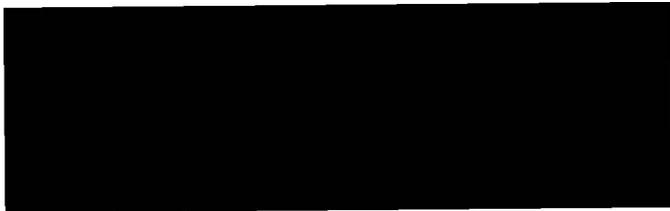




U.S. Citizenship
and Immigration
Services

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FILE:



SRC-03-015-52227

Office: TEXAS SERVICE CENTER

Date:

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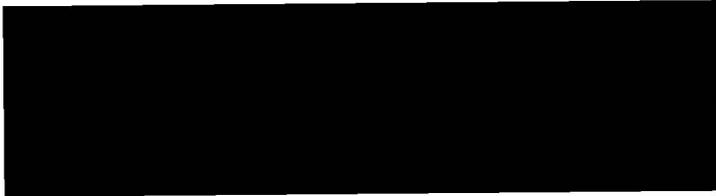
Petitioner:

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a solar systems company. It seeks to employ the beneficiary permanently in the United States as a solar energy system installer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or Form ETA 750), approved by the Department of Labor. 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.

On appeal, counsel submits additional evidence.¹

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 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 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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. 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 Application for Alien Employment Certification as certified by the U.S. Department of Labor 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 May 21, 2001. The proffered wage as stated on the Form ETA 750 is \$800 per week (\$40,600 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. On the Form ETA 750B, signed by the beneficiary on May 10, 2001, the

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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

beneficiary claimed to be working for the petitioner at the present, but did not provide the starting date.² On the petition, the petitioner claimed to have established in 1984, to have a gross annual income of \$2 million, and to currently employ eighteen (18) workers.

With the petition, the petitioner did not submit any documentary evidence pertinent to its ability to pay the beneficiary the proffered wage beginning on the priority date. On June 28, 2004, the director issued a request for additional evidence (RFE) requesting evidence in the form of copies of annual reports, prepared income tax returns, and/or audited financial statements for the years 2002 through 2004. In response to the RFE, counsel submitted a letter explaining that the beneficiary began his employment with AllSolar Service Corp. in August 2003, financial statements for AllSolar Service Co. and the beneficiary's W-2 form for 2003 from AllSolar Service Co. On September 27, 2004, the director issued a notice of intent to deny (NOID) stating that AllSolar Service Corp. is not the petitioning entity and there is no evidence to establish that it is the successor-in-interest to the petitioner. In response to the director's NOID, counsel submitted a letter confirming that the beneficiary is now working for AllSolar Service Corp. in the same position and salary offered by the petitioner.

The director denied the petition on January 3, 2005, finding that the evidence submitted with the petition and in response to the RFE and the NOID failed to establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and failed to establish AllSolar Service Corp.'s successor-in-interest status.

On appeal, counsel submits a statement of the beneficiary and the beneficiary's W-2 forms and individual tax returns for relevant years.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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 record contains copies of the beneficiary's Form W-2 Wage and Tax Statements. The record of proceeding does not contain any evidence to establish that any other company is the same entity as the petitioner or is the successor-in-interest to the petitioner. Therefore, the beneficiary's W-2 forms from any other entities cannot be considered in determining the petitioner's ability to pay the beneficiary the proffered wage. The beneficiary's W-2 form for 2000 is not necessarily dispositive since the priority date in the instant case is May 10, 2001. The beneficiary's Form W-2's for other relevant years from the petitioner show compensation as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$18,978.93	\$41,600.00	\$22,621.07
2002	\$0	\$41,600.00	\$41,600.00
2003	\$4,101.26	\$41,600.00	\$37,498.74

² On Form G-325A signed on February 11, 2003, the beneficiary indicated that he worked for the petitioner for periods from September 2002 to the present and from August 1999 to June 2001.

The petitioner has not established that it employed and paid the beneficiary the proffered wage in 2002 but paid partial wages in 2001 and 2003. Therefore, the petitioner is obligated to demonstrate that it could pay the full proffered wage in 2002 and the difference of \$22,612.07 in 2001 and \$37,498.74 in 2003 between the wages actually paid to the beneficiary and 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, CIS will next examine the net income or net current assets reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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). The regulation also allows the petitioner to establish its ability to pay the proffered wage using an annual report or audited financial statements as an alternative. See 8 C.F.R. § 204.5(g)(2).

The record does not contain the petitioner's annual reports, tax returns, or audited financial statements for the years 2001 through the present. The AAO cannot assess the petitioner's net income or net current assets for these years to determine whether the petitioner had sufficient net income or net current assets in these years to pay the beneficiary the full proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage. The petitioner failed to demonstrate its ability to pay the proffered wage through its net income or net current assets because it failed to submit regulatory-prescribed evidence.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had 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.

The instant labor certification application and petition were filed by the instant petitioner, Superior Solar Systems, Inc., which is structured as a corporation. Counsel submitted the financial statements of AllSolar Service Co. (AllSolar) to establish the petitioner's ability to pay. However, the record contains no evidence that AllSolar is the same entity as the petitioner or qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the beneficiary is working for the new company does not establish that the new company is a successor-in-interest to the petitioner. In addition, even if counsel had established AllSolar's successor-in-interest status, in order to maintain the original priority date, the successor-in-interest would have to demonstrate that the predecessor, i.e. the petitioner in the instant case, had the ability to pay the proffered wage. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). However, as previously discussed, the petitioner failed to establish its ability to pay the proffered wage.

Moreover, counsel did not establish that AllSolar had the ability to pay the proffered wage with regulatory-prescribed evidence. Counsel submitted AllSolar's financial statements. However, these financial statements are not audited. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant

to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's assertions and additional evidence submitted on appeal cannot overcome the decision of the director that the petitioner did not establish its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.