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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: LIN 05 103 51992 Office: NEBRASKA SERVICE CENTER Date: APR 0 6 2009

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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.

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 is a farming operation. It seeks to employ the beneficiary permanently in the United States as an operation's manager. 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 beneficiary did not possess the required employment experience set forth on the labor certification and that the petitioner had failed to establish 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 on March 9, 2006.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated that the beneficiary has the requisite work experience and has demonstrated that it had the continuing financial ability to pay the proffered wage.

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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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(l) states in pertinent part:

> (4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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)].

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also establish that it has had the continuing ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 26, 2001. It indicates that the proffered salary is $41,500 per year. On Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claims to have worked for the petitioner as an operation's manager since July 1991 until the present (date of signing).

The Immigrant Petition for Alien Worker, (I-140), was filed on February 22, 2005 and sought visa classification of the beneficiary as an alien of extraordinary ability under section 203(b)(1)(A) of the Act. Through a request for evidence issued on August 29, 2005, the director informed the petitioner of the evidentiary standards for such a classification and further advised the petitioner that such a classification does not require a labor certification such as the petitioner had submitted. The director instructed the petitioner to advise whether the classification selected was wrong and to state the visa classification sought. The director also stated that the required evidence supporting such a classification should also be submitted.

In response, [redacted] submitted a letter on behalf of the petitioner requested a visa classification under paragraph g of the I-140 designating any other worker (requiring less than two years of training or experience). [redacted] also stated that the required evidence should already be on file with USCIS. No other evidence supporting this visa classification was submitted with the letter.

It is noted that Item 14 of Part A of the Form ETA 750 describes the educational, training, and experience requirements for the job offered. In this case, the employment experience required, is two years of experience in the job offered as operation's manager or two years and four months in a

related occupation, also defined as operation's manager.[1] Other special requirements under Item 15 of Part A of the Form ETA 750 are stated as follows:

> A minimum of 2 years related experience is required. Must possess a Washington driver's license and have full knowledge of DOT requirements & regulations. Must possess or be eligible for a Washington driver's license and two years experience with the Department of Transportation requirements & regulations. [sic]

Based on these requirements, the only visa classification appropriate to the ETA 750 is for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. The petitioner specifically requested classification as an other, unskilled worker (requiring less than two years of experience or training).

However, the director did not deny the petition on the basis that the petitioner's request for designation as an other, unskilled worker was not consistent with the requirements of the ETA 750, as he could have in this matter. The petition was denied in part because no evidence had been submitted to support the ETA 750 requirements that the beneficiary had two years of experience in the job offered or two years and four months in the related occupation as required by the ETA 750.

It is noted that neither the law nor the regulations require the director to consider another classification if the petitioner does not establish the beneficiary's eligibility for the classification requested. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another visa classification.[2] The AAO notes that the petition may be dismissed for this reason.

Related to the issue of the beneficiary's experience, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—

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[1] The initials "CAE" appear numerous places on the ETA 750. Some of the language has been crossed out. No DOL stamp indicates approval of any corrections. This office will not recognize changes to the ETA 750 that have not been approved by the DOL. In the absence of a stamp, the petitioner has failed to submit correspondence between the petitioner and DOL to establish that DOL was aware of, and approved the changes.

[2] 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).

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> **(B) *Skilled workers.*** If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

On appeal, relevant to this issue, counsel merely asserts that the petitioner had previously submitted a letter from the beneficiary's employer that detailed his experience. Counsel does not specifically identify this letter in her argument, but includes two letters from on appeal. The first letter is dated June 18, 2002, and explains that [redacted] employed the beneficiary from March 1989 to July 1991. The job title is not given, but [redacted] states that the beneficiary's duties included supervising other workers who were irrigating. After he quit farming, [redacted] states that he referred the beneficiary to the petitioner where he has worked since 1991. The second letter is dated March 28, 2006. In this letter, [redacted] states that during the beneficiary's employment, he not only supervised other workers who were irrigating, but was responsible for moving and maintaining equipment, and had complete knowledge of the rules of the road as determined by the Department of Transportation (DOT).

It is noted that counsel's assertion that a letter submitted in another proceeding should be considered is not persuasive. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Additionally, in Item 13 of the ETA 750, the job duties are described as including the hiring and training of truck drivers to haul various commodities on all types of trucks and trailers; supervising workers on planting through harvesting of onions and other crops; coordinating storage and export of all crops; including truck dispatching and possession of mechanical skills including welding, cutting torch and all hand tools. The three skills confirmed by [redacted] included supervising workers who irrigated, moving and maintaining equipment and knowledge of applicable DOT rules.

Either taken separately or in combination, the letters do not sufficiently confirm that the beneficiary acquired such skill as hiring and training truck drivers or coordination of storage and export of crops as part of his job duties. Neither letter confirmed his job title. Moreover, the special requirements described in Item 15 of the ETA 750 imply that the beneficiary must have past and current knowledge of DOT requirements and regulations. In this case, there is no confirmation in the record that the beneficiary possesses current knowledge of such regulations. Based on this, the AAO does not find that even if the petition were considered as a request for a skilled worker visa classification that the evidence

would support that the beneficiary has acquired either two years in the job offered as operation's manager or two years and four months in the related occupation of an operation's manager.

Further, as noted by the director, the petitioner failed to establish its continuing financial ability to pay the proffered wage of $41,500 per year.

No evidence of this ability was provided until appeal. On appeal, counsel submitted three documents identified as combined financial statements for "Easterday Farms Partnership and Easterday Real Estate Joint Venture" for the period(s) ending December 31, 2001 and 2000, December 31, 2002 and 2001, and December 31, 2004 and 2003.

The petitioner has not established its continuing ability to pay the proffered wage. 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 a proffered salary. In the instant matter, the record suggests that the petitioner has employed the beneficiary, however no documentation of any compensation such as Wage and Tax Statements (W-2s), pay stubs or other verifiable payroll records have been provided.

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 income 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.) (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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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.[3] 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. Net current assets may be determined from Schedule L of a federal income tax return, an audited financial statement or an annual report accompanied by audited financial statements.

In this case, the petitioner's combined financial statements are not probative of its continuing financial ability to pay the certified wage of $41,500 per year. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must provide either copies of federal tax returns, annual reports, or *audited* financial statements. These evidentiary requirements were added to the subsequent 1991 revisions to the regulation at 8 C.F.R.§ 204.5 based on the implementation of the new provisions contained in section 121 of the Immigration Act of 1990, Public Law 101-649 that took the former third and sixth preference classifications of employment-based immigrant classifications and created five new classifications.[4]

Here, the regulation at 8 C.F.R. § 204.5(g)(2) also makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the petitioner's statements, the AAO cannot conclude that they are audited statements. In fact, they explicitly state that an "Accountants' Review Report" is included.[5] It is noted that page 2 of each of the financial statements that was supposed to contain such a review report is missing. Moreover, the accountant(s) are not even identified. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, the petitioner has failed to demonstrate its ability to pay the proffered wage for two additional reasons. First, no evidence was received that covers 2005 to the present was submitted.

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[3] 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.

[4] *See* 56 FR 60897-01, 1991 WL 249981 containing final rule implements (November 29, 1991) to the employment-based immigrant provisions. Prior regulations did not contain specific evidentiary provisions related to the ability to pay a proffered wage that appear in 8 C.F.R. 204.5(g)(2) as set forth above.

[5] Reviews as opposed to audits are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements.

Second, the regulation at 8 C.F.R. § 204.5 does not allow for multiple or co-employers as suggested by the combined financial statements that were provided. Page 7 of each of the combined statements states that Easterday Farms Partnership and Easterday Real Estate Joint Venture are two separate entities "combined for financial statement purposes only."

For immigration purposes, there must be one employer with clearly identifiable financial ability to pay the proffered wage. There is nothing in the regulation at 8 C.F.R. § 204.5, that permits USCIS to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Easterday Farms is the employer named on the ETA 750 and on the I-140, not Easterday Real Estate Joint Venture. It is claimed in the financial statements that Easterday Farms is a partnership, but the statements do not specify the type or include a copy of the partnership agreement.[6] The record of proceeding does not contain enough information regarding the organizational structure of the petitioner. As such, and for the reasons explained above, the petitioner has not established its continuing financial ability to pay the proffered wage. 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)).

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this matter, as discussed above, the

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[6] A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment.

petitioner provided incomplete combined unaudited financial statements of Easterday Farms Partnership and Easterday Real Estate Joint Venture performed by unidentified accountants. The record suggested that these are two separate entities. Further, the record contained no financial documentation pertinent to 2005. Therefore, no evidence in the record was probative of the petitioner's ability to pay the proffered wage. Additionally, no unusual business or reputational circumstances have been shown to exist in this case that parallel those in *Sonegawa,* nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Based on a review of the underlying record and the arguments and evidence submitted on appeal, it may not be concluded that the petitioner established that the certified position required less than two years training or experience in order to qualify the beneficiary for the visa classification sought; that the petitioner established that the beneficiary had obtained the requisite employment experience according to the terms of the labor certification; or that the petitioner demonstrated a continuing ability to pay the proffered wage.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.