U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 14 2013 Office: TEXAS SERVICE CENTER

IN RE: Petitioner:
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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 construction business. It seeks to employ the beneficiary permanently in the United States as a drywall mechanic. 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. The director also determined that the petitioner had failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position with two years of work experience as a drywall mechanic, as required by the labor certification. 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 denials dated February 17, 2010, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is $12.50 per hour, based upon a forty hour work week ($26,000.00 per year). The Form ETA 750 at part 14 states that the position requires two years of experience in the job 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]

[1] 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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to currently employ 20 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, the beneficiary claims to have been employed by the petitioner since April 1998.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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. The petitioner has not submitted any evidence to demonstrate that it paid wages to the beneficiary.[2]

If, as in this case, 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.

[2] The record includes a letter dated March 2, 2010 from the vice president and general operations manager for the petitioner, indicating that the beneficiary has been employed as a drywall mechanic since April 1998. In response to a Request for Evidence (RFE) issued by the AAO on March 5, 2013, counsel states that "during periods of extreme slowdowns in the work the beneficiary would work for a similarly situated employer…Hence his W-2s do reflect some alternate employers." However, the record does not contain any evidence that the petitioner employed the beneficiary at any time. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). As these inconsistencies are not resolved, the AAO cannot determine that the beneficiary has the requisite experience or that she is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1) and (l)(3)(ii)(A).

2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd,* No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[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 proffered wage is $26,000.00. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases.

The petitioner's 1120S[3] tax returns demonstrate its net income as shown in the table below:

- In 2001, the Form 1120S stated net income of $283,898.00.
- In 2002, the Form 1120S stated net income of $465,702.00.
- In 2003, the Form 1120S stated net income of $180,394.00.
- In 2004, the Form 1120S stated net income of $75,286.00.
- In 2005, the Form 1120S stated net income of $394,775.00.
- In 2006, the Form 1120S stated net income of $205,882.00.
- In 2007, the Form 1120S stated net income of $454,554.00.
- In 2008, the Form 1120S stated net income of $293,932.00.
- In 2009, the Form 1120S stated net income of -$116,169.00.
- In 2010, the Form 1120S stated net income of -$81,955.00.
- In 2011, the Form 1120S stated net income of -$8,760.00.
- In 2012, the Form 1120S stated net income of -$21,156.00.

Therefore, for the years 2009, 2010, 2011, and 2012, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 return demonstrates its net current assets as shown in the table below:

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

[4] 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.

- In 2009, the Form 1120S stated net current assets of $180,911.00.
- In 2010, the Form 1120S stated net current assets of $153,705.00.
- In 2011, the Form 1120S stated net current assets of $146,063.00.
- In 2012, the Form 1120S stated net current assets of $122,577.00.

For the years 2009, 2010, 2011, and 2012, the petitioner has established its ability to pay the proffered wage to the beneficiary through its net current assets. Therefore, the AAO is persuaded that the AAO is persuaded that the petitioner has the continuing ability to pay the proffered wage from the priority date onwards.

A second issue in this case is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had two years of experience as a drywall mechanic. In determining whether the beneficiary is qualified to perform the duties of the proffered position, 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).

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); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's two years of experience as a drywall mechanic, he represented that he was employed by [redacted] in [redacted] Virginia, as a drywall installer from January 1996 to April 1998. The beneficiary also stated that he was employed by the petitioner as a drywall mechanic from April 1998 to April 22, 2001, the date he signed the labor certification.

As evidence of the beneficiary's employment, the petitioner submitted an employment statement from [redacted] who stated that the beneficiary worked for his business in [redacted] West Virginia hanging drywall. Here, the employment statement does not establish that beneficiary has the experience necessary to perform the duties described in the Form ETA 750. The letter fails to provide dates of employment or whether the beneficiary's employment was on a full-time basis. The declarant also fails to state his title or the basis of his knowledge of the beneficiary's employment. Furthermore, the beneficiary did not indicate on the labor certification that he was employed by [redacted] in any capacity. In *Matter of Leung,* 16

I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The vague employment statement casts doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 582. Regardless, even if the AAO were to consider the employment letter, it does not demonstrate two years of experience in the job offered as stated in the ETA 750.

The petitioner submitted employment letters dated March 2, 2010 and April 30, 2013 from Mr. Sutphin, vice president and general operations manager of the petitioner who stated that the company employed the beneficiary as a drywall installer from April 1998 to the present, and that the beneficiary worked eight hours a day five days a week, earning an annual salary of $26,000.00. The declarant further stated that the beneficiary did not have a social security number, so the company paid him through his brother, who had a social security number and who was authorized to work.

The petitioner submitted an affidavit from who stated that he is the beneficiary's brother and that he was employed by the petitioner. The declarant further stated that he brought the beneficiary to the petitioner and that the beneficiary did not have work authorization or a social security number when he began working for the petitioner, so the beneficiary was paid through him for his work as a drywall installer. He also stated that because of the beneficiary's status, there are no tax records or tax documents, but that the beneficiary has been employed by the petitioner since 1998. The petitioner has not submitted any independent objective evidence to rebut or resolve the inconsistencies in the record. *Matter of Ho*, 19 I&N Dec. at 582.

Moreover, contrary to the statements made by the petitioner's representative and the beneficiary's brother, the record of proceeding contains Forms W-2 issued to the beneficiary by other companies since 2008, all bearing the beneficiary's social security number. To date, the petitioner has not provided any evidence of the beneficiary's employment with its business since 1998 to the present. Furthermore, based upon the wages earned by the beneficiary for working with other companies during the relevant time period, it appears that the beneficiary could not have been employed by the petitioner on a full-time basis. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Accordingly, it has not been established that the beneficiary has the requisite two years of experience and is thus qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1) and (l)(3)(ii)(A). For this reason, the petition will be denied.

Although the petitioner has established its ability to pay the proffered wage, the appeal will still be dismissed for failure to demonstrate that the beneficiary had two years of experience as a drywall mechanic as required by the labor certification.

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.