identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 28 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 brick and masonry contractor. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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). 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 had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying experience. 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 October 11, 2007 denial, the issues in this case are (1) 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, and (2) whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 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).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $15.25 per hour for a forty-hour work week, which equates to $31,720 per year, and

overtime at the rate of $22.50 per hour. The labor certification states that the position requires six years of grade school education and two years of experience in the position offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On appeal, counsel for the petitioner submits a brief. Relevant evidence in the record includes the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Returns, for the years 2001 through 2006; a letter dated March 14, 2007, from the petitioner stating that the beneficiary had been employed since May 1998, and currently works as a stonemason at the rate of $15.25 per hour without health benefits; a letter dated September 13, 2001, from [redacted] in Monterrey, Mexico, stating that the beneficiary worked for that company for three years; and, a letter dated April 12, 2007, from [redacted], in administration at [redacted] stating that the applicant had worked for the company from June 1983 until January 1998.

The record of proceeding reveals that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on April 24, 1997, to have a gross annual income of $157,000, a net annual income of $86,000, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 1, 2002, the beneficiary claimed to have attended grammar school at [redacted] in Mexico from September 1974 to June 1980. He also claimed to have worked as a stonemason for [redacted] in Plainfield, New Jersey, from June 1983 to November 1998 (40 hours per week); [redacted] in Piscataway, New Jersey, from April 2000 to November 2001 (various hours per week); and, [redacted] in North Plainfield, New Jersey, from April 1998 to the date he signed the Form ETA 750B (40 hours per week).

Counsel filed the instant appeal on November 13, 2007. On appeal, counsel asserts that the reasons stated by the adjudicating officer, i.e. the director, for failure to accept the beneficiary's employment letter (from [redacted]) seem pre-textual, issued to only give multiple reasons for dismissal; that the director appeared to have placed every possible reason for a denial in the denial letter, whether it was correct or not; that the director failed to recognize the standard practice for contracted labor being a "purchase;" and, that the director failed to acknowledge the reality of smaller scale construction contracting. Counsel asserts that the applicant had a 15-year career with his employer in Mexico and that the exact dates of employment may not easily be remembered since the last date that company employed the beneficiary was nine years prior to submission of the documentation;

---

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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).

that the petitioner signed multiple forms swearing that the statements made were true and correct; that a review of the petitioner's tax records clearly shows that the amount the sole owner of the corporation, [redacted], paid out to employees from 2001 to 2006 doubled - which corresponds to the increase in money claimed by the beneficiary in payments each of those years; that despite a $70,000 decrease in profits in 2006, the petitioner paid nearly the same amount for labor; that the beneficiary never claimed that he was anything but self-employed and "filed taxes stating that he had no social security number each of those years and filed with a taxpayer identification number." Counsel states in his brief "see beneficiaries [sic] taxes 2001-2006," however; the beneficiary's tax returns are not included in the record of proceeding. Counsel further asserts that when lines 2 and 13 of the petitioner's tax forms are combined they clearly demark an ability to pay the wages to the beneficiary; that in smaller scale construction companied, wages are often "carried" forward, and that wages paid in any one year may not be reflective of that year's actual receipts; that the petitioner could not employ the beneficiary as an employee due to his lack of a Social Security number, however, could contract with a business with a taxpayer identification number to do work for him. Counsel concludes in his brief that while the burden of proof is upon the petitioner to show that the beneficiary can be paid the prevailing wage, that burden is not beyond a reasonable doubt, but by a preponderance of the evidence and that United States Citizenship and Immigration Services (USCIS) cannot ignore accepted accounting practices, no matter what regulation is cited, as the regulations merely serve to interpret the law, not define it.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Nothing in the record of proceeding reveals that the director went beyond what legal authority guides the agency in statute, regulatory interpretation, precedent case law and administrative law and procedure. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

The first issue in this proceeding is whether or not the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, 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.

There are discrepancies, inconsistencies, and inadequacies noted in the record regarding the beneficiary's employment history. The petitioner claims to have employed the beneficiary from at least May 1998 to May 2007. However, no evidence, other than the petitioner's un-notarized letter claiming to have employed the beneficiary has been submitted. Although counsel refers in his brief to submission of the beneficiary's tax returns, no such documentation is contained in the record. Also, although counsel indicates that the petitioner could not employ the beneficiary as an employee due to his lack of a Social Security number, but could contract with a business having a taxpayer identification number to do work for him, no evidence of the petitioner having contracted with any of the companies the beneficiary claims to have worked for is contained in the record. 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). 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)).

Based on the above, the AAO concludes that the petitioner has not established that it employed and paid the beneficiary throughout the requisite time period.

If the petitioner fails to establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the requisite time 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. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120, U.S. Corporation Income Tax Return, or (prior to 2007), line 24 of Form 1120A.

The record before the director closed on October 9, 2007 with the receipt by the director of the petitioner's submissions in response to the director's Request for Evidence (RFE). Therefore, the petitioner's tax return for 2006 would be the most recent return available. The petitioner's Forms 1120 demonstrate its net income/loss for 2001 through 2006 as:

Year	Net Income/Loss ($)
2001	510
2002	-1,410
2003	254
2004	3,623
2005	31,169
2006	-2,384

Therefore, for the years 2001 through 2006, the petitioner did not establish sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end

[2] 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

current assets are shown on Form 1120, Schedule L, lines 1 through 6, or Form 1120-A, Part III, lines 1 though 6, and include cash-on-hand. Its year-end current liabilities are shown on Form 1120, lines 16 through 18, or Form 1120-A, Part III, lines 13 through 14. 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 Forms 1120 demonstrate its end-of-year net current assets/liabilities for 2001 through 2006 as:

Year	Net Current Assets/Liabilities ($)
2001	4,626
2002	2,915
2003	3,255
2004	2,360
2005	13,153
2006	13,731

Therefore, for the years 2001 through 2006, the petitioner did not establish sufficient net current assets to pay the proffered wage.

From the date the Form ETA 750 was accepted for processing by the DOL on April 26, 2001, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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

---

payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 this case case, the petitioner claims to have been in business since 1997, to employ 5 individuals, and indicates that the beneficiary is not filling a new position or replacing a former employee. The petitioner has not established that it, in fact, employs 5 individuals.[3] The historical growth of the company has not been established. The petitioner's total assets and gross receipts or sales are neither significant nor consistent during the years 2001 through 2006. [4] The petitioner also has not established the occurrence of any uncharacteristic business expenditures or losses or its reputation within its industry, or any other evidence that would be relevant to its ability to pay the proffered wage.

Assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established by a preponderance of the evidence that it had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue in this proceeding is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (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.

---

[3] The petitioner's tax forms reflect total salaries and wages for the claimed 5 employees were $$9,500; $28,295; $26,753; $23,263; $56,853; and, $53,610 respectively from 2001 through 2006.

[4] The petitioner's tax forms reflect total assets were $17,122; $9,928; $5,255; $8, 946; $17,964; and, $16,767 and gross sales were $156,252; $181,787; $191,668; $178,096; $374,812; and, $301,642 respectively from 2001 through 2006.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). As previously stated, the labor certification application was accepted on April 26, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have 6 years of grade school education and two years of experience in the position offered.

There are also discrepancies, inconsistencies, and inadequacies noted in the record regarding the beneficiary's qualifications. The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form were true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he had attended grammar school in Mexico for six years from September 1974 to June 1980 and that he had been employed as a stonemason from approximately 1983 through March 2002. However, there is no documentation contained in the record establishing that the beneficiary attended six years of grade school. Furthermore, in 2001, [redacted] of [redacted] submitted a letter claiming to have employed the beneficiary in Mexico "during three years." In March 2002, the beneficiary claimed on the Form ETA 750B to have been employed by [redacted] for 40 hours per week from June 1983 to November 1998. In April 2007, [redacted] claimed that [redacted] employed the beneficiary from June 1983 to January 1998. Therefore, it is not clear whether the beneficiary worked in Mexico for [redacted] for 3 years, or more than 15 years, and when he terminated that employment, in January or November 1998. The prior employment letters also do not state specifically the type of work the beneficiary was involved in while employed and no corroborating evidence of the beneficiary's employment with the petitioner is contained in the record.

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)). Furthermore, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The AAO concludes that the preponderance of the evidence does not demonstrate that the beneficiary has the required six years grade school education or had acquired two years of experience as a stonemason from the evidence submitted into this record of proceeding. Thus, the petitioner also has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Based on the evidence submitted, the AAO affirms the decision of the director. The petitioner has 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 has not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.