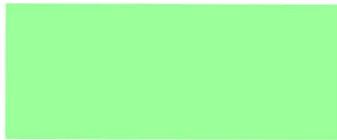


(b)(6)

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

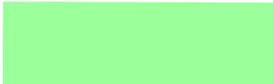


U.S. Citizenship
and Immigration
Services

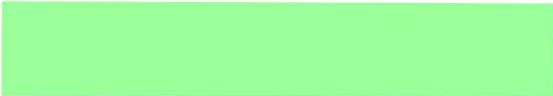


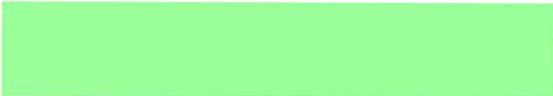
Date: JUN 27 2013

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

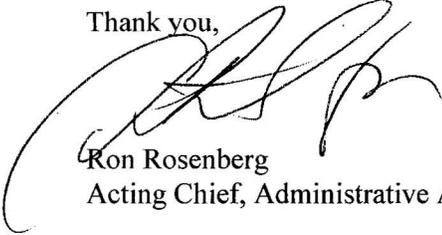


INSTRUCTIONS:

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

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. It seeks to employ the beneficiary permanently in the United States as a live-in Jain specialty cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it 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 February 16, 2012 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.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

¹ The director considered evidence of the petitioner's ability to pay the proffered wage from 2010, which was prior to the January 21, 2011 priority date. Therefore the AAO sent a Request for Evidence (RFE) on May 1, 2013 in which it requested additional evidence of the petitioner's ability to pay the beneficiary's proffered wage as the evidence was not available at the time that the director denied the petition. The AAO requested the petitioner's 2011 and 2012 federal income tax returns, including all schedules and attachments, or audited financial statements, or annual reports; evidence of any wages paid wages to the beneficiary during 2011 and 2012, including copies of W-2 statements or any Form 1099s issued to the beneficiary; evidence of family income in 2011 and 2012, such as 2011 and 2012 W-2 statements or Form 1099s issued to the petitioner and her spouse; and an updated household expense summary for both 2011 and 2012, supported with substantiating documentary evidence.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on January 21, 2011. The proffered wage as stated on the ETA Form 9089 is \$30,264 per year. The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

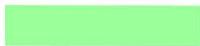
The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as an individual. On the ETA Form 9089, signed by the beneficiary on March 7, 2011, the beneficiary claimed to have worked for the petitioner since July 1, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 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

² 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).



petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not submitted any evidence that it paid the beneficiary any wages from the priority date on January 21, 2011 onwards.

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), *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 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner 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 the instant case, the individual householder supports a family of 6. The proprietor's tax returns reflect the following information for the following years:

	2011	2012
Petitioner's adjusted gross income (Form 1040, line 37)	\$(1,021,682)	Not submitted ³

In 2011, the individual household sponsor's adjusted gross income of \$(1,021,682) fails to cover the proffered wage of \$30,264 per year. It is improbable that the householder could support herself and her family 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 the petitioner's combined 2012 Form W-2s (for the individual and her spouse) reflect \$149,000 in income; the petitioner's 2011 tax return reflects \$150,000 in income;

³ The record reflects that the petitioner filed for an extension for her 2012 Form 1040.

the tax return reports a carryover loss which does not effect the cash flow of the petitioner per an April 19, 2012 accountant's letter; the petitioner is relying on "family income" to document ability to pay the beneficiary's proffered wage; and the annual family expenses are \$75,590 which leaves enough income to pay the beneficiary the proffered wage. The petitioner's 2012 Form W-2 reflects an income of \$30,000.10 and her spouse's 2012 Form W-2 reflects an income of \$119,999.88.

The petitioner's accountant states that [REDACTED] is owned by the individual petitioner's spouse; it deducted bad debts arising from sale to customers in 2004 through 2006; the bad debt deductions flowed through to the petitioner and her spouse's individual tax returns which resulted in negative adjusted gross income on their individual income tax returns; these losses have been carried forward and will be utilized in subsequent years; and carrying net operating losses forward does not affect cash flows in the years that the losses have been carried forward. 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. However, 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 initially claimed \$50,280 in monthly expenses. The AAO requested in its RFE that the petitioner provide an updated household expense summary for both 2011 and 2012 and address missing expenses that appeared on the 2010 tax return, supported with substantiating documentary evidence. The petitioner responded with a list of expenses increased to \$75,590, although it is not clear what year it is for. The increased expenses also fail to account for the education expenses raised by the AAO in its RFE (stated as a \$44,997 qualified expense in 2010). Additionally, neither estimate states any mortgage expenses, but the petitioner's 2010 Form 1040 states \$9,107 in mortgage interest claimed. 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). The 2011 Form 1040 does not include any of the relevant schedules, as requested in the AAO's RFE, which might help verify the petitioner's claimed expenses. Without a full accounting of all personal expenses with supporting documentation, as requested by the AAO, the AAO cannot determine whether the petitioner's W-2 income can be used as income to cover both the proffered wage and all household expenses.⁴ In addition, the record does not include substantiating documentary evidence of the petitioner's expenses. Going on record without supporting documentary evidence is not sufficient for purposes

⁴ The addition of education and mortgage expenses, if any in 2011, and if at the same rate as 2010, combined with the new estimate of \$75,590, and the proffered wage, would exceed the individuals' combined W-2 income. Therefore, as the full household expenses were not addressed by the petitioner as the AAO requested, and the relevant schedules were not submitted, the AAO cannot conclude that the petitioner has established its ability to pay the proffered wage.

of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

USCIS may consider the overall magnitude of the petitioner's business activities 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). 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. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee 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 individual petitioner's 2010 and 2011 tax returns reflect a substantially negative adjusted gross income. The petitioner was allowed an opportunity to submit additional evidence and clarify their expenses. They failed to submit all the requested evidence, and the required documentation in support. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Therefore, the AAO is precluded from determining whether the petitioner can establish its ability to pay the beneficiary's proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it 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.