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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

EAC 05 202 51592

Office: VERMONT SERVICE CENTER

Date:

DEC 03 2007

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:

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting contractor. It seeks to employ the beneficiary permanently in the United States as a painter/job supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. 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 denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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, the day the Form ETA 750 Application for Alien Employment Certification 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 for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.75 per hour, which equals \$34,840 per year.

The Form I-140 petition in this matter was submitted by J&J Painting and Decorating, of [REDACTED] Lafayette Hill, Pennsylvania, on June 30, 2005. On the petition, the petitioner stated that it was established on September 1, 1996, that it employs five workers, and that its Employer Identification Number (EID) is [REDACTED]

J&J Custom Painting, of the same address as the petitioner, filed the Form ETA 750 Application for Alien Employment Certification on which the visa petition relies. On the Form ETA 750, Part B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for J&J Painting since August 2000.

The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Lafayette Hill, Pennsylvania.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹ In the instant case the record contains (1) the 2001 Form 1065 U.S. Return of Partnership Income of J&J Custom Painting, (2) the petitioner's unaudited 2003, 2004, and 2005 Profit & Loss statements, (3) a 2005 Form W-2 Wage and Tax Statement showing the wages the petitioner paid to the beneficiary during that year, (4) a letter dated June 28, 2005 from an accountancy, (5) an undated letter from the same accountancy, and (6) five letters dated August 24, 2006 from that accountancy. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The tax return of J&J Custom Painting shows that it was a general partnership, that it was founded on April 1, 1997, and that it reported taxes pursuant to cash convention accounting and the calendar year. That company's EID is 23-2889654, which demonstrates that it is a separate entity from the petitioner.

The 2001 tax return of J&J Custom Painting shows that the company declared Net Income² of \$44,355 during that year. At the end of that year the company's current liabilities exceeded its current assets.

The 2005 Form W-2 shows that the petitioner paid the beneficiary wages of \$4,800 during that year.

The accountant's June 28, 2005 letter states that the petitioner, J&J Painting and Decorating, Incorporated, is a subchapter S corporation that was founded on June 1, 2003 and took over the office space and work in progress of J&J Custom Painting. The accountant further notes that the visa petition filed by the instant petitioner, J&J Painting and Decorating, Incorporated, relies on the approved Form ETA 750 labor certification filed by and approved for the use of J&J Custom Painting.

The accountant's undated letter notes that the petitioner, J&J Painting and Decorating, reports taxes on a cash basis, which excludes the value of receivables and the debt represented by accounts payable. That letter states that the petitioner's 2001 tax return shows a profit of \$2,265, apparently referring to the petitioner's Line 22 ordinary income, plus depreciation, that the petitioner had "available accrued funds" of approximately \$50,000, that the tax return showed income of \$391,000, and that the financial statements prepared pursuant

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 record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² See page four, line one, above Schedule L. That statistic is considered to be the net income of an entity reporting taxes on a Form 1065 U.S. Return of Partnership Income.

to accrual convention showed total income of \$436,000. That letter further stated that J&J Painting and Decorating Incorporated's total assets in 2001 were \$75,000 and its net current assets were \$45,000.

Initially this office notes that, according to a previous letter from the same accountancy, the petitioner did not exist during 2001. The figures the accountant provided, therefore, do not pertain to the petitioner. The accountant is apparently asserting that these figure pertain to J&J Custom Painting, a partnership, and an entity separate from the petitioner.

The formula the accountant used to arrive at "available accrued funds" is not stated. Although counsel appears to imply that it is the sum of J&J Custom Painting's 2001 ordinary income and its depreciation deduction for the same year, this office notes that the sum of those two figures is \$9,542,³ rather than approximately \$50,000. The provenance of the remaining \$40,000 in "available accrued funds" is unclear.

Further, the 2001 tax return does not show income of \$391,000. That figure does not appear on the 2001 tax return of J&J Custom Painting. That the 2001 financial statement of J&J Custom Painting, prepared according to accrual, shows total income of \$436,000 is not demonstrated in the record. The record contains no 2001 financial statement.

The August 24, 2006 letters assert values for those same statistics during 2002, 2003, and 2004, and a statement of the petitioner's total assets on August 24, 2006.

The director denied the petition on July 25, 2006.

On appeal, counsel asserted that the letters from the accountant demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

That the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's implication, make them poor indices of the funds available to the petitioner with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual. No adjustment to the figures on the tax returns is warranted to correct for their preparation pursuant to cash convention accounting.

This office does not find the assertions by the accountant pertinent to the petitioner's financial performance, or, rather, that of J&J Custom Painting, to be credible. The regulation at 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. That regulation does not provide for unsupported conclusory declarations of the petitioner's performance by its accountant.

Further, the accountant's assertions pertinent to 2001, the only year for which this office has a tax return or other reliable evidence pertinent to the petitioner's financial performance, shows that the accountant's assertions pertinent to 2001 are generally either unsupported by the 2001 tax return or contradicted by it. This

³ \$2,265 + \$7,277

office sees no reason to believe that the accountant's assertions pertinent to the petitioner's performance during 2002, 2003, and 2004, and his assertion pertinent to the value of the petitioner's assets on August 24, 2006 are any more reliable. Those assertions will not be considered further.

The accountant's implication that the petitioner's depreciation deductions should play some role in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date does not convince this office.

This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although the accountant implied that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁴ The accountant appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. **The unaudited financial statements will not be considered.**

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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

⁴ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

realistic. 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, Citizenship and Immigration Services (CIS) 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. Although the beneficiary claimed to have worked for J&J Custom Painting since August 2000, and presumably for the petitioner since its inception, the only evidence of wages either paid to the beneficiary is the 2005 W-2 form showing that the petitioner paid the beneficiary \$4,800 during that year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$34,840 per year. The priority date is April 27, 2001. Analysis of the petitioner's continuing ability to pay the proffered wage beginning on the priority date is complicated by the fact that the petitioner is asserting that the financial performance of J&J Custom Painting through June 1, 2003 is attributable to the petitioner. J&J Custom Painting is a partnership, whereas the petitioner is a corporation. For the purpose of analysis, this office will assume, *arguendo*, that the 2001 tax return of J&J Custom Painting should be considered to relevant to the ability of the instant petitioner, which did not then exist, to pay the proffered wage during that year.

The 2001 tax return of J&J Custom Painting shows that the company declared net income of \$44,355 during that year. That amount exceeds the proffered wage. Assuming that amount is attributable to the petitioner, the petitioner has demonstrated the ability to pay the proffered wage during 2001.

The record contains no copies of annual reports, federal tax returns, or audited financial statements or any other evidence pertinent to the ability of either J&J Custom Painting or the petitioner to pay the proffered wage during 2002, 2003, or 2004. The petitioner has not demonstrated its ability to pay the proffered wage during 2002, 2003, or 2004.

The 2005 Form W-2 shows that the petitioner paid the beneficiary wages of \$4,800 during that year. The petitioner is obliged to show the ability to pay the remaining \$30,040 balance of the proffered wage during that year. The petitioner submitted no copies of annual reports, federal tax returns, audited financial statements, or any other reliable evidence of its ability to pay the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2005.⁶

On March 8, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. CIS received counsel's response to that request on June 5, 2006, and the record is deemed to have closed on that date. On that date the petitioner's 2006 tax return may still have been unavailable.⁷ For the purpose of

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁶ This office's implication that the beneficiary's 2005 tax return was available when the record closed rests on the assumption that the petitioner reports taxes pursuant to the calendar year. See footnote seven.

⁷ The accountant stated that the petitioner is a subchapter S corporation. The instructions to the Form 1120S, U.S. Income Tax Return for an S Corporation indicate that, absent extension, the tax return of an S corporation is typically due on the fifteenth day of the third month following the end of its reporting period. Assuming that the petitioner reports taxes pursuant to the calendar year, its 2005 return was due on March 15,

today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, 2004, and 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests an additional issue that was not addressed in the decision of denial.

The petitioner in this matter is [REDACTED] The labor certification upon which the visa petition in this matter relies was issued to J&J Custom Painting, a partnership. In order to rely on a labor certification issued to another company the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1986). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer.

The record contains a statement by an accountant that on June 1, 2003 the petitioner assumed the office lease of J&J Custom Painting and its work in progress. This single statement does not explain how the change in ownership occurred. Further, even if assumed to be fully credible, it does not demonstrate that the instant petitioner assumed all of the rights, duties, obligations, and assets of J&J Custom Painting. Further still, the myriad misstatements on the undated letter from the same accountancy cause this office to question the credibility of the affiant.

The petitioner has not demonstrated that it is the successor-in-interest of J&J Custom Painting. The petition should have been denied on this additional basis. 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*, 299 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).

The petition will be denied for both of 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.

2006 and its 2006 return was due on March 15, 2007. The record contains no indication of an extension. Therefore, when the record closed on June 5, 2006, the petitioner's 2005 tax return should have been available but its 2006 return was not.