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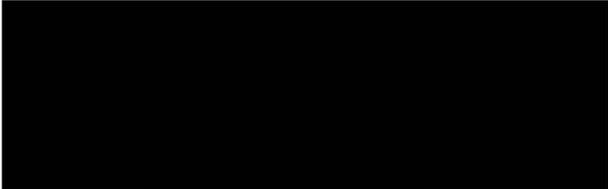
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2029



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN 06 128 51255

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

DEC 17 2008

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)

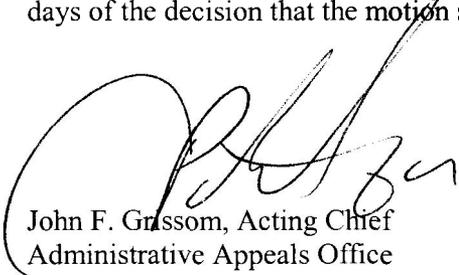
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grassom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate broker.¹ It seeks to employ the beneficiary permanently in the United States as an ornamental plasterer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director denied the petition as he determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2001 priority date of the visa petition.

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 November 10, 2006 denial, the single issue in this case is whether or not 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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [U.S. Citizenship and Immigration Services (USCIS)].

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

¹ The Form ETA 750 lists the petitioner's business activity as "maintenance."

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$30.66 per hour, or \$63,772.80 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job.

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 relevant evidence in the record, including new evidence properly submitted on appeal.²

With the initial petition, the petitioner submitted only the first page of its IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2001 to 2004, without the relevant schedules. In the director's Request for Evidence (RFE) dated July 10, 2006, the director requested complete copies of the petitioner's IRS Forms 1120S for tax years 2001 to 2005, and copies of all W-2 Wage and Tax Statements issued by the petitioner for the beneficiary. In response the petitioner resubmitted the first pages of its tax returns for tax years 2001 through 2004, and a copy of Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return for tax year 2005. The petitioner did not, however, provide all the relevant schedules as requested.

On appeal the petitioner submits complete copies of its Forms 1120S for tax years 2001 through 2005. It also submits a letter from [REDACTED], the petitioner's manager of human resources. In the letter, the human resources manager states that the 2005 tax return represents net income after paying salaries and that accounts receivable and payables are intercompany items. The human resources manager further states that the accounts receivables indicate accrued management fees for properties "sols,"³ and that the liabilities represent intercompany balances for items that either have no due dates or are not required payables. The human resources manager then asserts that the petitioner's assets in 2005 were \$3,883,757, and that as of November 22, 2006, the petitioner had 77 employees. The record also contains copies of the beneficiary's W-2 Wage and Tax Statements that indicate the petitioner paid the beneficiary \$23,463.43 in 2001 (\$40,309.37 less than the proffered wage); \$21,496.34 in 2002 (\$42,276.46 less than the proffered wage); \$24,911.22 in 2003 (\$38,861.58 less than the proffered wage); \$24,656.96 in 2004 (\$39,115.84 less than the proffered wage); and \$30,883.38 in 2005 (\$32,889.42 less than the proffered wage).

² 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).

³ This word may be a typo, and the human resources manager may have intended to write "sold."

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted its complete tax returns with relevant schedules to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.⁴ The AAO will examine the evidence again and make some further comments on the petitioner's net income, as outlined by the director. For illustrative purposes, the AAO will also briefly examine the petitioner's net current assets for specific tax years.

On appeal, counsel states on the Form I-290B that the director failed to consider that net income represents income after paying salaries. Counsel also states that the petitioner submits complete copies of its federal tax return for tax year 2001, 2003, and 2005.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on August 25, 1976, to have a gross annual income of \$270,887 in 2003, a net annual income of \$108,272 in 2003, and did not indicate the number of current employees. On the Form ETA 750, signed by the beneficiary on April 23, 2001, the beneficiary claimed to have worked with the petitioner since October 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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, 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 Sonogawa*, 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

⁴ However, even if the AAO considered the petitioner's full tax returns, the appeal would still be dismissed. The petitioner's complete tax returns fail to demonstrate the petitioner's ability to pay the proffered wage.

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the full proffered wage. In response to the director's RFE, the petitioner submitted W-2 Forms for the beneficiary that established the petitioner had not paid the proffered wage to the beneficiary as of the 2001 priority date through 2005. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$63,772.80 in the relevant period of time in question as set forth above.

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, USCIS will next examine the net income figure 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). 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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. [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.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537

The petitioner initially submitted the first page of its tax returns for tax year 2001 to 2005 to the record. The director utilized the figures on line 21, ordinary income (loss) from trade or business activities as the petitioner's net income for the respective years. 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) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Since the petitioner did not provide complete copies of its tax returns in response to the director's RFE, the director utilized the figures on line 21.

When examining the tax returns submitted on appeal that did contain Schedule Ks, the AAO notes that except for tax year 2005, all tax returns had additional income or deductions that reduced the petitioner's actual net income in those years. Thus, the petitioner had the following net income from the 2001 priority year to 2005: \$113,543 in 2001; -\$84,314 in 2002; \$64,272 in 2003; \$15,977 in 2004 and \$9,028 in 2005. Thus, if the petitioner's complete tax returns had been accepted into the record on appeal, the petitioner would have established significantly lower net income in tax years 2003 and 2004, than what the director indicated in his decision. The petitioner would have established its ability to pay the difference between the beneficiary's actual wages and the proffered wage only in tax years 2001, and 2003. The petitioner would still need to demonstrate that it could pay the proffered wage in 2002, 2004 and 2005.

If the petitioner's net income if any, is added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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. If the petitioner's complete tax returns had been accepted into the record on appeal, these documents would have established the petitioner's net current assets in tax years 2002, 2004, and 2005 as follows: -\$518,262 in 2002, -\$513,716 in 2004, and -\$488,518 in 2005.

⁵According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2002, 2004, and 2005, the petitioner did not have either sufficient net income or net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

Based on the foregoing, from the date that the petitioner filed the Form ETA 750 with DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage onward as of the priority date through either an examination of wages paid to the beneficiary, or the petitioner's net income or net current assets, except for the 2001 priority year and 2003.

The petitioner's human resource manager's assertions on appeal with regard to intercompany monies and accounts receivable or payable are too limited for further comment by the AAO. These assertions cannot be concluded to outweigh the evidence presented in the petitioner's tax returns that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor onward.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.