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U.S. Citizenship
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Services

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FEB 01 2007

File:

EAC-04-168-52353

Office: VERMONT SERVICE CENTER

Date:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is in the business of construction and woodworking and seeks to employ the beneficiary permanently in the United States as a cabinet maker. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's January 18, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001.² The proffered wage as stated on Form ETA 750 for the position of an electrician is \$17.50 per hour, based on a 40 hour work week, which is equivalent to \$36,400.00. The labor certification was approved on January 9, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on April 29, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: April 13, 1995; gross annual income: \$452,505; net annual income: \$273,972; and current number of employees: six.

On September 22, 2004, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically related to the petitioner's ability to pay, including the petitioner's federal tax returns, annual reports, or audited financial statements for the years 2001, 2002, and 2003. Further, the RFE requested that the petitioner provide evidence that the beneficiary met the requirements as set forth in the ETA 750. Counsel responded to the RFE and submitted bank statements for the years 2001, 2002 and 2003. The petitioner had previously submitted its 2001 and 2002 federal tax returns, but did not submit its 2003 federal tax return. Additionally, the petitioner submitted two letters regarding the beneficiary's prior experience.

On January 18, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary listed that he has been employed with the petitioner since August 1998. The petitioner did not submit any evidence of wage payment or any W-2 statements to document that it has employed and paid the beneficiary. Therefore, the petitioner cannot establish its ability to pay the beneficiary through prior wage payment.

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 figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's

² The petitioner listed on the ETA 750 is [REDACTED]. The petitioner listed on Form I-140 is [REDACTED] (formerly [REDACTED]). The petitioner did submit evidence that [REDACTED] had dissolved and that [REDACTED] operates under the assumed name of [REDACTED]. However, we note that since the first corporation dissolved, the petitioner may need to demonstrate that the new corporation is the proper successor-in-interest to the initial corporation in order for the beneficiary to benefit from the initial labor certification. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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).

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 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.

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 figure reflected on the petitioner's federal income tax return. 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 petitioner is organized as a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 of the tax returns demonstrates the following concerning the petitioner's ability to pay the proffered wage of \$36,400.00 per year:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002 ³	\$4,987
2001	\$3,541

The petitioner's net income would not allow for payment of the proffered wage in either year. The petitioner would not be able to demonstrate its ability to pay the proffered wage based on the net income above.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ Current assets include cash on hand, inventories, and receivables expected to be

³ The petitioner did not submit its 2003 tax return, which may not have been available at the time that the petitioner filed the I-140 petition, but should have been available at the time of its response to the RFE. We note that the RFE specifically requested that the petitioner submit its 2003 federal tax return, audited financial statement or annual report. The petitioner did not submit one of the three designated items for 2003, and did not offer any explanation regarding the petitioner's 2003 federal tax return's availability, or the lack thereof. Further, we note that the petitioner provided tax returns for the previous entity, Luxor General Contracting. As noted above, the petitioner may need to demonstrate that the new corporation is the proper successor-in-interest to the initial corporation in order for the beneficiary to benefit from the initial labor certification.

⁴According 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

converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2002	\$11,994
2001 ⁵	not submitted

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner would lack the ability to pay the proffered wage in any year under the net current asset test. The petitioner's tax returns reflect negative net current assets for all tax returns submitted.

The petitioner had additionally submitted bank statements for the time period January 2001 through December 2003. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Additionally, funds that appear in the petitioner's bank account should already have been accounted for as cash on the petitioner's Schedule L and included in net current assets analysis above. The petitioner did not submit any evidence to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, at least for the year 2002. While the petitioner's bank statements do reflect generally high balances, we would not accept the bank statements in the absence of the petitioner's Schedule L for 2001, and 2003 federal tax return, including Schedule L, in order to determine the petitioner's liabilities.

On appeal, counsel provides that the "Center Director overlooked the Record and misinterpret[ed] the employer's tax return as the owner of the company have more [sic] than sufficient compensation each year."

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. His position on several documents is listed as the company's president. According to the petitioner's 2001 and 2002 IRS Forms 1120, Schedule E (Compensation of Officers), he elected to pay himself \$52,000 and \$65,000, respectively. These figures, however, are not supported by W-2 Forms. Additionally, we note that officer's compensation is not a fixed salary. However, if we were to reduce the owner's compensation by approximately \$30,000 each year required to meet the proffered wage (adding in the petitioner's available net

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.

⁵ The petitioner failed to submit its 2001 Form 1120, Schedule L, which would list the petitioner's current assets and liabilities and allow calculation of the petitioner's net current assets. This deficiency was noted in the director's decision. The petitioner did not correct this deficiency on appeal.

income above), the owner would be left with very minimal compensation himself (\$22,000, and \$35,000) lessening the credibility of counsel's claim. The petitioner's sole shareholder did not provide any statement that he is willing to forgo some or most of his compensation to pay the beneficiary. We only have the statement of counsel that the director failed to consider his compensation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, even if we were to accept that the petitioner's shareholder was willing to forgo compensation to pay the beneficiary's wage, the petitioner only submitted its federal tax returns for the years 2001, and 2002, but not 2003, so that we cannot determine how much, if any, officer compensation was allotted in 2003. We note that the RFE specifically requested the petitioner's 2003 federal tax return, but that the petitioner failed to provide this document in response to the RFE. Further, the petitioner did not provide any reason for its failure to submit this document and did not assert that the tax return was unavailable.

The purpose of the request for evidence is to elicit further information that clarifies whether the petitioner can establish eligibility for the benefit sought. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). In the present matter, the petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency, but has failed to do so. Further, we note that the petitioner failed to provide its 2001 Form 1120 Schedule L, the absence of which was noted in the director's decision. The petitioner also did not provide any evidence of prior payment to the beneficiary, but presumably should have been able to do so as the beneficiary has listed that he has been employed with the petitioner since August 1998.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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.