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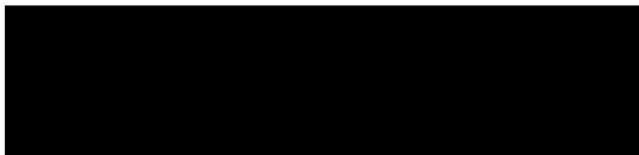
U.S. Department of Homeland Security  
20 Mass. Ave. N.W., Rm. 3000  
Washington DC 20529



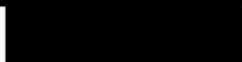
U.S. Citizenship  
and Immigration  
Services

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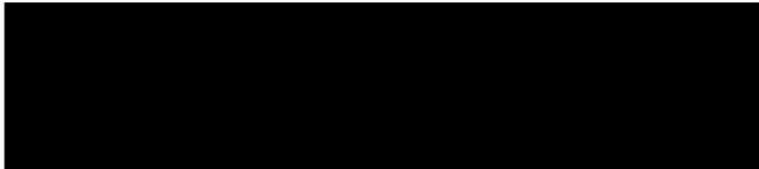
Petitioner:



Beneficiary:

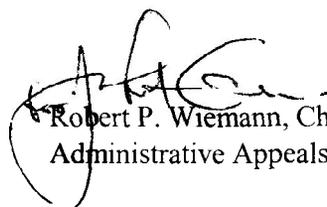
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based visa petition was denied by the Director (director), Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further review and entry of a new decision.

The petitioner is an interior design firm. It seeks to employ the beneficiary permanently in the United States as an interior designer. As required by statute, an ETA Form 9089, Application for Permanent 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, counsel contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 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 [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 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 Form 9089 was accepted for processing on October 17, 2006. The proffered wage as stated on Part G of the ETA Form 9089 is \$31,907 per year.

On Part 5 of the I-140, the petitioner states that it was established in 1996. Part K of the ETA Form 9089<sup>1</sup> as well as counsel's brief submitted with the petition accompanied by copies of three checks issued by the petitioner to [REDACTED], indicate that the petitioner has employed the beneficiary as an independent contractor and paid compensation to the beneficiary's corporation. The copies of the front of the checks reflect that \$840.00 was paid to [REDACTED] on November 20, 2006, December 4, 2006, and December 11, 2006, respectively.<sup>2</sup>

The director issued a request for evidence on May 10, 2007. He instructed the petitioner to submit additional evidence establishing its continuing ability to pay the proffered wage as of October 17, 2006 and that such evidence must include a copy of the petitioner's annual report, its latest U.S. tax return, or audited financial statement. The director also requested a copy of the beneficiary's Wage and Tax Statement (W-2) for 2006 and advised that the payroll records submitted with the petition were not sufficient to establish the petitioner's ability to pay the proffered wage.

In response, counsel advised that the petitioner's 2006 income tax return had not been prepared. Counsel submitted copies of the petitioner's internal vendor accounting record indicating that it had paid \$48,119.52 to the beneficiary's corporation from January to December 2006. Counsel also provided a copy of a July 27, 2007 e-mail from the petitioner's bookkeeper explaining that a Form 1099 was not issued to the beneficiary in 2006 or 2007 because it was not required for corporations and that the petitioner would incur additional penalties if one was issued for 2006 because the deadline had passed.

Following a review of the evidence submitted, the director denied the petition on August 7, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage. The director noted that the petitioner's vendor accounting record failed to establish that the petitioner had the ability to pay the beneficiary's proposed wage offer of \$31,907 per year.

On appeal, the petitioner, through counsel, contends that the petitioner demonstrated its ability to pay the proffered wage. Counsel cites the petitioner's payment of compensation to the beneficiary as an independent contractor in 2006. He also provides a copy of an Internal Revenue Service (IRS) application for a six-month extension of time related to the petitioner's 2006 income tax return, a copy of a Form 1099 for 2006 showing \$48,119.52 paid to the beneficiary's corporation, and a duplicate of the July 27, 2007, e-mail submitted by the petitioner's bookkeeper. Counsel states that since the petitioner has now issued a Form

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<sup>1</sup> Part K indicates that the beneficiary is self-employed by her company.

<sup>2</sup> It is noted that [REDACTED] converted to [REDACTED] on 1/17/06. On remand, the petitioner should explain payments to an inactive corporation. (see attached)

1099 for \$48,119.52 to the beneficiary for 2006, that this conclusively demonstrates that the petitioner paid in excess of the proffered wage and has established its financial ability to pay.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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,<sup>3</sup> the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

In this case, the petitioner elected to submit evidence of compensation paid to the beneficiary. This compensation, however, although in excess of the proffered wage of \$31,907, was not shown to be paid to the beneficiary directly but to the beneficiary's corporation. In such a case, it should be clearly established that this compensation would represent funds available to pay the proffered wage to the beneficiary if she were directly hired. This case will be remanded to determine 1) the number and identity of the shareholders and employees of the beneficiary's company during the relevant period so that a determination may be made as to whether the proffered wage of \$31,907 out of the \$48,119.52 in compensation paid in 2006 (or any

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<sup>3</sup>Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

other period) may be attributed to the beneficiary individually and 2) that the amounts paid to the beneficiary are sufficiently corroborated by such evidence as copies of negotiated checks as well as evidence that the Form 1099 provided on appeal was filed with the IRS, given the suggestion by the record that additional penalties would be incurred if such a form was filed past the deadline.<sup>4</sup>

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2) in order to determine the petitioner's continuing ability to pay the proffered wage. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which is to be certified to the AAO for review.

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<sup>4</sup> The petitioner's 2006 federal income tax return should also be available.