

(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: JUN 20 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual. She seeks to employ the beneficiary permanently in the United States as a child and personal care provider. 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 she 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 January 14, 2009 denial, an 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)(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.

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 its Form ETA 750, Application for Alien Employment Certification, 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.30 per hour, and the position requires 35 hours per week. This equals \$20,566 per year.

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

The evidence in the record of proceeding shows that the petitioner is an individual. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that her 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 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 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. In the instant case, the petitioner has not established that she employed and paid the beneficiary the full proffered wage from the priority date in April 2001, or subsequently.

If the petitioner does not establish that she 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.

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). 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).

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. Therefore the individual's adjusted gross income, assets and liabilities are also considered as part of the petitioner's ability to pay. 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's tax returns show her filing status as head of household with a qualifying person who is not a dependent. The petitioner's tax returns reflect the following information for the following years:

Adjusted gross income:

2001 (Form 1040, line 33)	\$0
2002 (Form 1040EZ, line 4)	\$168
2003 (Form 1040, line 34)	\$10,508
2004 (Form 1040, line 36)	\$18,890
2005 (Form 1040, line 37)	\$17,036
2006 (Form 1040, line 37)	\$23,271
2007 (Form 1040A, line 21)	\$33,519

In 2001, 2002, 2003, 2004 and 2005, the petitioner's adjusted gross income is less than the proffered wage of \$20,566. It is improbable that the petitioner could support herself on a deficit, which is what remains in these years after reducing the adjusted gross income by the amount required to pay the proffered wage. Additionally, the petitioner submitted a list of recurring monthly expenses totaling \$1,770, which equates to \$21,240 per year. When these expenses are subtracted from the petitioner's adjusted gross income, the remainder fails to cover the proffered wage during the years 2006 and 2007.

On appeal, counsel explains that the petitioner and her husband, [REDACTED] are separated and that he pays child support and rent for the petitioner and the couple's daughter. Counsel notes that both [REDACTED] are listed as the employer on the Form ETA 750 and requests that [REDACTED] income tax returns be considered as evidence of the petitioner's ability to pay the proffered wage.

² In a request for evidence (RFE) issued by the director on September 30, 2008, the director specifically requested copies of the petitioner's tax returns for the years 2001 through 2007, a statement of the family's monthly living expenses, evidence of any personal assets used to pay the

tax returns reflect the following information for the following years:

Adjusted gross income:

2001 (Form 1040, line 33)	\$48,036
2002 (Form 1040, line 35)	\$16,057
2003 (Form 1040, line 34)	\$33,839
2004 (Form 1040, line 36)	\$29,369
2005 (Form 1040, line 37)	\$85,025
2006 (Form 1040, line 37)	\$156,360
2007 (Form 1040, line 37)	\$199,082

No information regarding [redacted] monthly expenses was submitted on appeal; however a copy of a check for \$2,000 from [redacted] to [redacted] was submitted to the director as evidence of child support and child care paid by [redacted]. In the year 2002, [redacted] adjusted gross income, combined with [redacted] adjusted gross income, is less than the proffered wage of \$20,566. In the year 2003, the amount remaining after subtracting \$2,000 per month (\$24,000 per year) child support and expense payment, combined with [redacted] adjusted gross income, is less than the proffered wage. Although in the year 2004 the amount remaining after subtracting [redacted] child support and expense payment, combined with [redacted] adjusted gross income, is more than the proffered wage, the balance is less than the petitioner's annual expenses of \$21,240.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of her adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).⁴ USCIS may consider such factors as

proffered wage, if any, and if the beneficiary had worked for the petitioner, copies of the beneficiary's Forms W-2 or 1099. The RFE noted that [redacted] name appears on the labor certification and that information regarding [redacted] was necessary for the petition. The petitioner's response to the RFE did not include any information regarding [redacted] tax returns or monthly expenses. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The 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).

³ Counsel asserts in a letter dated July 25, 2007 that [redacted] pays \$2,000 in child support to [redacted] per month.

⁴ The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion

any uncharacteristic 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.

No additional sources of income were submitted as evidence of the petitioner's ability to pay the proffered wage. Further, no evidence of uncharacteristic expenses was submitted to explain the low amounts reported as adjusted gross income for [REDACTED] or for [REDACTED] during the years 2001 through 2004. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that she had the continuing ability to pay the proffered wage from the time of the priority date in April 2001.

Beyond the decision of the director,⁵ it does not appear that the position offered to the beneficiary is the same position described in the labor certification. The regulation at 20 C.F.R. § 656.30(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

In this case, the Form ETA 750 was approved for the job opportunity of child and personal care and the occupational code 39-9011 was annotated.⁶ The total hours per week stated are "35" and the hourly work schedule is "7 – 9 a.m." and "3 – 6 p.m." No overtime hours or overtime rate are stated in the position's requirements section of the Form ETA 750. Although it is not explicitly stated on the Form ETA 750, in order to work 35 hours per week with the daily schedule of 7:00 a.m. to 9:00 a.m. (two hours) and 3:00 p.m. to 6:00 p.m. (three hours), the employee would be required to work

designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

⁵ 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*, 229 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, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁶ The Form ETA 750 was initially filed with the job title "Nanny", and was annotated by DOL with the occupational title "Children's Tutor Live-out" occupational code 099.227.010. Numerous corrections were approved by DOL on July 10, 2007 (although the Form ETA 750 was approved on July 9, 2007). It appears that the addition of a requirement in question number 20 for the employee to live at the employer's residence was approved by DOL. Thus, even though the Form ETA 750 states the position is for a "live out" employee, the approved correction to question number 20 of the Form ETA 750 leads to the conclusion that the position was certified as a live-at-work job offer.

seven days per week (five hours per day for seven days equals thirty-five hours). 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).

A document titled "Domestic Live-in Contract" was submitted to the director in response to a Request for Evidence. The contract is dated March 17, 2007, and is signed by the petitioner and the beneficiary. In a section beginning with the heading, "COMPENSATION," the contract states:

Employer agrees [to] pay Employee \$11.30 per hour. Employee will work from 7:00 am to 9:00 am; and then from 3:00 pm to 6:00 pm Monday to Friday. Employee is off on Saturday and Sunday. In addition to above compensation, Employee is entitled to one private room in my four-room apartment for free, and free meals. Employee is entitled to leave Employee[r]'s premise[s] during all non-work hours. Employer will not advance any money to the employee.

The beneficiary's work schedule described in the employment contract would result in her working only 25 hours per week. This differs from the 35 hours per week stated on the Form ETA 750. Moreover, a position requiring less than 35 hours per week is not considered full-time employment. The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). As the employment contract specifies that the beneficiary will work fewer hours than stated on the Form ETA 750, the petitioner has not demonstrated that the job opportunity described in the contract is the same as the job opportunity described in the Form ETA 750. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). These inconsistencies must be resolved with any further filings.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.