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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

DATE: SEP 06 2012

OFFICE: NEBRASKA 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 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,

A handwritten signature in cursive script, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), 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 horse trainer. 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 he 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 May 14, 2009 denial, the single 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 October 20, 2004. The proffered wage as stated on the Form ETA 750 is \$18.00 per hour (\$37,440 per year based upon a 40-hour work week). The Form ETA 750 states that the position requires four years of experience in the job offered: horse trainer.

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.<sup>1</sup>

On appeal, counsel submits a brief; a letter dated June 5, 2009 from [REDACTED] Accountant; a statement of the petitioner's expenses and income; and a copy of IRS Form W-2, Wage and Tax Statement, which was issued to the beneficiary by [REDACTED] in 2008.

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 12, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director miscalculated the petitioner's ability to pay. Counsel asserts that he supplied an expense report which was prepared by the petitioner's accountant and that the report showed sufficient cash available to pay the beneficiary the proffered wage for each year under consideration. On appeal, counsel also asserts that the petitioner paid the beneficiary the proffered wage in 2008.

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 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, on Form ETA 750B, the

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<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).

beneficiary did not claim to have worked for the petitioner. Further, the petitioner, [REDACTED] did not claim to have employed the beneficiary.

With the initial petition submission, the petitioner provided no evidence of having paid the beneficiary any wages. On October 24, 2008, the director issued a request for evidence (RFE), asking the petitioner to supply any IRS Forms W-2 or 1099 which he might have issued to the beneficiary between 2004 and 2007. In response, the petitioner provided a single IRS Form W-2 for 2007. However, the W-2, Wage and Tax Statement, was issued by [REDACTED]. The Employer Identification Number associated with this entity is [REDACTED]. The petitioner provided copies of the U.S. Income Tax Returns for an S Corporation (Forms 1120S) for [REDACTED] Inc. for 2006 and 2007. According to these documents, the petitioner, [REDACTED] owns 100 percent of [REDACTED]. However, this entity is a Sub-Chapter S Corporation which, according to Schedule B of the tax return, provides architectural services. [REDACTED] is not the petitioner in the instant circumstance. Thus, the evidence shows that the beneficiary was paid by [REDACTED] in 2007.<sup>2</sup> However, the petitioner has provided no evidence of any wages paid to the beneficiary by the petitioner from the priority date in 2004 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 (1<sup>st</sup> 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, 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 (7<sup>th</sup> Cir. 1983).

In the instant case, the petitioner supports a family of three. The petitioner's tax returns reflect the following information for the following years:

- In 2004, the petitioner's IRS Form 1040, line 36, stated adjusted gross income of \$49,021.00.

<sup>2</sup> On appeal, the petitioner provided IRS Form W-2 issued to the beneficiary by [REDACTED] for 2008.

- In 2005, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$59,434.00.
- In 2006, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$66,488.00.
- In 2007, the petitioner's IRS Form 1040, line 37, stated an adjusted gross loss of \$114,603.00.

As an individual, the petitioner must demonstrate the ability not only to pay the beneficiary the proffered wage but also the ability to support his family out of his adjusted gross income. In order to demonstrate such ability, the petitioner must provide documentary evidence of his recurring, monthly, household expenses. In response to the director's RFE, the petitioner provided expense reports for 2006 and 2007 only. According to these reports, the petitioner claimed \$200,004.72 in total expenses for 2006 and \$250,314.93 in total expenses for 2007. Since the petitioner did not provide reports for 2004 or 2005, the director used the lesser of the two sums to represent the petitioner's expenses for 2004 and 2005. Noting that the petitioner's claimed expenses far exceeded his adjusted gross income for all of the four years, the director found that the petitioner did not demonstrate sufficient income to support his family or pay the beneficiary the proffered wage.

While the AAO concurs with the director's findings, it should be noted that the expense reports contain items which pertain to the petitioner's horse farm and these items had already been deducted on the petitioner's Schedule E as business expenses. Therefore, business-related items, as reported on Schedule E, should have been deducted from the "Total Personal and Farm Expenses" as identified on the petitioner's expense reports. Following that rationale, for 2006, the petitioner's personal expenses were \$130,556.72 (\$200,004.72 as reported on the expense report, less \$69,448.00 in expenses claimed on Schedule E). For 2007, the petitioner's personal expenses were \$106,072.93 (\$250,314.93 as reported on the expense report, less \$144,242.00 in expenses claimed on Schedule E). Thus, even while deducting the sums which had already been reported on Schedule E, the petitioner's reported expenses still exceed his adjusted gross income for each year from 2004 through 2007.

On appeal, counsel for the petitioner asserts that the director miscalculated the petitioner's financial situation and, therefore, provided a revised expense report. The new report, prepared by [REDACTED] purports to identify, among other items, the petitioner's personal, household expenses for each year from 2004 through 2007. In her letter, dated June 5, 2009, [REDACTED] states:

I have compiled and reviewed the accompanying Income and Expense schedules of [REDACTED] for the years 2004, 2005, 2006 and 2007. The statements required minor compilation reports and review of [REDACTED] a Florida corporation of which [REDACTED] is the sole shareholder, President and Director, the [REDACTED] owned by [REDACTED] and his wife, financial records and personal accounting documentation of [REDACTED] for the years 2004 through 2007 along with corporate and personal income tax returns in full for the same periods.

Based upon [REDACTED] statements, it is not clear whether she compiled or reviewed the petitioner's financial statement. Nevertheless, it is clear that [REDACTED] did not audit the petitioner's financial statements.

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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements claims that the reports are both compiled and reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Compiled statements are the representations of management compiled into standard form. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, the revised financial/expense report provided on appeal contains figures for the petitioner's expenses which are inconsistent compared with the report which was provided in response to the director's RFE. The AAO noted above that the petitioner's initial reports purported to represent total personal and farm expenses for 2006 and 2007. We then deducted the farm-related expenses which were identified on Schedule E of the petitioner's tax returns. The resulting figure for 2006 is \$130,556.72, as opposed to \$77,407 as reported on the revised expense report. The resulting figure for 2007 is \$106,072.93, as opposed to \$85,012. According to the revised expense report, the petitioner claims \$96,145 in personal expenses for 2004 and \$70,085 in personal expenses for 2005. As has been mentioned, the petitioner failed to provide expenses for 2004 and 2005 in response to the director's RFE.

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, 591-592 (BIA 1988).

Given the inconsistencies between two reports and the lack of independent, objective, evidence which would demonstrate which figures are accurate, the AAO cannot accept either report as representing the petitioner's actual recurring, personal expenses. Therefore, the petitioner has not established that he has sufficient adjusted gross income to support his family and pay the beneficiary the proffered wage for any year between 2004 and 2007.

USCIS may consider the petitioner's personal, unencumbered and liquefiable assets that could reasonably be applied towards paying employee wages. However, the petitioner provided no documentary evidence of such assets.

On appeal, counsel asserts that the director miscalculated the petitioner's income and expenses, considering the petitioner to have greater expenses that was actually the case. Counsel asserts that the director included farm-related expenses in his analysis even though such expenses were already considered on the petitioner's tax returns, specifically Schedule E. In support of his assertion, counsel submitted a letter from [REDACTED] Accountant and a revised financial report.

The director issued an RFE, asking the petitioner to provide a list of his recurring, household expenses including but not limited to mortgage or rent payments, automobile payments, installment loans, credit card payments, and household expenses (e.g. gas, heat, water, garbage, cable, electric, phone, etc.). The petitioner responded by submitting an expense report which tabulated all expenses, business and personal, together. As explained above, in our analysis, the AAO deducted those sums which represent farm-related expenses as enumerated on the petitioner's federal income taxes, in Schedule E, from the total expenses which the petitioner identified on its expense reports for 2006 and 2007. Nevertheless, the resultant figures remain considerably higher than the petitioner's adjusted gross income for each year. Further, the figures differ from those which are reported on the revised financial statement provided on appeal and the petitioner provided no independent, objective evidence demonstrating which figures are accurate. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, counsel asserts "For 2008 [the beneficiary] was paid his full salary of \$37,440 and submitted the W-2 Wage Statement proving the Petitioner's ability to pay the wage." In support of his assertion, counsel submits IRS Form W-2 issued to the beneficiary by [REDACTED] for 2008. This W-2 statement indicates that the beneficiary was paid \$37,440. However, the employer which issued the W-2 is [REDACTED] and not the petitioner in the instant circumstance. This document does not demonstrate that the petitioner, [REDACTED] as an individual paid the beneficiary the full proffered wage for 2008.

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 Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).<sup>3</sup> USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is

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<sup>3</sup> 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.

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 has provided no independent, objective evidence demonstrating its gross farm income for the years between 2004 and 2007; has provided no evidence of wages paid to farm workers; has not demonstrated any uncharacteristic expenditures or losses which would adversely impact his farm business or whether the beneficiary is replacing a former farm worker or an outsourced service. Thus, 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.

**ORDER:** The appeal is dismissed.