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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 07 064 51454

JAN 2 1 2010

IN RE: Petitioner:
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:

[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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a human resources manager. As required by statute, the petition is accompanied by an ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner paid the proffered wage in 2004[1] and 2005, but the petitioner had not established that it had the ability to pay the beneficiary the proffered wage from 2006 onwards. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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.

As set forth in the director's denial, an issue in this case is whether or not the petitioner has established that it had the ability to pay the beneficiary the proffered wage from 2006 onwards.

Additionally, beyond the decision of the director, an 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, as well as for all the beneficiaries[2] sponsored by the petitioner.

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(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 either 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 ETA Form 750 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 ETA Form 750, as certified

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[1] As prorated.

[2] The petitioner has also filed nonimmigrant petitions.

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 ETA Form 750 was accepted on May 12, 2004. The proffered wage as stated on the ETA Form 750 is $40.93 per hour ($85,134.40 per year). The ETA Form 750 states that the position requires a four-year Bachelor's of Science/Bachelor's of Arts degree and two years of job experience or two years of experience in the related occupation of human resource.

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.[3]

The petitioner submitted the following relevant evidence: a labor certification; a letter from the petitioner dated December 29, 2006; California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Report for all employees; a letter from the petitioner's accountant dated April 5, 2007; a Certificate of Organization of the Incorporation of [redacted], dated June 24, 2002; the petitioner's business tax certificate and fire permit for [redacted], and [redacted], both with an expiration date of June 30, 2007; documents pertaining to the reputation of the petitioner in its community, advertisements and articles concerning the petitioner's business; and seven testimonials extolling the care given by the petitioner to its residents; a Wage and Tax Statement (W-2) for 2004 issued by the petitioner to the beneficiary in the amount of $76,760.00; beneficiary's Form 1099-MISC in the amount of $3,500.00, as well as a W-2 Statement for 2006 issued by the petitioner to the beneficiary in the amount of $67,235.00; a "Request Form for Reduced Work Schedule or Intermittent Leave of Absence" dated April 25, 2006; a letter from the petitioner's accountant dated June 11, 2007, with an unaudited exhibit of the petitioner's 2006 operating expenses as well as unaudited financial statements dated December 2006; pay stubs issued by the petitioner to the beneficiary for the period January 15, 2007, to June 30, 2007; a building permit/plan for the petitioner's facility at [redacted] licenses to operate residential care facilities known as [redacted] and [redacted], both located in Redwood City, California; an Articles of Incorporation of [redacted], dated April 23, 2002; and the petitioner's unaudited financial statements[4] dated May 4, 2005, and April 10, 2007.

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

[4] **Counsel's reliance on unaudited financial records is misplaced.** The regulation at 8 C.F.R. § 204.5(g)(2) 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 these statements, the AAO cannot conclude that they are audited

The director denied the petition on June 1, 2007. 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. Specifically, the director found that the petitioner paid the proffered wage as prorated in 2004, and the proffered wage in 2005, but the petitioner had not established that it had the ability to pay the beneficiary the proffered wage from 2006 onwards.

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the petition, the petitioner claimed to have been established in 1989 and to currently employ 45 workers. There are no tax returns in the record and there is no information in the record to determine if the petitioner is a C or S corporation. On the ETA Form 750B, signed by the beneficiary on May 16, 2006, the beneficiary did claim to have worked for the petitioner.

As additional relevant evidence on appeal, counsel submits, *inter alia*, a "Supplement to Brief" dated June 25, 3008 [sic 2008]; the beneficiary's U.S. Form 1040 and 1040A joint income tax returns for 2004, 2005, 2006, and 2007; the beneficiary's Form 1099-MISC statement for 2004; and the beneficiary's W-2 statements for 2005, 2006, and 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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, United States 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. The petitioner issued the beneficiary the following W-2 Statements: for 2004-$76,760.00 (and $3,500.00 reported on Form 1099-MISC in 2004); for 2005-$86,925.00; for 2006-$67,237.00; and for 2007-$83,287.00.[5]

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statements. 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.

[5] The petitioner also submitted pay statements evidencing wage payments to the beneficiary for the period November 15, 2006, to December 15, 2006, and for the period January 15, 2007, to June 30, 2007.

The proffered wage in this matter is $85,134.40. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2006 or subsequently. The petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is for 2006-$17,897.40;[6] and 2007-$1,847.40. In 2004, the petitioner paid the pro rata proffered wage, and in 2005 the petitioner paid the beneficiary the proffered wage.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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). Counsel asserts that the petitioner's payroll expense in 2006 is evidence of its ability to pay the proffered wage. Reliance on the petitioner's gross receipts and wage expense 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 USCIS, 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the

[6] The petitioner stated that because of the beneficiary's personal commitments, the beneficiary worked less hours in 2006 lowering her yearly wage. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

> AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on May 18, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The AAO notes that the record of proceeding contains no evidence reflecting the petitioner's financial status beginning on the priority date, such as annual reports, prepared federal income tax returns, or audited financial statements. Evidence of the ability to pay the proffered wage as well as the *bona fides* of the job offer and U.S. employer are clearly required under the Act and applicable regulations. 8 C.F.R. § 204.5(g)(2). Failure to provide required evidence is clear grounds for denial of the petition. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the ETA Form 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary from 2006 and onwards.

Counsel contends that additional evidence submitted on appeal demonstrates the petitioner's ability to pay the proffered wage. According to counsel, the evidence submitted demonstrates that, but for the beneficiary's reduced working hours in 2006, that the beneficiary's wages would have demonstrated the petitioner's ability to pay the proffered wage. Counsel's statement is misplaced. The labor certification was prepared by the petitioner and certified for a full-time job with the proffered wage calculated on a yearly basis. Further, the petitioner has submitted the beneficiary's Forms W-2 or 1099-MISC for 2006 and 2007, and those demonstrate that in each of those years, the petitioner did not pay the beneficiary the proffered wage. Although requested by the director, the petitioner did not provide annual reports, prepared federal income tax returns, or audited financial statements as required by the regulation at 8 C.F.R. § 204.5(g)(2). The petitioner's failure to submit these tax documents cannot be excused. 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. 1988)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190)(Reg. Comm. 1972)).

Counsel's assertions on appeal cannot be concluded to replace the missing mandated evidence. Accordingly, the petitioner has failed to establish that it could pay the proffered wage from 2006 onwards.

On appeal, counsel asserts that the petitioner is "thriving financially," is a "reputable business;" is in a process of expanding one of its facilities, and the total wages paid to all employees, demonstrate the petitioner's ability to pay the proffered wage. According to the petition, the petitioner claimed to have been established in 1989 and to currently employ 45 workers. USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

There is a paucity of information concerning the petitioner's finances such that the AAO is unable to determine the truth or falsity of counsel's assertions. In the instant case, the petitioner did not provide annual reports, prepared federal income tax returns, or audited financial statements as required by the regulation at 8 C.F.R. § 204.5(g)(2). The evidence submitted were unaudited financial statements or opinions as to the ultimate issue to be decided in this matter, that is, whether or not the petitioner had the ability to pay the proffered wage.

As already stated, the regulation at 8 C.F.R. § 204.5(g)(2) 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 these statements, the AAO cannot conclude that they are audited statements. 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, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However,

where an opinion is not in accord with other information or is in any way questionable, the USCIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Counsel states on appeal that because of the cost of expansion of one of the petitioner's facilities, commencing in 2007, the petitioner will have better business prospects. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from 2006 onwards.

Additionally, beyond the decision of the director, an 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, as well as for all the beneficiaries sponsored by the petitioner.

The AAO has accessed the USCIS electronic records as of November 20, 2009, and those records indicate that the petitioner has filed an I-140 and 11 I-129 petitions with three USCIS Service Centers since 2003. Consequently, USCIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. The AAO needs to examine not only the salary requirements relating to the instant I-140 petition, but also the petitioner's ability to pay 12 combined salaries. There is no evidence in the record concerning the I-129 petitions filed by the petitioner. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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

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.