

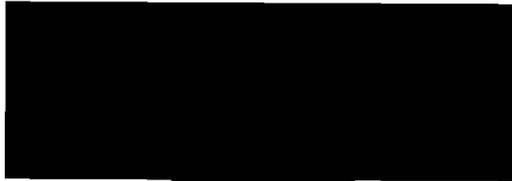
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6

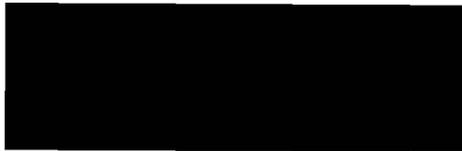


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: DEC 30 2008  
SRC 06 800 18143

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.

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 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 contractor. It seeks to employ the beneficiary permanently in the United States as a roofing mechanic. 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 not established 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 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.

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 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, Application for Alien Employment Certification, 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 March 22, 2001. The proffered wage as stated on the Form ETA 750 is \$750 per week (\$39,000.00 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 appeal.<sup>1</sup> On appeal, counsel submits a letter from the petitioner's accountant. Other relevant evidence in the record includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for the years 2001 through 2005 and copies of the form W-2 Wage and Tax Statements issued by the petitioner to the beneficiary in 2002, 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.<sup>2</sup>

On the I-140 petition the petitioner claimed to have been established on June 4, 1998 and to currently have 5 employees. The petitioner listed its gross annual income as \$761,863.00 and its net annual income as \$57,543.00. On the Form ETA 750B, signed by the beneficiary on March 19, 2001, the beneficiary claimed to have worked for the petitioner since October of 1995.

The Form I-290B Notice of Appeal to the Administrative Appeals Office was accompanied by a letter from the petitioner's accountant. The letter explains that the petitioner elected to file its tax returns on a cash basis rather than an accrual basis.<sup>3</sup> The letter further explains that, using accrual basis accounting, petitioner had sufficient net income to pay the proffered wage.

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, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

---

<sup>1</sup> 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).

<sup>2</sup> The record contains copies of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for the years 2001 through 2005; Form 941 Employer's Quarterly Federal Tax Returns from 2003 through 2005; Form 940 Annual Federal Unemployment Tax Returns from 2003 and 2005; and W-2 Wage and Tax Statements issued by the petitioner to employees other than the beneficiary for the years 2001 through 2005. Although these documents show the total wages paid by the petitioner and wages paid to other employees, they do not establish the petitioner's ability to pay the proffered wage.

<sup>3</sup> Counsel indicated on the Form I-290B that he would submit a brief and/or evidence to this office within 30 days of filing the appeal. No such brief or evidence appears in the record. Counsel was contacted by this office on December 9, 2008 and a copy of the brief and/or additional evidence was requested. Counsel did not respond to this request.

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 submitted copies of the Form W-2 Wage and Tax Statements issued to the beneficiary in 2002, 2004 and 2005. These documents show that the petitioner paid the beneficiary \$9,900.00 in 2002, \$19,200.00 in 2004 and \$16,450.00 in 2005. As this is a partial payment of the proffered wage, the petitioner must establish that it was able to pay the difference between the proffered wage and the wage actually paid in 2002, 2004 and 2005. Since the proffered wage is \$39,000.00 per year, the difference between the proffered wage and the wages actually paid is \$29,100.00 in 2002, \$19,800 in 2004 and \$22,550.00 in 2005. There is no evidence of wages paid to the beneficiary in 2001 or 2003. Therefore, the petitioner must establish that it was able to pay the full proffered wage in 2001 and 2003.

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. 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). For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001 through 2005 as shown in the table below.

- In 2001, the Form 1120 stated net income of \$57,543.00.
- In 2002, the Form 1120 stated net income of \$8,010.00.
- In 2003, the Form 1120 stated net income of \$27,883.00.
- In 2004, the Form 1120 stated net income of -\$1,141.00.
- In 2005, the Form 1120 stated net income of \$6,404.00.

The petitioner had sufficient net income to pay the proffered wage in 2001. The petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2002, 2004 or 2005. The petitioner did not have sufficient income to pay the full proffered wage in 2003.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown

---

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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

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 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. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2002 through 2005 as shown in the table below.

- In 2002, the Form 1120 stated net current assets of \$7,546.00.
- In 2003, the Form 1120 stated net current assets of -\$7,248.00.
- In 2004, the Form 1120 stated net current assets of \$13,924.00.
- In 2005, the Form 1120 stated net current assets of \$23,859.00.

The petitioner had sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2005. The petitioner did not have sufficient net current assets in 2002 or 2004 to pay the difference between the proffered wage and wages actually paid to the beneficiary. The petitioner did not have sufficient net current assets in 2003 to pay the full proffered wage.

The petitioner has established that it had the ability to pay the proffered wage in 2001 and 2005. The petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2002, 2003 or 2004 through wages paid to the beneficiary, net income or net current assets.

As noted above, a letter from the petitioner's accountant was submitted in support of the appeal. The letter states that, on an accrual basis accounting, the petitioner had sufficient income to pay the proffered wage from 2002 to 2005. It is noted that the petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS. This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or a financial statement prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

---

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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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

**ORDER:** The appeal is dismissed.