneficiary obtained the requisite experience.

Counsel timely submitted additional documentation on appeal but it was unavailable to the record the time the AAO summarily dismissed the appeal. For that reason, the AAO grants the motion for reconsideration and withdraws its summary dismissal. Based on a review of the record as it now stands, the petition remains denied and the appeal will be dismissed.

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 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.

For the reasons set forth below, the AAO finds that the petitioner failed to establish that the beneficiary had the training and experience required by the terms of the labor certification as well as failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage. 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 at 145 (AAO's *de novo* authority well recognized by federal courts).

¹ In a letter, dated March 18, 2009, the petitioner stated that she employed the beneficiary from 2004 to 2008. It is noted that the petitioner must be offering a *bona fide* permanent job offer.

² After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

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 evaluating the beneficiary's qualifications, U.S. 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 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. Coorney*, 661 F.2d 1 (1st Cir. 1981).

The petitioner must demonstrate that the beneficiary has the requisite education, training, and experience as set forth on the Form ETA 750 as of the priority date. The petitioner must also establish that it has the continuing ability to pay the proffered wage from the priority date onward. The priority date 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); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 1, 2004, which establishes the priority date.³ The proffered wage as stated on the Form ETA 750 is \$424 per week, which amounts to \$22,048 per year. The Form I-140 (Immigrant Petition for Alien Worker) was filed on January 14, 2008.

The minimum education, training, experience and other special requirements required to perform the duties of the offered position are set forth at Part A, Items 14 and 15 of the labor certification. In the instant case, the labor certification states that the offered position of nanny/child care provider requires five years of training in child care and eight years of experience in the offered position. Other special requirements in Item 15 are set forth as "own car, non-smoking, CPR certified, able to work 3-11pm on Fridays, able to speak English & Spanish."

It is noted that the training and experience requirements are exclusive of each other. This is because time spent as a child care trainee cannot be considered as experience as an independently operational nanny or child care provider. Thus, the petitioner must establish that the beneficiary had both five years of training and eight years of employment experience by the June 1, 2004, priority date.

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Experience

At the outset, it is noted that Part B of the ETA 750, signed by the beneficiary under penalty of perjury⁴ lists two places of prior employment. From April 1994 to June 1996, the beneficiary claims to have worked for [REDACTED] and [REDACTED] as a childcare provider. No address is given and no duties are described. From April 2001 to January 2004, the beneficiary claims to have been employed as a child care provider and nanny for [REDACTED] in San Diego. The beneficiary summarizes her duties as taking care of the children including teaching them Spanish, as well as light housekeeping. It is noted that this experience together amounted to four years and eleven months, not the required eight years set forth on the ETA 750. It also failed to detail any training.⁵ 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)).

In support of the beneficiary's experience, the petitioner has submitted several employment verification letters, as well as a letter describing volunteer experience as follows:

⁴Part B of the ETA 750 was initially submitted without the beneficiary's signature. It was provided in response to the director's February 13, 2009 request for evidence.

⁵The beneficiary does not state any education beyond high school on Form ETA 750B and does not list any training, or certificates on that form.

1). A letter, dated June 29, 1996, from ██████████ of Del Mar, California, stating that the beneficiary worked for him as a live out taking care of the family and cleaning for two years. This letter fails to give the exact dates that the beneficiary worked for him and fails to specify whether the work was full-time or part-time.

2). A letter, dated December 4, 2003, signed by ██████████ of San Diego confirming that the beneficiary worked for her as a nanny to her two daughters. The letter does not give exact dates, duration of time or whether the job was full-time or part-time.

3). A second letter, dated March 22, 2009, from ██████████ stating that the beneficiary worked for her as a nanny from June 1997 to January 2004 and describing her full-time duties including helping the children with school and teaching them Spanish. ██████████ describes how the beneficiary was trained in the children's medicine, nutrition, physical activities and "laundry," but did not state how long or the dates that such training occurred. Further, it conflicts with the statement of dates given by the beneficiary on the ETA 750B. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

4). A third letter, dated July 7, 2009, signed by ██████████ and ██████████ stating that the beneficiary had eight years of experience. Attached is a check register which purports to show checks written during the years of August 28, 1999 to August 2000 and includes one to the beneficiary. ██████████ state that the beneficiary inadvertently made a mistake in her dates of employment with them. According the dates of the second ██████████ letter, the beneficiary acquired seven years and six months in their employment, not eight years as they claimed in this letter. Since no separate duration of child care training was actually documented, the time with the Freis may be regarded as experience only.

5). A undated letter, signed by ██████████ of ██████████ Vista, California, stating that the beneficiary volunteered at her facility from 1-5 hours per week starting in 2000. Experience which is unpaid or experience where someone is paid "off-the books," can be qualifying experience, however there may be serious proof problems. *Matter of B&B Residential Facility*, 01-INA-146 (BALCA July 16, 20002). In this letter, ██████████ described the beneficiary's activities at the children's center but failed to give specific dates and times. Further, as noted by the director, this activity overlapped when she was claimed to be employed full-time by the Freis. This has not been clarified. Additionally, it is also unclear whether this activity is intended to be offered in support of the beneficiary's child care training or as work experience. 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)). It is also noted that this experience is not listed on the ETA 750B.

6). The beneficiary submits a declaration, dated July 7, 2009, describing her work history however it does not constitute objective documentation that she has fulfilled the necessary experience or training required by the labor certification. Additionally provided on motion are letters from ██████████ and ██████████ respectively. ██████████ states that the beneficiary worked for her from December 1991 until February 1993 taking care of her children as a live-in. ██████████ states that the beneficiary worked for her from March 1993 to March

1994 to take care of her two children. Neither of these jobs was certified under penalty of perjury by the beneficiary on the ETA 750B. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

It is noted that a letter, dated July 8, 2009 from the [REDACTED] states that the beneficiary worked for the family from January 2004 until August 2008. As the priority date is June 1, 2004, all but approximately six months of this experience would not be credited toward experience acquired as of the priority date. Even this amount of time is not corroborated, as a letter, dated July 6, 2009, from the petitioner puts the time period of employment from February 2004 to August 2008.

The above letters do not establish that the beneficiary had eight years of full-time experience as a nanny/child care provider as required by the ETA 750. They are either are non-specific as to times and dates or are inconsistent with the beneficiary's own sworn claims on the ETA 750B or both. The record lacks independent verifiable evidence to corroborate the additional claimed employment such as evidence of pay.⁶ At most the seven years and six months with the Freis is credible.

Training

As noted above, the petitioner drafted the ETA 750 to have two separate and distinct requirements of eight years of nanny/child care experience and five years of child care training. The petitioner established that the beneficiary is CPR certified as of the priority date, but has not established that beneficiary has five years of child care training. The beneficiary has submitted a statement that she attended a 1997 six-month "Parent Institute For Quality Education" at her daughter's middle school and offers a list of graduates with her name, but this evidence does not document the specific dates and whether the course was full-time or part-time. As noted above, the letters from various employers do not document training and work experience separately and the ETA 750 does not specify any specific child care training. Going on record without

⁶ The submitted photographs of the beneficiary are not corroborated with any kind of first hand record of the date or place taken and a corroborating sworn statement of the photographer and are not probative of specific work experience. 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)).

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)). Based on a review of the record, the petitioner has not established that the beneficiary possessed five years of child care training as of the June 1, 2004 priority date.

Ability to Pay the Proffered Wage

Beyond the decision of the director, it is found that the petitioner has failed to establish that she has had the continuing ability to pay the proffered wage of \$22,048.00 per year.

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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 one of the essential elements 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 overall circumstances affecting the petitioner 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 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 this case, the sole proprietor, through counsel, has provided copies of checks written for wages to the beneficiary. The checks amount to \$1,551 for 2005; \$2,750 for 2006; \$1,575 for 2007 and \$910 for 2008. Nothing shows that the petitioner paid the beneficiary any wages in 2004.

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, (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 householder, similar to a sole proprietorship, an entity in which one person operates in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses 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. Sole proprietors 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, sole proprietors 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). For this reason, sole proprietors provide evidence of the individual monthly household expenses to be considered as part of their ability to pay the proffered wage.

In response to the director's request for evidence, the petitioner submitted a summary of monthly household expenses. The petitioner provided a monthly total of \$6,252 of individual monthly household expenses, which would amount to \$75,024 per year.

Further, the petitioner also submitted partial copies of the individual householder's 2004, 2005, 2006, and 2007 individual tax returns. They show that the petitioner claimed adjusted gross income of \$300,865 in 2004; \$414,208 in 2005; \$88,077 in 2006, when the householder began filing individually as head of household, and \$106,232 in 2007. No other source of income has been documented except for two bank statements from 2009 which are not pertinent to the ability to pay from the priority date through 2008.

It is noted 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, adjusted gross income was enough to establish the petitioner's ability to pay in 2004, 2005, and 2007. However, in 2006 after deducting annualized household expenses of \$75,024 from the adjusted gross income of \$88,077, the remaining \$13,053 would not be sufficient to

cover any shortfall resulting as a comparison of actual wages of \$2,750 paid to the beneficiary and the proffered wage of \$22,048. Therefore, it may be concluded that the current record does not establish the petitioner's continuing financial ability to pay the proffered wage from the priority date onward pursuant to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2).

In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. *Sonogawa* related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In this matter, there is insufficient evidence upon which to conclude that the petitioner's circumstances justify approval based on *Sonogawa*, when the tax returns submitted to this record showed declining adjusted gross income as mentioned above, and other evidence submitted has not established that the petitioner has paid the proffered wage to the beneficiary or has employed her full-time as indicated above. Other than two 2009 bank statements, no other cash or cash equivalent assets from which the proffered wage may be paid has been submitted and no other evidence similar to that discussed in *Sonogawa* has been provided that would demonstrate that such unusual and unique circumstances would apply here.

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.