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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 06 005 50972

Office: TEXAS SERVICE CENTER

Date: NOV 17 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:

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.

John F. Grissom, Acting 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 provider of machine repair. It seeks to employ the beneficiary permanently in the United States as an engine repair supervisor. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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. The director also noted inconsistencies in information pertaining to the beneficiary's prior work experience and directed the petitioner to submit evidence as to why the labor certification should not be invalidated, if the decision was appealed. The director denied the petition accordingly.

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 primary 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. 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 9089, Application for Permanent Employment Certification, as certified by the DOL 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 9089 was accepted on July 13, 2005. The proffered wage as stated on the Form ETA 9089 is \$62,400.00 per year.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ Counsel submits a brief on appeal. Relevant evidence in the record includes the petitioner's corporate federal tax return for 2005. Counsel also submits the beneficiary's W-2 Forms for 2004 and 2005 and paystubs. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the Form I-140 petition, the petitioner claimed to have been established on March 29, 1995, to have a gross annual income of \$4,500,000.00, and to currently employ ten workers. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on September 29, 2005, the beneficiary has not claimed to have worked for the petitioner.

On appeal, counsel asserts that the director's request for evidence (RFE) dated July 10, 2006 did not address the specific concerns of Citizenship and Immigration Services (CIS) regarding information on the Form ETA 9089. Specifically, counsel asserts that the beneficiary was previously employed by the petitioner. Counsel also states that the petitioner has the ability to pay the proffered wage.

Prior to addressing whether the petitioner has the ability to pay the proffered wage, the AAO finds it necessary to address the procedural history in this case. An ETA 750² was approved for the petitioner with a priority date of July 2, 2002. On April 28, 2004 the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary. On the same date, the beneficiary filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On January 26, 2005, the director issued a request for evidence, and on March 22, 2005, the petitioner responded to the director's request. On April 23, 2005, the director issued two separate decisions, one denying the Form I-140 because the beneficiary did not satisfy the job requirements certified by the DOL and the other denying the Form I-485. On May 2, 2005, the petitioner filed a Motion to Reopen/Reconsider with the director of the Texas Service Center. On May 5, 2005, the Texas Service Center erroneously transferred the Motion to Reopen/Reconsider to the AAO. On November 22, 2005 the petitioner submitted a Motion to Supplement the Motion to Reopen/Reconsider to the AAO. On November 13, 2006, the director denied the Motion to Reopen/Reconsider.

After the Motion to Reopen/Reconsider had been forwarded to the AAO, but prior to the director's November 13, 2006 denial of the Motion to Reopen/Reconsider, an ETA 9089 was certified for the petitioner on behalf

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).

² The ETA 750 preceded the ETA 9089.

of the beneficiary with a priority date of July 13, 2005. The ETA 9089 is for the same occupation, but lists different job requirements. On October 7, 2005, the petitioner filed a second Form I-140. On July 10, 2006, the director issued an RFE and on August 4, 2006, the petitioner responded to this RFE. On November 10, 2006, the director denied the instant Form I-140. On December 8, 2006, the petitioner filed the instant Form I-290B, Notice of Appeal.

On September 30, 2008 the AAO received a brief from counsel addressing the beneficiary's education level. The brief does not address the petitioner's ability to pay, the basis of the director's denial. Furthermore, counsel asserts that she is supplementing the motion regarding the first Form I-140 which was filed on April 28, 2004. As previously noted, the director dismissed the motion to reopen on November 13, 2006, thus the AAO does not have jurisdiction over this matter. The only appeal pending before the AAO is from the November 10, 2006 director's denial of the second Form I-140, which only deals with experience and the petitioner's ability to pay.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, 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 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. Counsel asserts that from December 1, 2004 to April 30, 2005 the beneficiary was employed full-time by A-1 Machinery and earned \$800.00 a week. In support of this assertion, counsel submits copies of the beneficiary's Form W-2 Wage and Tax Statements for 2004 and 2005, as well as several earnings statements. Counsel asserts that the beneficiary's employment with A-1 machinery was not listed on the Form 9089 due to a clerical error. The AAO observes that the 2004 Form W-2 for the beneficiary shows \$5,760 in wages from [REDACTED], but the 2004 tax return for [REDACTED] shows no wages, officer compensation or cost of labor paid. As such, the AAO does not find the beneficiary's 2004 Form W-2 to be credible. As the beneficiary did not list employment with the petitioner on the ETA 9089, more than Forms W-2 from leasing companies and pay stubs is needed, especially in light of other inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*; *see Matter of*

Leung, 16 I&N Dec. 12, 14 (Dist. Dir. 1976) noting that employment not listed on a labor certification is not credible.³ Furthermore, evidence preceding the priority date in 2005 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage as of the priority date. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). As there is no documentation in the record to support counsel's assertions, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$62,400.00 in 2005 or subsequently.

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 figures reflected on the petitioner's federal income tax returns, 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 supported by federal case law. See *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* 719 F. Supp. at 537

³ *Matter of Lam*, 16 I&N Dec. 432 (BIA 1978) overturned *Matter of Leung's* holding that undocumented employment cannot qualify the beneficiary for the job; however, the AAO notes that *Matter of Lam* did not address previously unclaimed employment.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 4, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 is the most recent return available. The AAO notes that while the petitioner failed to submit an income tax return for 2005 in response to the director's request for evidence, the petitioner has submitted an income tax return for 2005 on appeal. 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, 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 Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted its 2005 federal income tax return to be considered, it should have submitted the return 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 2005 tax return submitted on appeal. Consequently, the record before the director did not establish that the petitioner had the continuing ability to pay the proffered wage as of 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.