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U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

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)

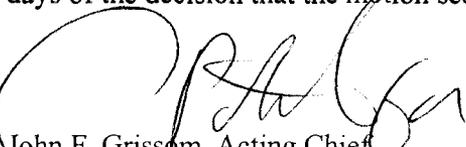
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i)


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based 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, All Texas Foundation Repair, Inc. is a foundation repair firm. It seeks to employ the beneficiary permanently in the United States as a house foundation repairer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, contends that the petitioner has demonstrated its financial ability to pay the proffered salary.¹

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).

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 at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

¹ 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 noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its *continuing* financial ability to pay the certified salary as of the priority date. 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). If the preference 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, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The priority date is the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Part A of the ETA 750 is \$8.91 per hour, which amounts to \$18,532.80 per year. On Part B of the ETA 750, signed by the beneficiary on April 11, 2001, the beneficiary claims to have worked for the petitioner from August 1996 to present (date of signing).

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on May 23, 2006, the petitioner claims to have been established in 1989.

This is the second I-140 petition filed by the petitioner on behalf of this beneficiary using the same labor certification. The first petition was filed on May 30, 2003 and denied by the director on June 4, 2004, based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage. The appeal was dismissed by the AAO on November 18, 2005.

In support of the instant petition, and as evidence of its continuing financial ability to pay the proposed wage offer of \$18,532.80 per annum and in response to the director's request for evidence, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, 2003, 2004, and 2005. The returns that were submitted indicate that the petitioner files its taxes using a fiscal year beginning on July 1st and ending on June 30th in the following year. Thus, the petitioner's 2001-2005 returns cover a period beginning on July 1, 2001 and ending on June 30, 2006. The petitioner did not provide a tax return covering the priority date of April 30, 2001. The returns provided also contain the following information:

	2001	2002	2003	2004	2005
Net Income ²	\$ 2,186	-\$ 387	-\$513	\$ - 0-	\$1,338

² For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28. (taxable income before net operating loss deduction and special deductions) USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or

Current Assets	\$ 41,852	\$ 64,042	\$ 31,308	\$46,304	\$53,676
Current Liabilities	\$ 90,667	\$ 85,557	\$46,317	\$37,903	illegible ³
Net Current Assets	-\$ 48,815	-\$ 21,515	-\$15,009	\$ 8,401	unknown

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for a given period. Net current assets are found on line(s) 1 through 6 on Schedule L and current liabilities are itemized on line(s) 16 through 18 on Schedule L.

The petitioner (tax id xx-xxx [redacted]) also provided copies of various Wage and Tax Statements (W-2s) purported to be issued to the beneficiary. Some of the W-2s appeared to be issued by the petitioner and by other entities. Three different social security numbers are shown as being used by the beneficiary. The W-2s are reflected as follows:

Year	Issuer	Employee Soc. Sec. Number	Wages
2001	All Texas Foundaion Repair, Inc (tax id xx-xx [redacted])	xxx-xx- [redacted]	\$8,651
2001	AMS (tax id xx-xxx [redacted])	xxx-xx- [redacted]	\$10,712
2002	Sterling Personnel (tax id xx-xxx [redacted])	xxx-xx- [redacted]	\$9,764.40
2002	All Texas Foundation Repair Inc. (tax id xx-xx [redacted])	xxx-xx- [redacted]	\$8,650
2003	xx-xxx [redacted] AMS Staff Leasing NA, Ltd. Pay Agent for Breckinridge Enterprises Ltd All Texas Foundation Repair	xxx-xx- [redacted]	\$ 8,456.29
2003	All Texas Foundation Repair Inc		

sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

³ The photocopy of the petitioner's 2005 Schedule L is not readable.

⁴ 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.

	(tax id xx-██████████	xxx-xx-██████████	\$11,066.75
2004	xx-xxx-██████████ AMS Staff Leasing NA, Ltd. Pay Agent for Breckinridge Enterprises Ltd All Texas Foundation Repair	xxx-xx-██████████	\$7,210
2004	All Texas Foundation Repair, Inc (tax id xx-xxx-██████████	xxx-xx-██████████	\$12,360.40
2005	Breckinridge Enterprises Ltd (tax id xx-xxx-██████████ Pay Agent All Texas Foundation Repair	xxx-xx-██████████	\$7,828.00
2005	All Texas Foundation Repair (tax id xx-xxx-██████████	xxx-xx-██████████	\$11,070.51
2006	Breckinridge Enterprises Ltd. (tax id xx-xxx-██████████ Pay Agent for AMS Staffing, NA All Texas Foundation Repair	xxx-xx-██████████	\$8,528.40
2006	All Texas Foundation Repair (tax id xx-xxx-██████████	xxx-xx-██████████	\$15,115.60

The petitioner also provided a letter dated May 5, 2006, from its president, ██████████. The letter states that the petitioner leased out part of its payroll services to AMS Staff Leasing NA, LTD as its payroll agent since 1990. ██████████ also states that Sterling Personnel is a “sister company” of AMS Staff Leasing.

Following a review of the petitioner’s financial documentation, the director determined that the petitioner had not established its ability to pay the proposed wage offer and denied the petition on May 10, 2007. The director noted that the petitioner did not declare a positive net income on its tax returns except for 2001.⁵ He also noted that the petitioner had not sufficiently clarified its relationship with the other entities that issued W-2s during the relevant period, or provided first-hand evidence that the funds were actually funds derived from the petitioner. Further, the director noted that the petitioner has not explained why it would pay the beneficiary directly in one year on its payroll and additionally pay the beneficiary through AMS or Sterling Personnel in the same year.

On appeal, the petitioner, through counsel re-submits the W-2s and ██████████’s letter previously submitted to the record. Additionally, counsel submitted a July 5, 2007 letter signed by ██████████, the payroll

⁵ The director used the petitioner’s taxable income (line 30) of \$-0- shown on the 2005 tax return rather than the net taxable income before net operating loss deduction of \$1,338 shown on line 28.

manager of AMS Staff Leasing. She states that “AMS, Breckenridge Enterprise, Inc. and Sterling Personnel are all three under the Breckenridge Enterprise umbrella.” She further states that the petitioner has been a client since 1997 and that wages reported by the petitioner will be reported on the W-2 and any wages not reported are the client’s responsibility. In support of these claims, two copies of online documents identified as “Franchise Tax Certification of Account Status” respectively referring to AMS Staff Leasing and Breckenridge Enterprises Inc. Neither of these documents support the proposition that one is under the “umbrella” of the other. Also provided is an internal summary of wages paid to the beneficiary.

On appeal, counsel claims that the relationship of the petitioner and the other entities that issued W-2s has been sufficiently explained. He notes that the addresses of AMS Staff Leasing and Breckenridge Enterprise, Inc. are the same or similar and that they both share the same registered agent as shown on the franchise tax certification documents. He also states that the telephone greeting refers to both companies and reflects that they share the same corporate offices. Counsel states that the petitioner reports its wages to AMS Staff Leasing and its affiliates and then the W-2s and other payroll papers are processed by these entities. He adds that the fee arrangement between the petitioner and AMS or its affiliates is confidential, but that the evidence submitted establishes that the petitioner has paid the proffered wage by the employer and its payroll agents during the 2001-2006 period.

Counsel’s contentions are not persuasive. In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner’s ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner’s net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period.

In this case, without additional reliable documentation, none of the W-2s are sufficiently credible to demonstrate wages paid to the beneficiary for his services during the relevant period. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is not found that either [REDACTED] letter or Ms. [REDACTED] letter are sufficiently probative of the entities’ relationship during this period. Subsequent to an approved Form 2678, Employer Appointment of Agent, pertinent IRS rules provide for the use of a payroll agent in issuing W-2s whereby the payroll agent appears as the employer in box c of the W-2 and enters its name and agency relationship for the identified employer, as well as the agent’s address. If it acts for more than one employer, then a separate W-2 must be filed for the employee showing the wages paid by each employer. The W-2s must be filed with the pertinent Social Security Administration and/or IRS offices.⁶

⁶ See, *2001 Instructions for Forms W-2 and W-3*, (<http://www.irs.gov/pub/irs-prior/iw2w3--2001.pdf>) and *2008 Instructions for Forms W-2 and W-3*, (<http://www.irs.gov/pub/irs-pdf/iw2w3.pdf>).

Here, it is noted that the 2001 W-2 issued by AMS and the 2002 W-2 issued by Sterling Personnel show no agency relationship with the petitioner. Conflicting social security numbers are reflected as belonging to the beneficiary as shown on the petitioner's W-2s issued in 2001 and 2002 and by the AMS or Sterling Personnel W-2s for the same years.⁷ Further, on Part 3 of the first I-140 filed by the petitioner on May 23, 2003, the petitioner claimed that the beneficiary had no social security number. However, evidence submitted in support of the instant petition shows that the petitioner issued a W-2 in 2003 to an individual with a social security number of xxx-xx-██████. Other W-2s were issued to an employee identified with a social security number of xxx-xx-██████ in 2001 and 2002 as reflected on the petitioner's W-2s. Additionally, in 2003, the other W-2 issued by AMS Staff Leasing NA, Ltd. as a payroll agent on behalf of All Texas Repair as well as Breckinridge Enterprises Ltd, reported wages collectively rather than on separate W-2s for each employer. The same procedure was used on the 2006 W-2 whereby Breckinridge Enterprises Ltd. now appears as a pay agent for AMS Staffing, NA and All Texas Foundation Repair in collectively reporting wages to an individual with the xxx-xx-██████ social security number.

It is incumbent on 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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In view of these discrepancies on the W-2s, they are not found to be probative of the actual wages paid by the petitioner to the beneficiary during the relevant period. The petitioner did not submit any first-hand evidence of actual monies paid as wages to the beneficiary such as negotiated checks or payroll records to support the amounts claimed on the W-2s. The petitioner failed to provide a credible confirmation that the individual claimed to have been paid wages during this period using multiple social security numbers was, in fact, the beneficiary identified on the I-140. Further, the petitioner did not provide first-hand evidence of the work performed by the beneficiary for all entities listed on the W-2s, accompanied by a credible explanation of the reason for such an arrangement in the first place.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

⁷ This office notes that an individual who wrongfully uses or misrepresents a social security number may face civil and/or criminal penalties. *See* 8 U.S.C. § 1324c and 42 U.S.C. § 408(a)(7).

In the instant matter, the petitioner's net income of \$2,186 in 2001; -\$ 387 in 2002; -\$513 in 2003; \$-0- in 2004, and \$1,338 in 2005 was not sufficient to meet the beneficiary's proposed wage offer of \$18,532.80 per year. Further as noted above, the petitioner's net current assets of -\$48,815 in 2001; -\$21,515 in 2002; -\$15,009 in 2003; \$8,401 in 2004, and an unknown figure in 2005 due to the illegibility of the current liabilities reported on Schedule L. Further, as additionally noted the petitioner failed to submit pertinent financial information such as tax return, audited financial statement or annual report covering the period beginning as of the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing financial ability to pay the proffered wage. Based on a review of the underlying record and the argument and evidence submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.