



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 03 2013**

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska 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 nanny. 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 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 April 6, 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 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 December 7, 2006. The proffered wage as stated on the ETA Form 9089 is \$10.87 per hour (\$22,609.60 per year based on 40 hours per week). The ETA Form 9089 states that the position requires two years of experience in the proffered position of nanny.

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 ETA Form 9089, signed by the beneficiary on February 19, 2007, 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 Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 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 2006 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 (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

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 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 the instant case, the petitioner supported a family of five in 2006 and a family of four in 2009 through 2011. The petitioner's family size for 2007 and 2008 is unknown and not demonstrated by any documents in the record. The petitioner lives in [REDACTED] Florida. On appeal, the petitioner submitted a copy of an April 27, 2009 email that her husband, [REDACTED] sent to counsel, stating that their family's annual household expenses amounted to approximately \$420,000.00.² On appeal, counsel asserts that the petitioner's family owns several real estate properties and therefore created two limited liability companies, [REDACTED] and Merit [REDACTED] the accounts of which cover the family's household expenses. In the June 4, 2012 NOID/RFE, the AAO asked the petitioner to identify on the previously submitted account statements regarding these entities the withdrawals made or checks drafted to pay her family's household expenses. Counsel failed to address this request in his response to the AAO. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

The petitioner's tax returns reflect her adjusted gross income for 2006 through 2011, as shown in the below table.

² In response to the AAO's June 4, 2012 Notice of Intent to Dismiss/Request for Evidence (NOID/RFE), the petitioner submitted a letter from her husband, [REDACTED] dated July 17, 2012, indicating that their current total annual expenses amount to \$290,000.00. The letter states that the couple divorced on an unlisted date. Going on record without supporting documentary evidence is not sufficient for purposes 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)). Counsel's response to the AAO's NOID/RFE states that the family's expenses have been drastically reduced, but fails to provide any date. The AAO will consider that the family's annual expenses were \$420,000.00 for 2006 through 2011, and \$290,000.00 from 2012 to the present.

- In 2006, the Form 1040 stated adjusted gross income of -\$118,555,911.00.
- For 2007, the petitioner did not submit regulatory prescribed evidence demonstrating her ability to pay.
- For 2008, the petitioner did not submit regulatory prescribed evidence demonstrating her ability to pay.
- In 2009, the Form 1040 stated adjusted gross income of \$101,776.00.
- In 2010, the Form 1040 stated adjusted gross income of -\$108,610.00.
- In 2011, the Form 1040 stated adjusted gross income of \$32,300.00.

Therefore, for the years 2006 through 2011, the petitioner did not demonstrate sufficient adjusted gross income to pay the proffered wage of \$22,609.60 and her family's estimated yearly household expenses.

The petitioner submitted copies of her [REDACTED] joint account statements with an average balance of \$25,453.15 in 2006 and \$15,674.87 in 2007, her [REDACTED] stock saving account with an ending balance in 2007 of \$193,848.82, and her [REDACTED]'s investment account with a balance of \$19,601.03 in March 2009. The AAO finds that the petitioner's account statement balances fail to demonstrate her ability to pay the proffered wage of \$22,609.60 and her family's estimated yearly household expenses for 2006 through 2011.

On appeal, the petitioner submitted information regarding the value of her two real estate properties located in Illinois and Florida. Regarding the petitioner's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset 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 (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).

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).³ USCIS may consider such factors as

³ The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 *Sonegawa* was based in part on the

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 sole proprietor did not demonstrate that she had sufficient adjusted gross income to pay the proffered salary and her estimated yearly expenses from 2006 to 2011. The petitioner submitted no evidence specifically demonstrating any uncharacteristic business expenditures or losses or that she was replacing another household worker. 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.

Therefore, the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director found that the petitioner submitted sufficient evidence demonstrating the beneficiary's work experience. The AAO withdraws this section of the director's decision, finding that the petitioner has 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 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).

According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered as a nanny.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification,

petitioner's sound business reputation and outstanding reputation as a couturiere.

meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. Part K of ETA Form 9089 indicates that the beneficiary worked as a teacher/child attendant for the [REDACTED] Poland from September 1998 through August 2001. With the petition, the petitioner submitted a certified, translated certificate from the [REDACTED] indicating that the beneficiary worked there as a teacher from September 1998 through August 2001. The letter fails to list the name of the actual employer/supervisor, his or her title, a description of the beneficiary's work, and an indication as to whether the employment was full-time or part-time. Further, the letter indicates that the beneficiary worked there as a teacher, not in the proffered position of a nanny.

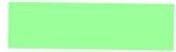
In response to the director's January 26, 2009 RFE, the petitioner submitted an additional certified, translated letter from [REDACTED] indicating that the beneficiary worked for her as a nanny from October 1994 through June 1997. The petitioner failed to explain why the beneficiary did not list this previous experience in the proffered position on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification, lessens the credibility of the evidence and facts asserted.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director,⁴ the record of proceeding indicates that the petitioner has moved to Florida, whereas the labor certification was approved with [REDACTED] Illinois as being the area of intended employment. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). It seems that the petitioner intends to employ the beneficiary as a nanny in Florida, outside the terms of the ETA Form 9089. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment). If the petitioner does not intend to employ the beneficiary in Illinois, then no bona fide job offer exists. This issue must be addressed with any future filings.

⁴ 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).

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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.