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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

PUBLIC COPY

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[redacted]

FILE: EAC-04-120-51827 Office: VERMONT SERVICE CENTER Date: OCT 24 2006

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:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a concrete finisher supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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.

Counsel filed an appeal timely with a brief and resubmission of the evidence submitted previously.[1]

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 CFR § 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 initially accepted on April 27, 2001. The Form ETA 750 states that the position requires two (2) years experience in the job offered. The proffered wage as stated on the Form ETA 750 is $20.00 per hour ($41,600 per year). On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner since March 1998.

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[1] Although 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), and 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), counsel did not submit any additional evidence. Therefore, the AAO will make its decision based on evidence already submitted and kept in the record only.

The I-140 petition was submitted on March 15, 2004. On the petition, the petitioner claimed to have been established in 1998, to currently have twenty-three (23) employees, to have a gross annual income of $2,500,000, and to have a net annual income of $400,000.

With the petition, the petitioner did not submit any supporting documents pertinent to its ability to pay the proffered wage. Therefore, the director issued a request for evidence (RFE) on August 20, 2004, requesting evidence to establish that the petitioner had the ability to pay the proffered wage as of April 27, 2001 and continuing to the present. The director specifically requested the petitioner's 2001 tax return or annual report for 2001 as an alternative and the beneficiary's Form W-2 Wage and Tax Statements. In response to the RFE, the petitioner submitted its Form 1120S, U.S. Income Tax Return, for 2001 and 2003, and copies of the beneficiary's individual income tax returns for 2001 and 2003.

On February 2, 2005 the director denied the petition, finding that the submitted tax return for 2001 shows that the petitioner did not have sufficient net income, and its current assets did not exceed its current liabilities in an amount sufficient to pay the proffered wage, and therefore, did not establish that it had the ability to pay the proffered wage at the time of filing.

On appeal, counsel asserts that the director erred in not considering all funds which are clearly available, and that the petitioner established its ability to pay the proffered wage with total funds of $56,313 combining net income with cash assets, and that the petitioner paid the beneficiary more than the proffered wage in 2001 with Form 1099.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 record contains copies of the beneficiary's tax returns with Form 1099s issued by the petitioner for 2001 and 2003. Counsel argues on appeal that these documents establish that the petitioner paid the beneficiary the full proffered wage beginning on the priority date. The 1099 forms indicate that the petitioner paid $184,046 in 2001 and $99,547 in 2003 to a company named Fredy Concrete Contractor with federal employer identification number 52-2304954, but not to the beneficiary. The amount paid appears to be the price of subcontracted projects instead of compensation to employees. The AAO cannot consider these 1099 forms as prima facie proof of the petitioner's ability to pay the proffered wage because it is unclear what portion of that compensation, if any, was distributed to the beneficiary for performing the duties of the proffered position for the petitioner.[2] Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2001, 2002 and 2003 through examination of wages actually paid the beneficiary.

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. 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)

[2] The record shows that Fredy Concrete Contractor received $184,046 from the petitioner and paid wage of $102,038 to its employees in 2001. After expenses, the beneficiary's company had a net profit of $31,722 in that year. It is difficult to ascertain the beneficiary's compensation. Furthermore, even so, the $31,722 in 2001 could not establish that the petitioner paid the beneficiary the proffered wage in that year.

(*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 gross profits and other expenses 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.

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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Reliance on depreciation is misplaced. The court in *Chi-Feng Chang* further clearly 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* at 537.

The evidence indicates that the petitioner is structured as an S corporation and the petitioner's fiscal year is based on a calendar year. The record contains copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001 and 2003. The priority date in the instant case is April 27, 2001 and the record before the director closed on November 15, 2004 when the director received the response to his RFE, therefore, the petitioner's tax returns for 2001 through 2003 are the available tax returns in determining the petitioner's ability to pay. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $34,379.80 per year in 2001, 2002 and 2003.

> In 2001, the Form 1120S stated net income[3] of $31,862.
> In 2003, the Form 1120S stated net income of $32,344.

Therefore, for the years 2001 and 2003 the petitioner did not have sufficient net income to pay 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. Contrary to counsel's assertion to use the total current assets without deduction of current liabilities in determining the petitioner's ability to pay, the AAO rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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

[3] Ordinary income (loss) from trade or business activities as reported on Line 21 of Form 1120S.

petitioner's ability to pay the proffered wage. Counsel argues on appeal that the cash of $24,451 at the end of the year 2001 should be added to the net income and together to be part of funds available to pay the proffered wage. Counsel's reliance on cash without being balanced by liabilities is misplaced. As discussed above, like all other current assets, cash cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage unless it is balanced by the petitioner's current liabilities. Therefore, CIS will consider net current assets instead of cash balance 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.[4] 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 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's attached to the petitioner's tax returns yield that the petitioner had current assets of $24,451 and current liabilities of $3,606, thus the net current assets were $20,845 at the end of the year 2001; and that the petitioner had current assets of $38,515 and current liabilities of $15,741, thus the net current assets were $22,774 at the end of the year 2003. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage of $41,600 in 2001 and 2003.

The petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner did not submit its tax return or other regulatory-prescribed evidence for 2002. The AAO cannot determine whether the petitioner had sufficient net income or net current assets in 2002 to pay the beneficiary the proffered wage. Therefore, the petitioner failed to establish its ability to pay in 2002 because it did not meet the burden of proof.

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, or its net income or net current assets.

Counsel urges on appeal that a combination of the petitioner's net income and current assets should be considered in calculating the funds available to the petitioner to pay the proffered wage. Combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive

[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.

roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in the years of 2001 and 2003. The record of proceeding does not contain any regulatory-prescribed evidence to establish that the petitioner had the ability to pay the proffered wage in 2002. The decision of the director must be affirmed.

Beyond the director's decision, the AAO will discuss an issue about the bona fides 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The AAO notes that [redacted] is the person who signed the instant petition on behalf of the petitioner and signed the experience letter from the beneficiary's prior employer. This causes doubt about a valid employment relationship between the petitioner or the writer of the letter and the beneficiary. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). Because of these defects, Mr. Marques' letter will be given less weight in these proceedings and the bona fides of the job offer are questionable. Any further proceedings in this matter must include an explanation of these issues.

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.