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

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 25 2010

EAC 06 095 51834

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.

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

The petitioner is an electrical contractor. It seeks to employ the beneficiary[1] permanently in the United States as an electrician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL) and a Form ETA 750B for the substituted beneficiary. 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.

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 the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As noted by the director in his request for evidence (RFE) dated September 5, 2006, an additional issue in this case is whether the petitioner has the ability to pay the proffered wage from the priority date as well as the proffered wages of each of the beneficiaries that it also sponsors for visa preference immigrant petitions. 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*, 229 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).

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:

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[1] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

> *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 the Service.

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 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 Form ETA 750 as certified 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 Form ETA 750 was accepted on January 4, 2001. The proffered wage as stated on the Form ETA 750 is $22.59 per hour ($46,987.20 per year). The Form ETA 750 states that the position requires two years of experience.

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 at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On September 5, 2006, the director issued a RFE asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward. Specifically the director requested complete copies of the petitioner's federal tax returns for 2001, 2002, 2003, 2004, and 2005, as well as the beneficiary's W-2 or 1099-MISC statements issued by the petitioner. Further, the director noted that the petitioner had filed one additional petition and requested the petitioner provide the amount of the prevailing wage of that additional sponsored beneficiary and W-2/1099-MISC statements.

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[2] 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).

Evidence that was submitted by the petitioner in response to the RFE is stated below. To this date, the petitioner failed to submit complete copies of W-2 statements identifying the beneficiary or any other employee. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Relevant evidence found in the record is a Form ETA 750 and a Form ETA 750B for the substituted beneficiary; partial copies of the petitioner's federal Form 1120 tax returns for 2003, and 2004, and complete copies of the petitioner's 2001, 2002, and 2005 federal Form 1120 tax returns; a letter from the petitioner dated October 31, 2006; a letter from the controller of the petitioner dated September 20, 2006; the petitioner's Employers Quarterly Federal Tax Form (Form-941) for 2004; the petitioner's Form W-3 "Transmittal of Wage and Tax Statements" for 2005; approximately 106 defaced copies of the petitioner's Wage and Tax Statements (W-2) for 2005 with social security and worker's name and address obscured or deleted.

On appeal, counsel submitted legal briefs and the petitioner's federal Form 1120 tax return for 2006.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1965. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on December 20, 2005, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. On appeal, counsel asserts that because of the petitioner's annual gross sales and annual profits are proof of the petitioner's ability to pay. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient.

Similarly, on appeal, counsel asserts the petitioner's annual labor cost[3] is proof of the petitioner's ability to pay. 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 the Service should have considered income before expenses were paid rather than net income.

On appeal, counsel asserts that because of the petitioner's depreciation is proof of the petitioner's ability to pay. 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 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

[3] The suggestion that wage expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages are payroll expenses in those tax returns. Wages paid to employees are not discretionary expenditures. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

> 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on approximately October 31, 2006 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the petitioner's federal income tax return for 2007 was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120 stated net income of $49,118.00.
- In 2002, the Form 1120 stated net income of $35,148.00.
- In 2003, the Form 1120 stated net income of $-0-.
- In 2004, the Form 1120 stated net income of <$80,238.00>.[4]
- In 2005, the Form 1120 stated net income of $35,617.00.
- In 2006, the Form 1120 stated net income of <$37,147.00>.

The proffered wage is $46,987.20. Therefore, for the years 2002, 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net income to pay the proffered wage. No wage information was submitted by the petitioner.

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, USCIS will review the petitioner's assets. We reject, however, counsel's 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 petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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[4] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the Form 1120 stated net current assets of $168,087.00.
- In 2002, the Form 1120 stated net current assets of $119,289.00.
- In 2003, the Form 1120 stated net current assets of <$41,650.00>.
- In 2004, the Form 1120 stated net current assets of <$83,064.00>.
- In 2005, the Form 1120 stated net current assets of $15,762.00.
- In 2006, the Form 1120 stated net current assets of $9,009.00.

Therefore, for the years 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 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 in 2003, 2004, 2005 and 2006, through an examination of net income or net current assets.

According to counsel, the petitioner employed more than 100 employees in 2005 which is proof of the petitioner's ability to pay the proffered wage. According to a letter from the controller of the petitioner dated September 20, 2006, "The annual figures [of the obscured W-2 statements without employee names or addresses] vary substantially because many employees chose not to work full-time. However, fulltime [employment] is available to any of the Company's electricians. That is why the Company is forced to seek qualified workers from outside the U.S."

A reading of the pertinent part of the regulation at 8 C.F.R. § 204.5(g)(2) shows that the introduction of such a letter is qualified by the regulation, "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." Since according to the controller's qualified statement, an unknown part of the 2005 workforce represented by the 2005 W-2 Statements do not work full time, the letter submission fails as sufficient evidence of the full time employment of "100 or more workers" demonstrating the petitioner's ability to pay the proffered wage. The DOL considers employment offered to alien workers to be full time, not part time.

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[5]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.

To establish that the employer does in fact have an employee roster of 100 full time employees, substantiation is necessary such as payroll records, identification of the employees by name, social security number, titles, duties, hours worked, wages paid, identification of projects, quarterly payroll reports, unemployment compensation and workmen compensations reports. The petitioner has not submitted sufficient evidence to demonstrate that it employs 100 or more workers and, even if it had it is in the director's discretion whether to accept the petitioner's evidence in this regard.

Further, the petitioner has not divulged under what circumstances its workers choose part time work over full time work. A review of the petitioner's tax returns shows, in every year for which returns were submitted, that the petitioner's cost of labor figures always far out strip its stated wage and salary expenses assuming cost of labor reflects non-employee expenses.

The petitioner's controller's statements in his letter only serve to raise additional questions since the petitioner has submitted only W-2 statements, with no differentiation made between employee and non-employee expenses. An attempt to correlate the figure stated in the petitioner's W-3 statement that the wages stated in 106 W-2 Statements for 2005 total $2,963,807.46 contradicts the figure stated in Form 1020, Line 13, that the petitioner paid in that year only $433,907.00 in salary and wages. From the tax returns submitted, it appears that consistently the petitioner's business model is to operate with mostly part time employees since in each year total wage and salaries are much lower than its cost of labor. Therefore, it is not clear under the circumstances of this case if the beneficiary will be employed full time and paid the proffered wage by the petitioner as an electrician.

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 2003, 2004, 2005 and 2006.

On appeal, counsel asserts that the petitioner has been in business for more than forty years. According to counsel, the totality of the petitioner's circumstances is proof of the petitioner's ability to pay the proffered wage. 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.

In the instant case, the petitioner's gross receipts increased to its highest level in 2003, after which it declined by 8% to $8,107,288.00 in 2006. Its business has grown from a gross receipt level of $5,015,572.00. According to counsel, the losses, stated by the petitioner in its tax returns are "paper" losses meaning the petitioner has structured its operations to be tax advantaged. This statement will not allow the AAO to overlook the inability of the petitioner to pay the proffered wage in 2003, 2004, 2005, and 2006. There was not sufficient evidence introduced to demonstrate why in 2003 to 2006 the petitioner lacked the ability to pay, and, conversely, where the money would come from to pay the proffered wage.

Although total wages, and the petitioner's ability to meet its payroll obligations, are an indicator of its financial health, all the W-2 statements submitted were obscured 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Other than as stated, there is no evidence of the petitioner's business reputation within its business sector. 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.

Another issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the priority date for other workers as well as the proffered wage for the beneficiary. 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*, 229 F. Supp. 2d at 1043 *aff'd*, 345 F.3d 683 *see also Dor v. INS*, 891 F.2d at1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

In the RFE, the director requested the amount of the prevailing wage of an additional sponsored beneficiary and his/her W-2/1099-MISC statements, because the petitioner must establish that it had sufficient income to pay all the wages at the priority date. To date the petitioner has not submitted that requested information. The AAO has researched the USCIS electronic records and finds that the petitioner has six other I-140 immigration petitions pending.[6] The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority dates until the beneficiaries each obtain permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden

[6] USCIS case identification numbers: EAC0601952377; EAC0022950841; EAC0022651391; EAC0203154321; EAC0022950819; and LIN0620651842.

of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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.