

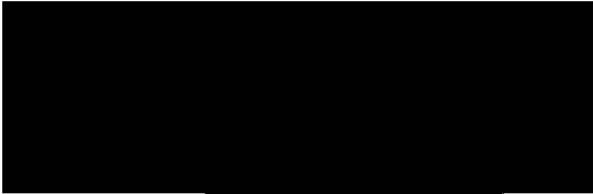


U.S. Citizenship
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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **AUG 13 2009**

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial and industrial painting company. It seeks to employ the beneficiary permanently in the United States as a construction equipment mechanic. As required by statute, the petition is accompanied by a labor certification application 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 denied the petition accordingly.

The record shows that the appeal is properly filed and 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 January 10, 2008 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 ETA Form 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 ETA Form 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 September 25, 2006. The proffered wage as stated on the Form ETA 9089 is \$18.72 per hour (\$38,937.60 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 On appeal, the petitioner submits a brief. Relevant evidence in the record includes an affidavit dated February 7, 2008, from [REDACTED] an affidavit dated February 11, 2008, from [REDACTED]; a copy of a check dated June 21, 2007, issued by the petitioner to [REDACTED] in the amount of \$40,000.00; IRS Form 1099-MISC issued by the petitioner to [REDACTED] in the amount of \$45,000.00; and the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2006.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on May 7, 1996, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that it paid [REDACTED] \$45,000.00 in 2006 and [REDACTED] \$40,000.00 in 2007 to perform the services of construction equipment mechanic. The petitioner asserts that these funds will be allocated to the beneficiary's salary.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

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).

² The record contains the petitioner's IRS Form 1120 for 2005. Evidence preceding the priority date in 2006 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date 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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 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.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay

wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[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.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 13, 2007, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. In 2006, the petitioner’s IRS Form 1120 stated net income of -\$345.00. Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the proffered wage.

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. We reject, however, counsel’s idea that the petitioner’s total assets should have been considered in the determination of the ability to pay the proffered wage. 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 include cash-on-hand. 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. In 2006, the petitioner’s IRS Form 1120 stated net current assets of -\$127,358.00. Therefore, for the year 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

³According 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.

Therefore, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, the petitioner asserts that it paid [REDACTED] \$45,000.00 in 2006 and [REDACTED] \$40,000.00 in 2007 to perform the services of construction equipment mechanic. The petitioner asserts that these funds will be allocated to the beneficiary's salary.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, in the instant case, the petitioner has established that it plans to replace a named subcontractor with the beneficiary. The petitioner stated the wages of the subcontractors and verified their full-time employment. Moreover, the petitioner established that the positions of the two subcontractors involve the same duties as those set forth in the Form ETA 750. Therefore, the wages paid to the subcontractors may be utilized to prove the petitioner's ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

However, beyond the decision of the director,⁴ the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have completed high school, and have two years of experience in the job offered.

⁴ 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed full-time as a heavy machinery mechanic for DePaula Trucking Repair in Newark, New Jersey from March 1, 1997 to April 30, 1999, and that he was employed full-time as a heavy machinery mechanic for R&P Trucking in Newark, New Jersey, from February 1, 1995 to January 30, 1997. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted a letter dated April 10, 2001, from [REDACTED] of DePaula Trucking Repair in Newark, New Jersey, stating that the beneficiary was employed as a full-time mechanic from March 20, 1997 to April 18, 1999. The petitioner also submitted a letter dated April 11, 2001, from [REDACTED] of R&P Trucking in Newark, New Jersey, stating that the beneficiary was employed as a full-time mechanic from February 15, 1995 to January 20, 1997.⁵ The petitioner submitted no evidence to demonstrate that the beneficiary has the required high school education.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

On March 4, 2009, the AAO sent a Notice of Derogatory Information (NDI) to the petitioner. The AAO noted in the NDI that we had conducted our own investigation regarding the beneficiary's claimed work experience. In a telephone conversation with [REDACTED] the secretary of DePaula Trucking Repair, [REDACTED] told the AAO investigator that DePaula Trucking Repair did not come into existence until August 1998, which is more than one year after the date that the beneficiary claims he began employment with the company. Further, upon reviewing the letter submitted by the petitioner

⁵ This employment is less than the two years of experience required by the labor certification application.

dated April 10, 2001, purportedly written and signed by [REDACTED], Ms. [REDACTED] confirmed that the beneficiary never worked for DePaula Trucking Repair and that the signature on the letter is a forgery.⁶ Because the initial work experience letter provided by DePaula Trucking Repair was deemed to be fraudulent, the AAO requested that the petitioner provide independent, objective evidence of the beneficiary's former employment. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO also requested that the petitioner submit additional evidence to establish that the beneficiary was employed full-time as a heavy machinery mechanic for DePaula Trucking Repair in Newark, New Jersey from March 1997 to April 1999, and that the beneficiary was employed full-time as a heavy machinery mechanic for R&P Trucking in Newark, New Jersey, from February 1995 to January 1997. The AAO noted that such evidence may include pay stubs, tax documents, financial statements or other evidence of payments made to the beneficiary by the two employers during his claimed periods of employment.

In a late response to the NDI, counsel submits a brief and a statement of [REDACTED] dated March 30, 2009. Counsel asserts that the petitioner is unable to gather independent, objective evidence of the beneficiary's former employment. Counsel states that the beneficiary did not have work authorization when he worked for DePaula Trucking Repair and that the beneficiary was paid in cash. Counsel further asserts that [REDACTED] of DePaula Trucking Repair did not work for the company between March 1997 and April 1999; that she did not know the type of entity under which DePaula Trucking Repair operated at that time; that she lacks personal knowledge of the facts in the instant case;⁷ and that it is impossible for her to identify a signature over the telephone.⁸ Therefore, counsel claims the information given to the AAO by [REDACTED] is unreliable. Further, counsel asserts that the petitioner submitted the Form ETA 9089 and Form I-140 in good faith, and did not commit fraud and or willful misrepresentation of the facts. Counsel and the petitioner request that the AAO not enter a formal finding of fraud and/or invalidate the labor certification application in the instant case.

Because the petitioner has failed to provide independent, objective evidence of the beneficiary's former employment, the AAO finds that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding. The petitioner has also failed to provide evidence to demonstrate that the beneficiary has the required high school education. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The AAO will not enter a

⁶ 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

⁷ Counsel has provided no evidence to support these assertions. 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)).

⁸ The AAO notes that we faxed a copy of the work experience letter from DePaula Trucking to Ms. [REDACTED] for her review and verification.

formal finding of fraud and/or invalidate the labor certification application in the instant case.

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.