

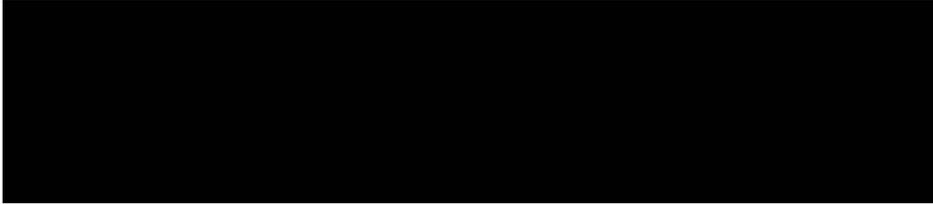
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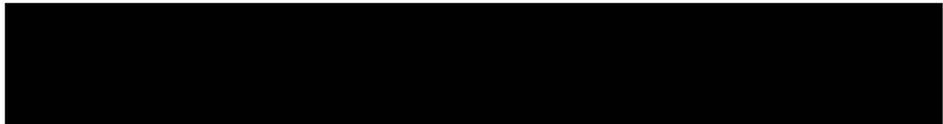


FILE: [REDACTED]
EAC-03-212-51921

Office: VERMONT SERVICE CENTER

Date: JAN 31 2008

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:

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a management and development corporation. It seeks to employ the beneficiary permanently in the United States as a supervisor for janitorial services (supervisor, janitorial/maintenance services). As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL). The director denied the petition on the basis that the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date of the visa petition. The AAO affirmed the director's decision because the AAO found that the petitioner failed to established its ability to pay the proffered wage as well as the beneficiary's qualifications.

The record shows that the motion is properly filed, timely with new evidence, and makes a specific allegation of error in law or fact. The motion meets applicable requirements set forth at 8 C.F.R. §§ 103.5(a)(2) and (3). 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 motion is filed by the petitioner through an attorney named Rania Major-Trunfio of Pennsylvania. Although the attorney's submission letter dated October 26, 2006 indicated her Notice of Entry of Appearance as Attorney or Representative (Form G-28) was enclosed, the record does not contain a properly executed Form G-28 signed by the petitioner's representative and the attorney who filed the instant motion. Thus, the petitioner is considered self-represented in this matter.

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).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion¹. On motion, the petitioner submits a brief, documents as new evidence and evidence previously submitted to establish the petitioner's ability to pay and the beneficiary's qualifications. The relevant evidence in the record includes Form 1120S U.S. Income Tax Return for an S Corporation filed by PA Residential Real Estate for 2000 through 2005, Form 1065 U.S. Return of Partnership Income filed by Juniper East Associates for 2000 through 2005, the beneficiary's W-2 forms for 2003 through 2005 and payroll as of July 14, 2006 from Pennsylvania Residential Real Estate, a letter from [REDACTED] and an email letter from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The record shows that Pennsylvania Residential Real Estate Management & Development Corporation, located at [REDACTED], Philadelphia, PA 19147, filed a Form ETA 750 on behalf of the instant beneficiary on April 16, 2001 and the Form ETA 750 was certified on April 2, 2002. The proffered wage as stated on the Form ETA 750 is \$550.00 per week (\$28,600 per year). On June 25, 2003, Pennsylvania Residential Real Estate Management filed the instant petition based on the instant approved labor certification. Therefore, the petitioner in the instant case is Pennsylvania Residential Real Estate Management & Development Corporation (Pennsylvania Residential Real Estate Management or PRREM). On the petition, the petitioner identified itself with federal employer identification number (FEIN) [REDACTED] and claimed to have been established in 1995, to have a gross annual income of \$1,075,966, to have a net annual income of \$258,167², and to currently employ five workers plus subcontractors.

On motion, the petitioner claimed that the AAO failed to properly understand and evaluate the financial information for both the petitioner and Juniper East Associates. However, the petitioner did not explain why the financial information for Juniper East Associates should be considered in determining its ability to pay the proffered wage in the instant case. Nor did it submit any evidence establishing that the petitioner and Juniper East Associates are the same business entity, or that either of them qualifies to be the successor-in-interest to the other. This status requires documentary evidence that the successor company has assumed all of the rights, duties, and obligations of the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

The record contains the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 through 2005, and Form 1065 U.S. Return of Partnership Income filed by Juniper East Associates for 2000 through 2005. The petitioner's tax returns show that the petitioner was incorporated and elected as an S corporation on October 15, 1993 with an address at [REDACTED], Philadelphia, PA 19147 and the federal employer identification number (FEIN) [REDACTED]. Juniper East Associates' tax returns show that Juniper East Associates was formed as a limited partnership on October 24, 1962 with the same address as the petitioner's and a FEIN [REDACTED]. The fact that a business entity is doing business at the same location as the other does not establish that the business entity is a successor-in-interest to the other.

¹ The submission of additional evidence on motion is allowed by the regulation at 8 C.F.R. § 103.5(a). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² This office assumes that the petitioner meant \$258,167.

³ It is noted that the petitioner mistakenly claimed Juniper East Associates' FEIN as its own on the petition

In addition, this office accessed the Pennsylvania corporation and business entity data website.⁴ According to the Pennsylvania official database, Pennsylvania Residential Real Estate Management and Development Corporation was established on November 2, 1993 as a Pennsylvania management corporation at [REDACTED] Philadelphia, PA 19147 and is currently active; and Juniper East Associates was established on November 21, 1983 as a limited partnership at [REDACTED] Philadelphia, PA 19102 and is currently active. The Pennsylvania official website indicates that Pennsylvania Residential Real Estate Management and Development Corporation is structured as a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [Citizenship and Immigration Services (CIS)] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the assets or financial information of Juniper East Associates cannot be considered in determining the petitioner's ability to pay the proffered wage.

Furthermore, the Pennsylvania corporation records show that both the petitioner and Juniper East Associates are currently active. The petitioner did not explain how Juniper East Associates has assumed all of the rights, duties, and obligations of and became the successor-in-interest to the petitioner, a current active corporation.

The AAO finds that the petitioner in the instant case has not submitted persuasive evidence that indicates that Juniper East Associates qualifies as a successor-in-interest to the petitioner or that the petitioner and Juniper East Associates are the same entity. Without establishing the successor-in-interest or same entity status for Juniper East Associates, the petitioner must establish its continuing ability to pay the proffered wage beginning on the priority date to the present with its own financial sources. Therefore, the AAO will review Juniper East Associates' financial documents in determining whether the petitioner had the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 the beneficiary's W-2 forms issued by the petitioner for 2003 through 2005. The W-2 forms show that the petitioner paid the beneficiary \$2,000 in 2003, \$25,100 in 2004 and \$26,480 in 2005. Therefore, the petitioner failed to establish its ability to pay the proffered wage from 2001, the year of the priority date, to the present through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$28,600 in 2001 and 2002, and the difference of \$26,600 in 2003, \$3,500 in 2004 and \$2,120 in 2005 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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, 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

form.

⁴ See <http://corporations.state.pa.us/corp/soskb/csearch.asp> (accessed on December 20, 2007).

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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 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. [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.

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

As previously noted, the petitioner is structured as an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 through 2005. The priority date in the instant case is April 16, 2001, therefore, the petitioner's 2000 tax return is not necessarily dispositive. The petitioner's tax returns for 2001 through 2005 demonstrate the following financial information concerning the ability to pay the proffered wage of \$28,600 per year from the priority date:

- In 2001, the Form 1120S stated a net income⁵ of \$(178,769).
- In 2002, the Form 1120S stated a net income of \$(11,647).
- In 2003, the Form 1120S stated a net income of \$5,491.

⁵ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

- In 2004, the Form 1120S stated a net income of \$104,194.
- In 2005, the Form 1120S stated a net income of \$17,694.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$28,600; for the year 2003, the petitioner did not have sufficient net income to pay the difference of \$26,600 between wages actually paid to the beneficiary and the proffered wage; however, the petitioner had sufficient net income to pay the beneficiary the difference of \$3,500 in 2004 and \$2,120 in 2005 between wages actually paid to the beneficiary and the proffered wage. Thus, the petitioner failed to establish its ability to pay the proffered wage with its net income in 2001 through 2003, while it established its ability to pay the proffered wage in 2004 and 2005.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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, CIS 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.⁶ A corporation's year-end current assets are shown on Schedule L to the Form 1120 or Form 1120S, 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.

- The petitioner's net current assets during 2001 were \$(519,120).
 - The petitioner's net current assets during 2002 were \$(829,670).
- The petitioner's net current assets during 2003 were \$(939,884).

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage of \$28,600, and for the year 2003, the petitioner did not have sufficient net current assets to pay the beneficiary the difference of \$26,600 between wages actually paid to the beneficiary and the proffered wage. Thus, the petitioner failed to establish its ability to pay the proffered wage with its net current assets in 2001 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2001 through 2003 through an examination of wages paid to the beneficiary, and its net income or its net current assets.

⁶According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On motion, the petitioner claims that its former counsel failed to request the full, complete and proper documentation necessary from the petitioner and the beneficiary in order to make a proper determination on the immigrant petition and in response to the director's request for evidence on May 4, 2004. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). However, the record does not contain such evidence submitted on motion. The petitioner's assertion on motion cannot overcome the director's denial and the AAO's previous decision.

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). As set forth in the AAO's September 28, 2006 dismissal, the issue beyond the director's decision in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite qualifications for the proffered position prior to the priority date.

The certified Form ETA 750 in the instant case states that the position of janitorial/maintenance services supervisor requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on March 8, 2001, the beneficiary set forth her work experience as a "Supervisor of Maintenance" at [REDACTED] San Francisco de Macoris, Dominican Republic from 1990 to 1992; and as "Maintenance/Cleaning" at Mars Community Residence, North East, Maryland from 1993 to 1998.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

As evidence of the beneficiary's qualifications required by the above regulation, the petitioner initially provided a letter from Lic. Faustina Altagracia-Santos, Attorney, General Real Estate (Faustina letter). This letter confirmed that the beneficiary was employed "from the year 1990 until 1992, as the person in charge of Maintenance Department of inside and outside of my offices." The letter does not confirm the exact months of starting and ending the employment, nor does it verify the beneficiary's full-time employment. Therefore, the petitioner failed to establish the beneficiary's qualifications with the Faustina letter.

The second letter comes from Mars Community Residence (Mars letter), which provided that the beneficiary “worked for my business from 1993 to 1998.” The Mars letter similarly failed to contain the exact months of starting and ending the employment, failed to verify the beneficiary’s full-time employment, and moreover failed to confirm that the beneficiary worked as a supervisor. Therefore, the petitioner failed to establish the beneficiary’s qualifications with the Mars letter.

On motion, the petitioner submitted an affidavit of [REDACTED], and a statement from the beneficiary. [REDACTED] testifies that the beneficiary worked for [REDACTED] in her offices and business of real estate as a Cleaning Supervisor working full-time from February 1990 to November 1992. The affidavit shows that [REDACTED] is the parent of [REDACTED], and thus the affidavit of [REDACTED] is not an experience letter from the beneficiary’s former employer. Therefore, the Affidavit of [REDACTED] cannot be accepted as primary evidence to establish the beneficiary’s qualifications. Although the regulation at 8 C.F.R. § 204.5(g)(1) allows CIS to consider other documentation relating to the beneficiary’s experience in the circumstance that the required experience letter from a former employer is unavailable, the petitioner did not submit any evidence showing that an experience letter from [REDACTED] is not available. Furthermore, the beneficiary’s one year and ten months experience testified by [REDACTED] does not meet the requisite two years of experience requirement for the proffered position in the instant case.

The beneficiary’s statement dated October 19, 2006 indicates that she worked as a cleaning supervisor for Rosemary’s company from September 1988 to November 1989, and that she worked for [REDACTED] as a full-time cleaning supervisor from February 1990 to November 1992 with one month off from July 1992 to August 1992, and then as a part-time cleaning supervisor from December 1992 to May 1993. However, a statement of the beneficiary is not one of forms regulatory-prescribed evidence. In addition, the beneficiary’s October 19, 2006 statement is not supported by her own statement on the Form ETA 750B, any experience letters from her former employer(s) or objective solid evidence. 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. at 158. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.”

Therefore, the petitioner failed to establish that the beneficiary possessed the requisite two years of experience as a janitorial/maintenance service supervisor, and thus, the petition cannot be approved.

The petition will be denied for 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 motion is granted. The previous decision of the AAO, dated September 28, 2006, is affirmed. The petition is denied.