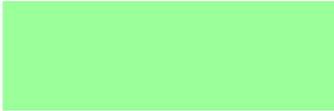




U.S. Citizenship  
and Immigration  
Services

(b)(6)



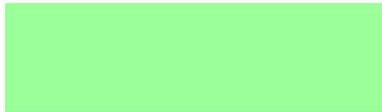
DATE: **FEB 05 2013** OFFICE: TEXAS SERVICE CENTER

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

(b)(6)

**DISCUSSION:** The Director, Texas Service Center denied the employment-based immigrant visa petition and dismissed the subsequent motion to reopen and reconsider. The matter 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 housekeeper. 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 petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded 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 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.<sup>1</sup>

At 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.

At the outset, the petition must be dismissed because it does not qualify for the requested preference classification. On Form I-140, the petitioner requested that the beneficiary be classified as a professional or skilled worker by marking Box e, in Part 2. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The labor certification states that the offered position requires three months of experience in the job offered. No other training or education is required. Since the labor certification does not require a baccalaureate degree or at least two years of training or experience, the petition cannot be approved in the professional or skilled worker classifications. Therefore, the petition must be dismissed.

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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).

Even if the petition were filed in the correct category, the director's decision would be affirmed. Regarding the petitioner's ability to pay the proffered wage, 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 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 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 28, 2001. The proffered wage as stated on the Form ETA 750 is \$7.10 per hour (\$14,768 per year). The Form ETA 750 states that the position requires three months experience in the job offered.

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 27, 2001, the beneficiary claimed to have been self-employed since August 2001, which is four months after the date he certified the information to be correct.

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 onwards.

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 (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 four, although her total number of dependents fluctuates from one to four during the period beginning at the priority date, she provided a statement indicating that her monthly expenses have stayed constant. The petitioner's tax returns reflect the following information for the following years:

Petitioner's adjusted gross income for 2001 (Form 1040, line 33)	\$3,996.00.
Petitioner's adjusted gross income for 2002 (Form 1040, line 35)	(\$947.00).
Petitioner's adjusted gross income for 2003 (Form 1040, line 34)	\$3,047.00.
Petitioner's adjusted gross income for 2004 (Form 1040, line 36)	\$2,735.00.
Petitioner's adjusted gross income for 2005 (Form 1040, line 37)	(\$6,912.00).
Petitioner's adjusted gross income for 2006 (Form 1040, line 37)	(\$1,339.99).
Petitioner's adjusted gross income for 2008 (Form 1040, line 37)	(\$7,213.00).

The record does not contain the petitioner's Form 1040 for 2007. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii).

In each year from 2001 through 2006, and 2008, the petitioner's adjusted gross income failed to cover the proffered wage of \$14,768.00. The petitioner provided a list of her monthly household expenses which total \$1,735.00 per month, or \$20,820.00 per year. 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.

On appeal, counsel asserts that although the petitioner's total income on her federal income tax returns shows low or negative figures, it is not reflective of her ability to pay the proffered wage. Counsel contends that the petitioner's real estate holdings and a trust account check in the amount of \$519,634.52 received by the petitioner in December 2001 prove that the petitioner can establish the ability to pay the proffered wage from the priority date.

Regarding the petitioner's property values, a home or rental property are not readily liquefiable assets. Further, it is unlikely that the petitioner would sell such significant personal assets in order to pay the beneficiary's wage. 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 (5<sup>th</sup> 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).

Regarding the petitioner's trust account check, counsel asserts that the amount of the check is more than 35 times the amount required to pay the proffered wage. However, the petitioner did not receive the check until December 27, 2001 and provided no evidence to establish her ability to pay the proffered wage from April 28, 2001 to December 27, 2001. A petitioner must establish its ability to pay from the time of the priority date, which in this matter is April 28, 2001. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Even if the AAO concluded that the petitioner had the ability to pay the proffered wage for 2001, the record does not contain documentary evidence of the petitioner's ability to pay beyond December 2001. The petitioner provided bank statements for parts of 2002, 2003, 2004 and 2005. Of those bank statements provided, the petitioner did not show an ending monthly bank balance sufficient to pay the beneficiary the proffered wage in September 2003, November 2003 and January 2004. The petitioner's federal income tax return for 2008 shows no interest income earned and the petitioner provided no evidence of liquefiable assets other than those indicated above. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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).<sup>2</sup> USCIS may consider such factors as

<sup>2</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,

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.

However, the petitioner has not submitted evidence establishing that the factors set forth in *Sonegawa* apply to the instant case. 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.

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.

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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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.