



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: NOV 01 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as any Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*Nachel NiJuvio*  
for

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. Counsel for the beneficiary filed an appeal to the Administrative Appeals Office (AAO). The AAO subsequently rejected the appeal. Counsel for the petitioner filed a motion to reopen the AAO's decision. The AAO dismissed the motion. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the AAO will be affirmed, and the petition will be denied.

The petitioner is a household. It seeks to employ the beneficiary permanently in the United States as a children's nurse and domestic employee. 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 failed to establish 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 motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner has provided new facts with supporting documentation not previously submitted. Counsel asserts that the previous motion to reopen had a guaranteed delivery date of July 13, 2011, which would have been 33 days subsequent to the AAO's decision dated June 10, 2011. The petitioner submits as evidence a copy of a United States Postal Service (USPS) receipt, customer's copy, dated July 12, 2011 and a copy of a USPS Express Mail delivery receipt.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

On motion, counsel asserts that the petitioner's previous motion was timely filed. The petitioner submits as evidence a copy of a USPS receipt, customer's copy, dated July 12, 2011. The postal receipt indicates that a package was to be delivered from Norwalk, California to Lincoln, Nebraska via Express Mail. The postal receipt also stated "Wed 07/13/2011 12:00 PM – Guaranteed Delivery." The petitioner submitted a copy of a USPS Express Mail delivery receipt, which counsel asserts demonstrates that the petitioner's motion was timely delivered to the correct post office on July 13, 2011, but that United States Citizenship and Immigration Services (USCIS) did not receive the motion until the following day, July 14, 2011. Counsel further asserts that any delay in the filing of the petitioner's motion was reasonable and beyond the petitioner's ability to control. Although the petitioner's copy of the Express Mail receipt appears to indicate that the motion was delivered to the proper post office box on July 13, 2011, but that USCIS did not pick up the motion until July 14, 2011, the record of proceeding contains the original postal services Express Mail receipt. The original receipt indicates that the package was delivered to the post office in Norwalk, California on July 12, 2011, that its scheduled delivery date was July 13, 2011, and that its actual delivery date to USCIS was July 14, 2011. USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's

control. 8 C.F.R. § 103.5(a)(1)(i). In this matter, the motion was received by USCIS on July 14, 2011, 34 days after the AAO's June 10, 2011 decision. The petitioner has failed to demonstrate that there was a reasonable delay in filing or circumstances beyond his control sufficient to justify the late filing of the motion.

Even if the AAO were to accept counsel's assertions and accept the motion as having been timely filed, a review of the AAO's decision dated June 10, 2011 reveals that the AAO set forth a legitimate basis for its rejection of the appeal. [REDACTED] filed the appeal on behalf of the beneficiary. The record of proceeding did not contain a Form G-28, Notice of Entry of Appearance as Attorney or Representative, establishing that counsel represented the petitioner on appeal. There was only a Form G-28 indicating that [REDACTED] represented the beneficiary on appeal.

8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

8 C.F.R. § 103.3(a)(2)(v) states:

*Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

Neither the petitioner nor any entity with legal standing filed the appeal, but rather legal counsel for the beneficiary. Therefore, the appeal was not properly filed. The AAO accordingly rejected the appeal.

Although counsel states on motion that the Form G-28 indicating that his law office represented the petitioner was inadvertently left out of the appeal package that was submitted to USCIS, there is no evidence in the record to support such claim. The record of proceeding does not demonstrate an attempt on behalf of the petitioner to submit a Form G-28 showing that [REDACTED] represented the petitioner on appeal. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

The primary issue in this matter is whether the petitioner has established its continuing ability to pay the proffered wage from the priority date of April 30, 2001. Considering the instant matter on its

merits, the AAO finds that the petitioner has failed to establish its ability to pay the proffered wage in 2001 and 2003.<sup>1</sup>

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$1,395.00 per month (\$16,740.00 per year). The Form ETA 750 states that the position requires two years of training as a nurse's aide and five years of experience in the job offered as a children's nurse and domestic employee.

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 28, 2001, the beneficiary claims to have worked for the petitioner since July 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Comm. 1967).

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<sup>1</sup> The evidence in the record of proceeding demonstrates that it is more likely than not that the petitioner has established its ability to pay the proffered wage in 2002, and 2004 through 2012.

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 petitioner's ability to pay the proffered wage. The petitioner submitted copies of the beneficiary's Forms 1040 for 2001 and 2003. However, the beneficiary described her occupation as a "messenger" not as a children's nurse or domestic employee. Therefore, the beneficiary's income for 2001 and 2003 cannot be considered as being income from the petitioner.

If, as in this case, 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 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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*, 539 F. Supp. at 650.

In the instant case, the petitioner supported a family of five in 2001 and a family of four in 2003 in [redacted] California. The petitioner's tax returns reflect the following information for the following years:

	2001	2003
Petitioner's adjusted gross income (Form 1040, lines 33 or 34)	\$86,699.00	\$57,479.00

Where the petitioner's AGI amounts exceeded the proffered wage amounts, the petitioner must show that he can sustain himself and his dependents by listing his personal household expenses. *See id.* In the instant matter, the petitioner listed his household expenses as \$5,960.28 per month (\$71,523.36 per year). Subtracting the household expense amount \$71,523.36 from the above noted AGI amounts results in a remainder of \$15,175.64 in 2001 and -\$14,044.36 in 2003, which

is less than the proffered wage in both years. Therefore, the petitioner failed to demonstrate his ability to pay the proffered wage in 2001 and 2003.

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 *Sonegawa*, 12 I&N Dec. at 614-15.<sup>2</sup> 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, for 2001 and 2003, counsel did not contend on appeal or on motion that the petitioner faced unusually difficult times financially. Instead, counsel asserted that the petitioner's financial situation began to decline in 2007. Further, counsel has failed to demonstrate that unusual circumstances similar to those in *Sonegawa* existed during those two years. 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.

An additional issue is whether the petitioner has established that the beneficiary possessed all the education, training, and experience as of the priority date as required by the labor certification.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for processing by the DOL. See

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<sup>2</sup> 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 petitioner's sound business reputation and outstanding reputation as a couturiere.

8 C.F.R. § 204.5(d).<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on February 25, 2010.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 (1<sup>st</sup> Cir. 1981).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

In this matter, Part 14, of the labor certification states that two years of training as a nurse's aide are required. The labor certification at Part 14 also states that five years of experience in the proffered position of children's nurse and domestic employee are required.

Part 13, of the labor certification lists the required job duties as:

- To take care of two children ages; 2 years and 2 months old respectively. To provide care and personal hygiene of both children, custodial surveillance both inside and outside of the home. Execute household duties such as; home cleaning, cooking and management of weekly food expenditures.

Part 15, of the labor certification lists other special requirements:

- Must know how to administer medicine, be able to apply injections, have knowledge of First Aid techniques.
- Have a Roman Catholic Family background.
- Must speak and read Spanish.

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. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she has over 25 years of experience as a children's nurse and domestic employee. The beneficiary stated that she was employed by [REDACTED] as a nursemaid and domestic

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<sup>3</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

employee from June 1975 to May 2000. In the section of the labor certification eliciting information regarding the beneficiary's training, she stated that she attended [REDACTED] to be a nurse's aide from March 1988 to December 1988, and that she received a certificate of completion.

The record of proceeding contains an Official Capacitation Certificate, with English translation, from the [REDACTED] located in the city of [REDACTED]. The translation indicates that the certificate was issued to the beneficiary and that she completed 240 hours of training from August 10, 1990 to December 20, 1990. The translation also states that the beneficiary "has been educated to hold the occupation of First Aid and Basic Injections, in merit of having successfully completed the corresponding courses of teaching individuals to respond to sudden illness, injuries and breathing/cardiac emergencies in adults, children and infants." However, the English translation differs from the original certificate in that the original certificate does not indicate that the beneficiary "successfully completed the corresponding courses of teaching individuals to respond to sudden illness, injuries and breathing/cardiac emergencies in adults, children and infants." In addition, the beneficiary did not indicate on the labor certification that she attended this institution or that she received a first aid and basic injections certificate in December 1990. In fact, the beneficiary stated, under penalty of perjury, on the labor certification that she attended [REDACTED] training in "Cosmetology Beauty Parlor" from March 1989 to December 1990. There has been no explanation given for these inconsistencies. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Thus, the petitioner has not demonstrated that the beneficiary has received the required two years of training as a nurse's aide and is qualified to perform the duties of the proffered position.

The petitioner submitted a letter of employment dated January 4, 2000 from [REDACTED] who stated that he employed the beneficiary as a domestic servant and nanny since June 1975. In response to the AAO's Request for Evidence (RFE) dated June 28, 2013, the petitioner submitted an additional employment letter dated September 3, 2013 from [REDACTED] who stated that he employed the beneficiary as a domestic servant and nanny from June 1975 to May 2000, and that she was honest, trustworthy, and of good character. The AAO finds that the declarant has failed to describe the beneficiary's job duties, to list the number of hours the beneficiary worked per week, or to provide his address. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

The evidence in the record also fails to establish that the beneficiary met the special requirements as stated on the labor certification: "[m]ust know how to administer medicine, be able to apply injections, have knowledge of First Aid techniques;" must "[h]ave a Roman Catholic Family background;" and "[m]ust speak and read Spanish" as of the priority date, April 30, 2001.

Accordingly, the petitioner has failed to establish that the beneficiary has the requisite two years of training or the five years of work experience in the job offered as required by the Form ETA 750. 8 C.F.R § 204.5(g)(1).

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The motion to reopen is granted and the decisions of the AAO dated June 10, 2011, July 26, 2012 are affirmed. The petition is denied.