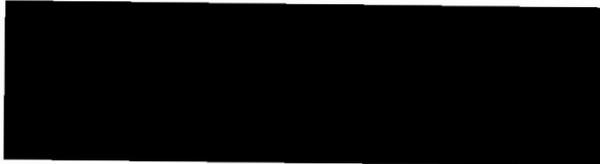




U.S. Citizenship
and Immigration
Services

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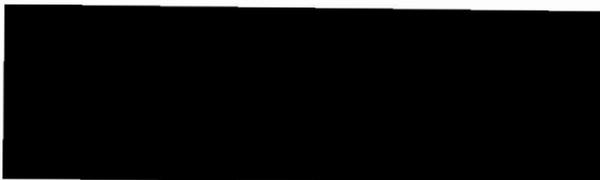
Office: TEXAS SERVICE CENTER

Date: OCT 18 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, 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 a roofing, siding and gutter company. It seeks to employ the beneficiary permanently in the United States as a sheet metal worker (tinsmith roofer). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's June 20, 2006 denial, the director determined that the petitioner had not established its 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, 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.

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 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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *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 Application for Alien Employment Certification as certified by the U.S. Department of Labor 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 May 14, 2004. The proffered wage as stated on the Form ETA 750 is \$30.50 per hour (\$63,440 per year). The Form ETA 750 states that the position requires four years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. On appeal counsel submits a brief, a letter dated July 17, 2006 from [REDACTED] regarding the three corporations he owns and the beneficiary's compensation from these three corporations, copies of signed job contracts, medical insurance statements paid by the petitioner, and invoices for purchasing heavy equipment by the petitioner. Other relevant evidence in the record includes Form 1120 U.S. Corporation Income Tax Return filed by Richard's Gutters & Sheet Metal, Inc. for 2004 and 1099 forms issued by Richard's Gutters & Sheet Metal, Inc., Richard's Siding & Windows, Inc. and Richard's Gutters, Inc. to the beneficiary for 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established in 1986, to have a gross annual income of \$647,737, to have a net annual income of \$11,944, and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on May 7, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that [REDACTED] owns three corporations and therefore, the beneficiary's compensation paid by the three corporations should be considered as paid by the petitioner; that the petitioner's cash flow from rents and depreciation, expenses spent in medical insurance, and heavy equipment purchase should be considered in determining the petitioner's ability to pay the proffered wage in 2004; and that the contracts signed by the petitioner provide proof of its continual source of income through the lengthy and highly paid job orders.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) 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).

The record shows that a Form ETA 750 on behalf of the instant beneficiary was filed by an employer named Richard's Gutters & Sheet Metal, Inc. on May 14, 2004 but the employer's name was changed to Richard's Siding & Gutters, Inc. and the Form ETA 750 was certified on February 9, 2004 to the employer, Richard's Siding & Gutters, Inc. who filed the instant petition with the CIS Texas Service Center on April 14, 2006. With the initial filing, the petition was submitted with a corporate tax return filed by Richard's Gutters & Sheet Metal, Inc. for 2004 as evidence of the petitioner's ability to pay the proffered wage. This office accessed the Illinois corporate record website and the corporation file detail report for Richard's Gutters and Sheet Metal, Inc. lists two old corporate names for Richard's Gutters and Sheet Metal, Inc.: Richard's Siding and Gutters, Inc. and Richard's Gutters and Sheet Metaling, Inc. *See* <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed on September 20, 2007). Therefore, the AAO will consider Richard's Siding & Gutters, Inc. and Richard's Gutters & Sheet Metal, Inc. as the same

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).

corporation and will review documents filed under Richard's Gutters & Sheet Metal, Inc. as the petitioner's documents. Consequently, the medical insurance payments were made by Richard's Siding & Windows, so these payments will not be considered in determining the petitioner's ability to pay the proffered wage.

However, contrary to counsel's assertion, the record contains no evidence that Richard's Siding & Windows, Inc. or Richard's Gutters, Inc. is the same business entity as the petitioner, is a part of the petitioning entity or qualifies as a successor-in-interest to the petitioner. The record shows that the petitioner was structured as an Illinois corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Counsel's assertion that the three corporations are owned by the same person does not establish that Richard's Siding & Windows, Inc. or Richard's Gutters, Inc. is the same entity as the petitioner, a part of the petitioner or the successor-in-interest to the petitioner. The AAO notes that Richard's Gutters, Inc. was dissolved while Richard's Siding and Windows, Inc. is still in good standing in the state of Illinois. *See* <http://www.ilsos.gov/corporatellc/CorporateLlcController>.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 submitted the beneficiary's 1099 forms for 2004 and 2005 issued by the petitioner and two other corporations. As discussed above, the compensation paid to the beneficiary by other employers cannot be considered in determining the petitioner's ability to pay the proffered wage. The 1099 forms issued by the petitioner to the beneficiary show that the petitioner paid the beneficiary \$13,550 in 2004 and \$1,500 in 2005 respectively. The petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2004 and 2005. The petitioner is obligated to demonstrate that it could pay the difference of \$49,890 in 2004 and \$61,940 in 2005 respectively between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses contrary to the petitioner's assertions. 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). Counsel's reliance on the petitioner's expenses in medical insurance and purchasing heavy equipment is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner spent expenses in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2004. According to the tax return in the record, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The petitioner's 2004 tax return demonstrates the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage for the year of the priority date:

- In 2004, the Form 1120 stated a net income² of \$11,944.

Therefore, for the year 2004, the petitioner did not have sufficient net income to pay the difference of \$49,890 between wages actually paid to the beneficiary and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and

² Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Calculations based on the Schedule L attached to the petitioner's tax return yield the following: the petitioner's net current assets during 2004 were \$(39,901).

Therefore, for the year 2004, the petitioner had negative net current assets, and therefore, the petitioner's net current assets were not sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage that year.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submitted job contracts signed by the petitioner in 2004 and asserted that these contracts show the continual cash flow from the work performed by the petitioner in recent years, and provide proof of the petitioner's continual source of income through the lengthy and highly paid job orders. However, contracts are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While contracts may establish the petitioner's job orders, the income from these contracts should be reflected on the petitioner's tax returns for the years the contracts are performed. It is noted that since these contracts were signed in 2004, the petitioner's 2004 tax return should have already included the income received from performing these contracts in 2004. However, the 2004 tax return shows that the petitioner did not have sufficient net income or net current assets to pay the proffered wage that year. On appeal filed on July 21, 2006, the petitioner did not submit its 2005 tax return, annual report or audited financial statements. Without the petitioner's financial documents for 2005, the AAO cannot be convinced that the petitioner's net income including income from these contracts in 2005 was sufficient to pay the proffered wage. The income from performing these contracts in 2006 and future years if any cannot establish the petitioner's ability to pay the proffered wage for 2004 and 2005. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In addition, the petitioner filed another Immigrant Petition for Alien Worker (Form I-140) under the name of Richard's Gutters & Sheet Metal, Inc. on January 24, 2006 with the priority date of January 8, 2004 and the petition was approved on March 3, 2006.⁴ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). In the instant case, the petitioner must also show that it had sufficient income to pay the other beneficiary the proffered wage from 2004, the year of the priority date for that petition and

⁴ LIN-06-082-51957.

continuing until the beneficiary obtains lawful permanent residence. Since the record in the instant petition failed to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved Form ETA 750 labor certifications.

Furthermore, the AAO notes that the Illinois corporate website indicates that the Illinois corporation Richard's Gutters and Sheet Metal, Inc., previously named Richard's Siding and Gutters, Inc. and Richard's Gutters and Sheet Metaling, Inc., has been dissolved.⁵ If the petitioner further pursues this matter, it must establish that the job offer to the beneficiary is a realistic one and that it has the continuing ability to pay the proffered wage.

On appeal counsel also submits copies of paid invoices for the purchase of heavy equipment by the petitioner and asserts that this large already paid investment of \$69,620 demonstrate the petitioner's financial ability to pay off the investments quickly and earn sufficient income to pay the beneficiary's offered wage. Counsel's reliance on the petitioner's future ability to create its income so that it can pay the beneficiary the proffered wage is misplaced. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

However, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the expenses of heavy equipment were uncharacteristic for the petitioner.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

⁵ See <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed on September 20, 2007).

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.