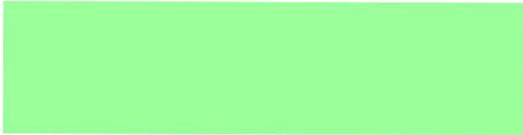




U.S. Citizenship
and Immigration
Services

(b)(6)



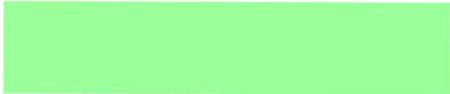
DATE: OFFICE: TEXAS SERVICE CENTER

JUN 21 2012

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 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 in accordance with the instructions on 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 who seeks to employ the beneficiary permanently in the United States as a cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The director's decision denying the petition concludes that the petitioner had not established that she had the ability to pay the beneficiary the proffered wage.

The record shows that the appeal is properly filed 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.

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.

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 Department of Labor (DOL). *See* 8 C.F.R. § 204.5(d).

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).

The record does not contain an original Form ETA 750, Application for Alien Employment Certification. Petitioner's counsel states that the certified original was never received by their office. During the adjudication of the appeal, the AAO obtained a transcript of the certified Form ETA 750 from the DOL. The Form ETA 750 was accepted on January 14, 1998 and that the proffered wage as stated on the Form ETA 750 is \$23,920 per year.

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, although the beneficiary claims to have worked for the petitioner since 1998, the petitioner has not established that she employed and paid the beneficiary at any time from the priority date onwards. Instead, the petitioner claims that businesses owned by her husband paid the beneficiary a salary. These businesses are named [REDACTED] and [REDACTED]. The petitioner does not explain how wages paid to the beneficiary by companies owned by her spouse should be considered as evidence of her ability to pay the proffered wage. First, the petitioner's spouse is not the petitioner in the instant case. Second, payments made by a separate business entity cannot be considered in determining the petitioner's ability to pay the proffered wage. *See e.g., Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In addition, the beneficiary's employment by the petitioner's spouse's businesses contradicts claims elsewhere in the record that the beneficiary has only worked for the petitioner as a cook since 1998. 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). 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. *Id.* at 591.

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. 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, liquid 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 supports a family consisting of herself, her husband, two children, and, in later years, two parents.

On appeal, the petitioner claims that the AAO should consider its net operating loss carryover when determining its ability to pay the proffered wage. If an individual taxpayer's deductions for the year are more than its income for the year, the taxpayer may have a net operating loss (NOL). When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. If a taxpayer is carrying forward an NOL, it shows the carryforward amount as a negative figure on the "Other Income" line of IRS Form 1040. Because a petitioner's NOL is related to another year's outcome, it is omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year.

The petitioner's tax returns reflect the following information which is a re-calculated adjusted gross income before net operating loss (NOL) carryover, for the following years:

- For 1998, Form 1040 states an adjusted gross income before NOL of \$91,005.00.
- For 1999, Form 1040 states an adjusted gross income before NOL of \$80,683.00.
- For 2000, Form 1040 states an adjusted gross income before NOL of \$90,806.00.
- For 2001, Form 1040 states an adjusted gross income before NOL of \$90,018.00.
- For 2002, Form 1040 states an adjusted gross income before NOL of \$39,996.00.
- For 2003, Form 1040 states an adjusted gross income before NOL of \$92,900.00.
- For 2004, Form 1040 states an adjusted gross income before NOL of \$101,046.00.
- For 2005, Form 1040 states an adjusted gross income before NOL of \$71,063.00.

- For 2006, Form 1040 states an adjusted gross income before NOL of \$56,193.00.
- For 2007, Form 1040 states an adjusted gross income before NOL of \$61,384.00.

The petitioner provided an annualized list of expenses, including mortgage, utilities, food, clothing and incidentals/others. The following table compares these expenses to the petitioner's adjusted gross income for each year since the priority date.

Year	AGI	Expenses	Difference	Proffered Wage
1998	\$91,005.00	\$27,000.00	\$64,005.00	\$23,920.00
1999	\$80,683.00	\$27,000.00	\$53,683.00	\$23,920.00
2000	\$90,806.00	\$25,800.00	\$65,006.00	\$23,920.00
2001	\$90,018.00	\$30,600.00	\$59,418.00	\$23,920.00
2002	\$39,996.00	\$30,600.00	\$9,396.00	\$23,920.00
2003	\$92,900.00	\$30,600.00	\$62,300.00	\$23,920.00
2004	\$101,046.00	\$31,800.00	\$69,246.00	\$23,920.00
2005	\$71,063.00	\$32,340.00	\$38,723.00	\$23,920.00
2006	\$56,193.00	\$34,740.00	\$21,452.00	\$23,920.00
2007	\$61,384.00	\$36,540.00	\$24,844.00	\$23,920.00

In 2002, the petitioner's adjusted gross income after expenses of \$9,396.00 fails to cover the proffered wage of \$23,920.00. Also in 2006, the petitioner's adjusted gross income after expenses of \$21,452.00 fails to cover the proffered wage. It is improbable that the petitioner could support herself and her dependents on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage for those years.

Further, the petitioner's claimed expenses for herself and her dependents are not supported by documentary evidence and are substantially lower than U.S. government statistics on average household expenditures. *See e.g.*, <http://www.bls.gov/cex/csxreport.htm>. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On appeal, counsel asserts that the petitioner has personal assets for consideration in her ability to pay the proffered wage. Counsel submitted copies of statements for an annuity held by the petitioner, these are annual statements from the end of 2006, 2007, 2008 and 2009. However, it is not clear from the record that the annuity balance is a liquid asset, available to the petitioner without penalty, for use to pay the beneficiary. Even if the annuity could have been liquidated to pay the proffered wage in 2006, there is no evidence that any annuity funds were available in 2002, the other year that the petitioner failed to establish the proffered wage.

Counsel also provided copies of statements from a joint checking account belonging to the petitioner's spouse and two other individuals. As these funds do not belong to the petitioner, they cannot be used to establish the petitioner's ability to pay the proffered wage. Furthermore, even if

the funds did belong to the petitioner, the average monthly balance for 2002 is not sufficient to meet the \$14,524 shortfall required to pay the proffered wage.

Finally, counsel submitted evidence of property owned by the petitioner and her husband, as well as their home. However, neither of these properties would be considered liquid assets that could be easily sold to pay the beneficiary's wage.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).² USCIS may consider such factors as 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.

In the instant case, the petitioner did not establish the occurrence of any uncharacteristic expenditures or losses, or whether the beneficiary is replacing a former household worker or any outsourced service. 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.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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, 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'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).

² 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.

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The record indicates that the offered position requires an individual able to cook both American and Filipino cuisine, or bake bread and pastries. There is no evidence in the record to establish that the beneficiary was able to cook both American and Filipino cuisine, or bake bread and pastries as of the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.