

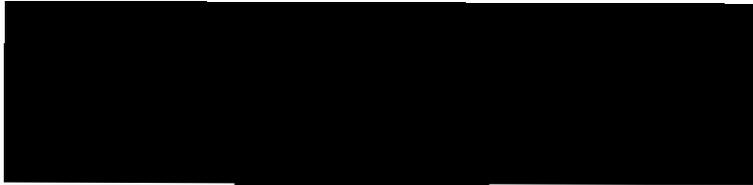
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

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MAY 04 2007

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC 06 800 15252

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker or Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial agricultural stable. It seeks to employ the beneficiary permanently in the United States as a commercial stable manager. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established its continuing financial ability to pay the proffered wage and accordingly denied the petition.

On appeal, the petitioner submits additional evidence and asserts that it has established its ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 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 petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, ETA Form 9089 was accepted for processing on May 12, 2006. The proffered wage is \$12.00 per hour, which amounts to \$24,960 per year based on a 40-hour workweek. Part K of the ETA Form 9089 directs that all jobs held by the beneficiary be listed. It also specifies that any other experience that qualifies the alien for the job offered be listed. In this case, the only employment claimed by the beneficiary is that of a construction supervisor for the [REDACTED] where he worked from May 1999 to June 1, 2000.

Part 5 of the I-140, which was filed on June 7, 2006, indicates that the petitioner was established in June 2003, has a gross annual income of \$225,000, a net annual income of \$30,000, and current employs six workers.

On July 14, 2006, the director issued a request for evidence. She instructed the petitioner to provide evidence in the form of letters from current or former employers verifying that the beneficiary had obtained three years of experience in the job offered as of the priority date of May 12, 2006. She also requested evidence in support of the petitioner's continuing financial ability to pay the certified wage consisting of copies of annual reports, federal tax returns or audited financial statements, as well as copies of any Wage and Tax Statements (W-2s) if the petitioner employs the beneficiary.

In response, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2005. It indicates that the petitioner files its taxes using a standard calendar year. The petitioner reported gross receipts or sales of \$100,981, total income of \$101,125, no officer compensation, no salaries and wages, and ordinary business income of -\$1,607.¹ Schedule L of the tax return reveals that the petitioner reported "-0-" for all entries relating to current assets or current liabilities.²

The petitioner also provided a copy of an Internal Revenue Service (IRS) Form 1099 for 2005 indicating that it paid \$9,814 in compensation to the beneficiary during that year.

The petitioner further supplied a letter from [REDACTED] its vice president who extensively described the duties that a stable manager would be expected to perform. Mr. [REDACTED] also referred to an unnamed individual as having "supervised and provided his labor on the construction of entire 7,000 square foot commercial stable," as well as performing other duties.

On August 17, 2006, the director denied the petition, concluding that the petitioner's evidence did not demonstrate the petitioner's continuing ability to pay the proffered salary.

On appeal, the petitioner submits a letter from its president [REDACTED]. She states that the petitioner has employed the beneficiary as a commercial stable manager since August 16, 2005. She claims that he is paid \$12.50 per hour, annualized to \$26,000 per year. In support of this claim, a copy of a list of checks paid in varying amounts to the beneficiary from January 1 to September 12, 2006 is provided. Also supplied is an affidavit from [REDACTED] declaring that these amounts are accurate. Further provided is a copy of the 2005 individual tax return of [REDACTED] and [REDACTED] and an unaudited income statement from [REDACTED] presenting the petitioner's financial data covering the first nine months of 2006. Ms. [REDACTED] asserts that these

¹ For the purpose of this review, ordinary income will be treated as net income.

² Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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.

documents show that the [REDACTED] wages, as well as the depreciation expense of \$12,170 should be included in the consideration of the petitioner's ability to pay the proffered wage.

In this case, the [REDACTED] salaries as shown on their individual tax return cannot be factored into the determination of the petitioning corporation's ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a closely held petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, the evidence indicates that the petitioner employed the beneficiary in 2005 and paid him compensation of \$9,814. The evidence provided on appeal suggests that the petitioner has continued to employ the beneficiary in 2006; however, the petitioner has failed to provide the best evidence of this employment and payment of wages consisting of either copies of negotiated paychecks or of pertinent copies of quarterly state wage or unemployment reports itemizing the employees' names and wages paid. 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)).

CIS will also examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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). 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. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value

due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. [CIS] 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. (Original emphasis.) *Chi-Feng* at 536.

The income statement from H&R Block cannot be considered determinative of the petitioner's ability to pay the proffered wage. According to the plain language of 8 C.F.R. § 204.5(g) (2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. To the extent that an unaudited financial statement or an unaudited component of a financial statement such as an unaudited income statement is also provided in certain cases, it will be accorded appropriate evidentiary weight. However, it cannot be concluded that either unaudited financial statements or a component part thereof, should be considered as probative of a petitioner's ability to pay the proffered wage in lieu of one of the required forms of evidence. 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. Here, the unaudited income statement provided on appeal provides limited reliability in determining a petitioner's ability to pay the proffered wage.

In this case, in 2005, neither the petitioner's reported net income of -\$1,607, nor its net current assets of -0- were sufficient to cover the \$15,146 difference between the proffered wage of \$24,960 and the actual compensation of \$9,814 paid to the beneficiary. As explained above, the documentation provided on appeal, does not sufficiently verify the beneficiary's actual wages paid in 2006. The record does not reflect that the corporate petitioner demonstrated its continuing ability to pay the proffered wage beginning at the priority date.

Accordingly, based on the evidence and argument contained in the record and provided on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

Beyond the decision of the director, it is noted that 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*, 229 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, 1002n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). In this matter, it is noted that this petition must also be denied because the position's requirements set forth on the labor certification are not consistent with

an “other, worker (requiring less than two years of training or experience)” visa classification designated by the petitioner on Part 2 “g” on the I-140, Immigrant Petition for Alien Worker. The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The labor certification’s minimum training and experience requirements, described at Part H of the Form ETA 9089 do not describe a position that would require less than two years training or experience, pertinent to the selected unskilled worker visa classification. Rather, Part H states that the applicant for the position offered of commercial stable manager must have 12 months of training in animal husbandry and 36 months of experience in the job offered. Pursuant to section 203(b)(3)(A)(i) of the Act, as noted above, this position described on the ETA Form 9089 requires a skilled worker classification, which specifies a minimum of least two years training or experience. As explained above, these experiential requirements must be met by the priority date. In this case, the only documentation of stable management experience that has been provided has been submitted on appeal. Based on the record suggesting that the beneficiary’s experience as a commercial stable manager began on August 16, 2005, the beneficiary had accrued only nine months in the position offered as of the priority date of May 12, 2006. As such, his qualifications do not meet the requirements set forth in Part H of the ETA Form 9089. He is not qualified as a skilled worker.

It is further noted that the regulation at 8 C.F.R. § 204.5(g)(1) requires the original labor certification to be submitted with the I-40. In this case, the petition must also be denied because ETA Form 9089 submitted with the I-140 appears to be a copy. For these independent and alternative reasons, the petition may not be approved.

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.