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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 22 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 head of a private household.[1] He seeks to employ the beneficiary permanently in the United States as a nanny for an infant. 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 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 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. 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).

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.

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[1] According to the petition, the petitioner does not have an EIN number but a social security number.

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, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on February 13, 2006. The proffered wage as stated on the ETA Form 9089, Section G, Item 1, is $9.50 per hour ($19,760.00).

Accompanying the petition and labor certification, counsel submitted, *inter alia,* the petitioner's federal income tax return (Form 1040) for 2006 and a Wage and Tax Statement (W-2) for 2006 issued to the petitioner by his employer.

The director issued a request for evidence (RFE) to the petitioner on May 11, 2009. The director requested evidence of the petitioner's ability to pay from the priority date, specifically:

> [I] ndicate all of the family's household living expenses ... housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. All items may be subject to verification.

The director also requested copies of the petitioner's federal income tax returns for 2006, 2007, and 2008, and evidence of any wage paid to the beneficiary as of the priority date.

In response, counsel submitted a cover letter dated June 3, 2009; a listing ("listing") of monthly bills for the petitioner totaling $1,084.00 per month ($13,008.00 per year); and the petitioner's federal income tax returns (Forms 1040) for 2006, 2007, and 2008.

On appeal, counsel submitted a legal brief dated August 24, 2009.

The evidence in the record of proceeding shows that the petitioner is the head of a household. On the ETA Form 9089, signed by the beneficiary on August 9, 2007, the beneficiary did not claim to work for the petitioner.

The petitioner must establish that its 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. Comm. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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 petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary. According to the record, the beneficiary resides in Richmond Hills, New York.

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 at 881 (E.D. Mich. 2010). 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.

There is evidence in the record that the petitioner's sole income is wage income received as an equipment operator. Individuals report income and expenses on their individual (Form 1040) federal tax return each year. Individual petitioners must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, individual petitioners must show that they can sustain themselves and their dependents. *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 petitioning entity structured as a sole proprietorship 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.

According to the regulation at 8 C.F.R. § 204.5(g)(2), evidence must be submitted to verify that the petitioner is in possession of sufficient assets to pay the proffered wage.

In this instance, the petitioner submitted a listing of 15 monthly household expense items which are principally his utility expenses, and truck and insurance payments. The items that were disclosed are given in an abbreviated fashion so it is not possible in every instance to understand what each notation means. No substantiation such as credit card statements, bank checking statements or utility bills was submitted to support the listing. The monthly expenses reported by the petitioner total $1,084.00 monthly ($13,088.00 yearly). The director noted in his decision that the petitioner has

under reported his recurring monthly personal expenses and has not reported rent/mortgage payments, daycare/nanny expense, or items such as food and clothing.[2]

The AAO notes that the petitioner stated on Forms 1040, Schedules A for 2006, 2007, and 2008, itemized total deductions including his mortgage interest expense of $17,601.00, $18,883.00, and $12,452.00, respectively. The petitioner stated expense items on Schedules A that are not noted on his listing of recurring personal expenses. For example, the mortgage interest deductions listed on Schedule A for 2006 and 2007 exceed the total yearly expenses reported by the petitioner in response to the director's RFE. Further, the petitioner's Forms 1040, Form 2441,[3] (that are included in the record), stated child and dependent care expenses of $3,076.00, $4,816.00, and $6,410.00 respectively, for 2006, 2007, and 2008. Child care expenses were not stated on the petitioner's listing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988).

In the instant case, the petitioner supported a family of two in 2006 and three in 2007 and 2008.

The petitioner's tax returns reflect the following information for the following years:

	2006	2007
Proprietor's adjusted gross income (Form 1040)	$45,963.00	$52,172.00

	2008
Proprietor's adjusted gross income (Form 1040)	$37,940.00

In 2006, 2007 and 2008, the petitioner's adjusted gross incomes fail to cover the proffered wage of $19,760.00 because it is improbable that the sole proprietor could support himself on the very nominal amounts, which is what remains after reducing his adjusted gross income by the amount required to pay the proffered wage, the amount stated on the petitioner's listing of recurring personal expenses, the amounts stated on the petitioner's Forms 1040, Schedule A for the same years, and on his Forms 2441. Had the petitioner reported all his reasonable recurring personal expenses to

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[2] Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), and car up-keep expense, installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), retirement and education savings accounts, vacation and entertainment, credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

[3] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing a U.S worker with a foreign worker, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

include omitted items (food, clothing, savings, entertainment, etc.), not found on Form 1040, Schedule A, Form 2441, or the listing, it is more likely than not that the petitioner would demonstrate a deficit for each year for which tax returns were submitted.

On appeal, counsel asserts that the petitioner has demonstrated by the evidence submitted that he can pay the proffered wage as well as his own living expenses "even without considering the additional income from his domestic partner." As stated above, the evidence submitted shows that the adjusted gross incomes are insufficient to cover the proffered wage, reported expenses for which evidence was present in the record, and omitted items. Insofar as counsel is referring to evidence outside the record concerning additional income received or to be received from another party, or the sharing of living costs, or special living accommodations, such evidence has not been submitted, and therefore cannot be considered in this discussion. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel states that the petitioner's listing of recurring household did include a statement of the petitioner's monthly mortgage payments since the abbreviated references of "WAMU 1st" and "Chase 2nd" accounted for monthly payments of $240.00 and $110.00, respectively.[4] Following counsel's assertion, the yearly mortgage expenses reputedly "accounted for" by the petitioner on the listing, calculate to $4,200.00 per year. However, as noted above, the Forms 1040, Schedules A for 2006, 2007 and 2008, noted "home mortgage interest and points" expenses on line 10 of each year's return as $13,693.00, $14,760.00, and $9,631.00, respectively. Counsel's assertion is contrary to the evidence submitted. One again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Similarly, counsel asserts that the petitioner's accounting for daycare/nanny expenses was also listed on his statement of expenses under [redacted] pay" and [redacted] pay." The AAO notes that although these items were included on the petitioner's listing of recurring household, they were lined out and no figures were provided. However, the petitioner stated on his Forms 1040, Forms 2441, for 2006, 2007, 2008, the amounts of $3,076.00, $4,816.00, and $6,410.00 for yearly child care expenses, respectively. It is not clear why counsel states on appeal that the petitioner did not incur child care services during 2008 when the petitioner reported on Form 1040, Form 2441, child care services expenses of $6,410.00 for that year. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Counsel makes similar assertions in his brief why other reasonable recurring household expenses were not reported, but since the assertions were made without substantiation, counsel's contentions have no probative value.[5]

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[4] The AAO notes that these two categories were struck out and the petitioner provided no monthly payment figures for these child care expenses on the listing.

[5] The petitioner does not operate a business. He depends on his earned income to support himself

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that he had the continuing ability to pay the beneficiary the proffered wage.[6]

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 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).

Section 203(b)(3)(A)(i) of 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 job qualifications for the certified position of a nanny are found on the ETA Form 9089 (section H, item 11). It describes the job duties to be performed as follows:

> Organize & regulate schedule for [an] infant[7] including feeding, bathing, changing, learning, singing, games, social communication skills.

The ETA Form 9089 states that the position requires two years of experience.

According to the ETA Form 9089, the beneficiary stated under penalty of perjury that she had one prior job experience as a nanny. She stated she had been employed full time by an individual in Greater Georgetown, Guyana, approximately 14 years ago, as a nanny in a private household from February 19, 1994, to April 27, 1996. According to a USCIS Form G-325, made by the beneficiary under penalty of perjury, the beneficiary stated that after the above job she was employed as a stewardess by two cruise ship lines from July 1997 to December 2005. Since December 2005, the beneficiary stated she has been unemployed.

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

> (ii) Other documentation—

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and his family. Therefore, an analysis following the case of *Matter of Sonegawa, supra.* cannot be accomplished under the circumstances of this case.

[6] It is noted that over 25% of the petitioner's reported income in 2008 was "unemployment compensation." Given the limited duration of this income source, this fact further undermines his claim to be able to pay the proffered wage.

[7] The petitioner has two daughters, born in 2003 and 2007 respectively. Neither could be described today as an infant.

> (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, 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 sole statement[8] submitted in the record concerning the beneficiary's qualifications was an original letter dated August 5, 2007, reputedly signed by [redacted] of Kitty Georgetown, Guyana, addressed to the United States Consulate, Georgetown, Guyana. There is no evidence the letter was mailed to the United States Consulate, and it is not sworn or notarized. [redacted] stated in the letter that he employed the beneficiary as a nanny from February 10, 1994, to April of 1996. Therefore, the dates of employment conflict with the different dates of employment provided by the beneficiary. 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).

[redacted] described the beneficiary's job duties exactly as set forth in the ETA Form 9089 (i.e. "Organize & regulate schedule for [an] infant including feeding, bathing, changing, learning, singing, games, social communication skills").

This replication of the same exact job description in the record of proceeding in a prior employment reference to substantiate job experience in the offered position is not credible. Since the prior employment reference and the described job duties are identical in format as well as content, they appear to be pre-prepared by a third party, and presumably, they are not the statement of [redacted] Further, it is reasonable to assume that if the beneficiary received compensation through her own labors while employed as a nanny, she would have produced records of earnings she received in

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[8] The undated statement that has been provided is not an affidavit as it was not sworn to or affirmed by [redacted], as the declarant, before an officer authorized to administer oaths or affirmations who has confirmed the declarant's identity and administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746.

Guyana in substantiation of her prior employment experience. No such substantiation is in the record. The AAO also notes that the petitioner is providing a job reference dated August 5, 2007, which could not have been provided to the DOL before it accepted the ETA Form 9089 on February 13, 2006, or before the Application was certified on May 25, 2007.

No other letters or statements according to the regulation at 8 C.F.R. § 204.5(l)(3) were submitted by the petitioner.

The beneficiary does not meet the terms of the labor certification. The petition will be denied on this basis as well. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring sufficient evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.