

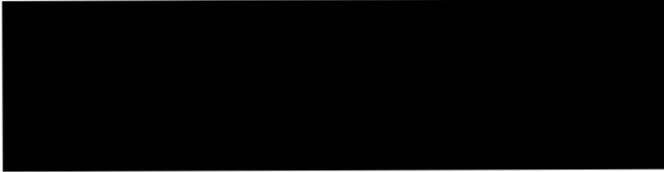
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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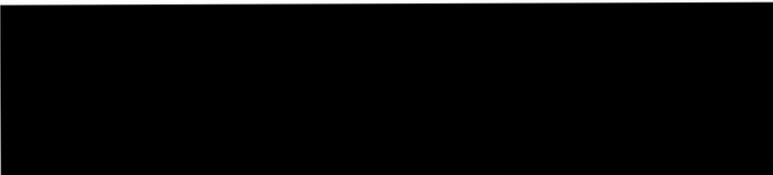
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **APR 27 2009**
SRC-07-251-52267

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

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. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 drywall installation company. It seeks to classify the beneficiary pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i) as a drywall applicator. The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present. Accordingly, the petition was denied on September 12, 2008.

On October 10, 2008, counsel filed the instant appeal timely but without a brief or any supporting documents. On the Form 290B, counsel indicated that a brief and/or additional evidence would be sent to the AAO within 30 days. Counsel dated the appeal October 8, 2008. As of this date, more than six months later, the AAO has received nothing further.

On appeal counsel merely stated that the director erred in disallowing depreciation as a factor to be considered in determining the petitioner's ability to pay the proffered wage and erred in looking at net current assets in isolation.

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, i.e. September 16, 2003 in this case, 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 DOL. *See* 8 C.F.R. § 204.5(d).

In the instant case, the proffered wage as stated on the Form ETA 750 is \$15.50 per hour (\$32,240 per year). On the Form ETA 750B signed by the beneficiary on September 15, 2003, the beneficiary claimed to have worked for the petitioner since September 2003. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$1,768,523, to have a net annual income of \$4,288, and to currently employ 25 workers.

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

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner or its predecessor employed and paid the beneficiary during that period. If the petitioner or the predecessor 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 petitioner submitted the beneficiary's Form 1099 for 2003 through 2007. The 1099 forms show that the petitioner paid the beneficiary \$30,972.08 in 2003, \$111,584.22 in 2004, \$77,933.92 in 2005, \$2,230.00 in 2006 and \$13,187.42 in 2007. Therefore, the petitioner established its ability to pay the proffered wage of \$32,240 per year for 2004 and 2005 through an examination of wages actually paid to the beneficiary. However, the petitioner is still obligated to demonstrate that it could pay the difference of \$1,267.92 in 2003, \$30,010 in 2006 and \$19,052.58 in 2007 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, 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. On appeal counsel asserts that depreciation should be considered as a factor in determining the petitioner's ability to pay the proffered wage in 2006. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have

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).

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* at 537

The record contains copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003 through 2007. According to the tax returns, the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. Since the priority date in this case is September 16, 2003, the petitioner's tax return for 2003 should be the one for the year of the priority date. The record before the director closed on July 3, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date the petitioner's federal tax return for 2008 was not available yet. Therefore, the petitioner's 2007 tax return is the most recent available tax return in determining the petitioner's continuing ability to pay the proffered wage in this case. However, the AAO will review and examine the petitioner's tax returns for 2003, 2006 and 2007 and determine whether the petitioner established its continuing ability to pay the proffered wage for these years since the petitioner has already demonstrated its ability to pay the proffered wage for 2004 and 2005 through an examination of wages actually paid to the beneficiary.

- In 2003, the Form 1120S stated a net income² of \$23,345.
- In 2006, the Form 1120S stated a net income of \$4,325.
- In 2007, the Form 1120S stated a net income of (\$5,982).

² 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. *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>.*

The above information shows that the petitioner had sufficient net income in 2003 to pay the difference of \$1,267.92 between wages actually paid to the beneficiary and the proffered wage that year and therefore, it established its ability to pay the proffered wage through wages actually paid to the beneficiary and its net income. However, the petitioner did not have sufficient net income reflected on its tax returns for 2006 and 2007 to pay the difference of \$30,010 and \$19,052.58 between wages actually paid to the beneficiary and the proffered wage respectively. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2006 and 2007 with its net income.

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, USCIS 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, 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and 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 2006 were (\$155,100).
- The petitioner's net current assets during 2007 were (\$138,750).

For the years 2006 and 2007, the petitioner's net current assets were negative, and it did not have sufficient net current assets to pay the difference of \$30,010 and \$19,052.58 between wages actually paid to the beneficiary and the proffered wage respectively. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2006 and 2007 with its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage for 2006 and 2007 through an examination of wages paid to the beneficiary and their net income or net current assets.

³ According 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.

Counsel refers to decisions issued by the AAO concerning the depreciation, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years.

In the present case, the petitioner is a drywall installation company that had been in business for three years at the time the Form ETA 750 was filed. Although it claimed on the petition that it hires 25 employees, its tax returns show that the petitioner paid only \$21,540 in wages and salaries during the year in which the priority date was established and \$28,765 at most in 2007. In addition, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2006 and 2007 were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has not established the ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by DOL. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.