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**U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAR 13 2008

IN RE:

Petitioner:
Beneficiary:

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

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.

A handwritten signature in black ink, appearing to read "Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The previous decision of the AAO will be affirmed and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Since counsel has not provided a reason supported by pertinent precedent decisions indicating that the decision was based on an incorrect application of law or CIS policy, and has not established that the decision was incorrect based on the evidence of record at the time of the initial decision, the motion does not meet the requirements for reconsideration.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence with the motion demonstrates that the petitioner had sufficient funds to pay the proffered wage.

The petitioner is a landscape and stonework design company. It seeks to employ the beneficiary permanently in the United States as a stone mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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. The AAO concurred with the director's decision on appeal and motion.

The record shows that the motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the AAO's July 9, 2004 dismissal, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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. 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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$36.47 per hour or \$75,857.60 annually.

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). Relevant evidence submitted on motion includes counsel's brief, a letter dated June 23, 2004 from [REDACTED] a copy of an unaudited balance sheet for [REDACTED] LLC as of April 30, 2001, a copy of the 2001 Schedule C for the petitioner as part of the 2001 Form 1040, U.S. Individual Income Tax Return, for [REDACTED] and a copy of a letter dated May 1, 2003 from [REDACTED] Certified Public Accountant (CPA) with a compiled statement of income and balance sheet for the three months ended March 31, 2003. Other relevant evidence in the record includes previously submitted documentation that will not be reiterated here since that documentation has been discussed in great detail on the prior appeal. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The letter dated June 23, 2004 from [REDACTED] states that the balance sheet for the April 30, 2001 period for [REDACTED] LLC is incorrect due to "receipts being posted as payments resulting in a negative balance. This is in the process of being audited by an accountant and the end result will be a positive balance of approximately \$83,000."¹

¹ The declaration that has been provided on motion is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations, who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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)).

The unaudited balance sheet for Robert Bruce LLC as of April 30, 2001 reflects net current assets of -\$85,474.37.

The copy of the 2001 Schedule C for the petitioner reflects gross receipts of \$548,747, gross profit of \$315,418, wages paid of \$189,768, and a net profit of \$36,544.

The compiled income statement and balance sheet for the three months ended March 31, 2003 for the petitioner reflect sales of \$103,256, gross profit of \$25,854, wages paid ?, net income of \$12,961, and net current assets of -\$11,035.

On motion, counsel requests reconsideration of the AAO's decision contending that it failed to properly consider the petitioner's net assets.

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, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As discussed in the prior appeal, in determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided evidence that it employed the beneficiary in 2001 at a salary of \$22,787 and in 2002 at a salary of \$21,899 as of December 18, 2002.

The petitioner is obligated to show that it had sufficient income to pay the difference between the proffered wage of \$75,857.60 and the actual wages paid to the beneficiary in 2001 and 2002. The difference between the proffered wage of \$75,857.60 and the actual wages paid to the beneficiary of \$22,787 in 2001 is \$53,070.60. The difference between the proffered wage of \$75,857.60 and the actual wages paid to the beneficiary of \$21,899 in 2002 is \$53,958.60. The AAO determined in the prior appeal that the petitioner has not established its ability to pay the proffered wage of \$75,857.60 from the priority date and continuing to the present.²

On motion, counsel claims that as of the priority date, the petitioner's net assets were approximately \$83,000 and that this figure should be added to net income of \$21,938 in order to demonstrate that the total covers the proffered wage. Counsel references 2001 documents at "Exhibit B." Exhibit B submitted on motion does not relate to the figure of \$21,938, which only appears on the previously submitted unaudited profit and loss statement representing the petitioner's financial status for the period between January 1, 2002 and August 16,

² The AAO noted on appeal that because the petitioner had filed other petitions bearing similar filing dates and similar wages, it must demonstrate that it had sufficient continuing income to pay all proposed wage offers as of the individual priority dates.

2002 contained in the underlying record. Exhibit B on motion represents a duplicate copy of Schedule C of the sole proprietor's 2001 tax return. Counsel presents no rationale why figures from a four-month unaudited balance sheet for 2001 should be added to the yearly net income figure represented on the Schedule C extract from the sole proprietor's individual tax return. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Resubmitting the three-month 2003 compilation of the petitioner's statement of income and balance sheet, counsel also contends that the petitioner's "Net Assets as of March 31, 2003 were \$66,777 and Net Income was \$12,961" should have been added together to show an amount great enough to cover the difference in 2001 between the actual wages paid and the proffered wage. The AAO finds this assertion unconvincing. First, it is implausible to compare figures extrapolated from three months in 2003 to determine whether in 2001, the petitioner could cover the difference between the wages paid and the proffered salary. Second, counsel's representation of \$66,777 as the net asset figure from the compilation is not accurate. Current assets must be balanced against current liabilities. The three-month 2003 balance sheet shows that the petitioner's current liabilities were \$66,777 and current assets were \$55,742, resulting in net current assets of -\$11,035. Third, even if CIS were to combine such figures as net income with net current assets, the resulting amount of \$1,926 has little significance. In addition, this approach 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 or 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 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.

It must be emphasized that this petitioner failed to provide complete copies of any income tax return throughout the record of proceeding. Instead, copies of either internally generated financial statements or compilations have been submitted. It is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage and is not an acceptable substitute for other required forms of evidence. According to the plain language of 8 C.F.R. § 204.5(g), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. A compilation is a presentation of financial statement information by an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. See *Barron's Accounting Handbook*, 370-371 (3rd ed. 2000). As these documents are not audited as required by 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented. The unsupported representations of management are not convincing evidence of a petitioner's ability to pay the proffered wage.

As noted in the previous AAO decision, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage of \$75,857.60 during 2001 or subsequently. The petitioner's adjusted gross income in 2001 of -\$7,793 was insufficient to cover the shortfall of \$53,070.60 between the actual wages paid and the proffered wage. Probative evidence of other available resources has not been

submitted to the record. Upon review, counsel has been unable to overcome the findings of the director and the prior AAO decision that the petitioner failed to establish its continuing ability to pay the proffered wage as of the petition's priority date.³ ⁴

³ It should be noted that a review of public records reveals the beneficiary appears to be using a social security number that does not belong to him. A review of those same public records also reveals that many of the employees filed for by the petitioner show social security numbers with multiple users. Misuse of another individual's social security number is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to ...*wilfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at <http://ssa-custhelp.ssa.gov> (accessed on August 27, 2007).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone ...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C.A. § 1324a(a)(2). Employers who violate the Immigration Reform and Control Act of 1986 (IRCA) are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). Therefore, in the present case, with the filing of a Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary may be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

⁴ Furthermore, should the petitioner wish to pursue this case further, there is an additional issue that must be determined before the visa petition may be approved. 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 issue that must be determined is whether or not the petitioner misrepresented the job to the Department of Labor (DOL) in the labor certification process thereby causing the labor certification to be invalid.

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.

In the instant case, the Application for Alien Employment Certification, Form ETA 750 was filed with DOL on April 30, 2001 by [REDACTED] Construction, LLC. The address listed for [REDACTED] Construction, LLC was listed as PMB [REDACTED]. The Form I-140, Immigrant Petition for Alien Worker, was filed with CIS on September 18, 2002. The petitioner is listed on the Form I-140 as [REDACTED] Construction, LLC with its address being the same as the address listed on the Form ETA 750.

At issue is whether [REDACTED] Construction, LLC existed when the labor certification was filed with DOL and when the visa petition was filed with CIS. A review of public records at website http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_det&p_be_rsn=750657&p_sr... on February 15, 2008 revealed that [REDACTED] Construction, LLC had a status of inactive and had been involuntary dissolved on October 5, 2000, before the filing of the labor certification or the filing of the visa petition. Therefore, the evidence in the record does not indicate that the petitioner actually existed when the labor certification was filed.

Further review of public records revealed that another company, [REDACTED] LLC, whose letterhead appears in the record of proceeding was registered with the state of Oregon on January 10, 2000. However, this company was listed as inactive and was administratively dissolved on March 14, 2003. Its place of business was listed as [REDACTED]. Two of its members, [REDACTED] and [REDACTED] both list their addresses as PMB [REDACTED] the same as the petitioner of the visa petition. A third company, A Native Plant Gardener, [REDACTED] was registered with the state of Oregon on July 19, 1995. However, this company was listed as inactive and showed a failure to renew as of July 20, 2003. The principal place of business for this company was listed as [REDACTED]. The only connection to the current petitioner is through one of its authorized representatives, [REDACTED]. A final company, [REDACTED] Ltd, was registered with the state of Oregon on June 23, 2003. Of the four businesses, it is the only business whose status is listed as active. However, its principle place of business is listed as [REDACTED] not the address listed on the I-140 or the labor certification. Its only connection to the petitioner is through its member, [REDACTED]

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

ORDER: The motion to reopen is granted. The AAO's decision of July 9, 2004 is affirmed. The petition remains denied.

Since there is no evidence in the record of a successor-in-interest to the petitioner, it does not appear that the position offered to the beneficiary was available because the business was not in operation at the time the job offer was made. A successor in interest occurs when the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change such as corporate restructuring or merger with another business entity, and the new or merged, or restructured entity assumes substantially all the rights, duties, obligations, and assets of the original entity. The petitioner must submit evidence of the change in ownership, the restructuring of the organization, or merger, evidence that the predecessor company had the ability to pay the wage at the time the application for labor certification was filed, and evidence to show that it has assumed all the rights, duties, and obligations of that business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In addition, the record does not contain any evidence showing that DOL knew that the business had been dissolved prior to the labor certification process. Therefore, the AAO finds that the business did not exist, the position was not available, the job opportunity could not have been open to any qualified U.S. workers as required by 20 C.F.R. § 656.20(c) at the time of filing the labor certification, and the job offer was not a realistic one.

The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification. The misrepresentation of a non-realistic job offer is of a material fact in the labor certification application process.

Even though this issue was not previously discussed, the observations noted above suggest that further investigation, including consultation with the Department of Labor will be warranted, in order to determine whether the labor certification should be invalidated should the petitioner further seek approval of this visa petition.

Section 204 of the Act, 8 U.S.C. § 1154 states in pertinent part:

(b) Investigation; Consultation; Approval; Authorization to Grant Preference Status.

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

