

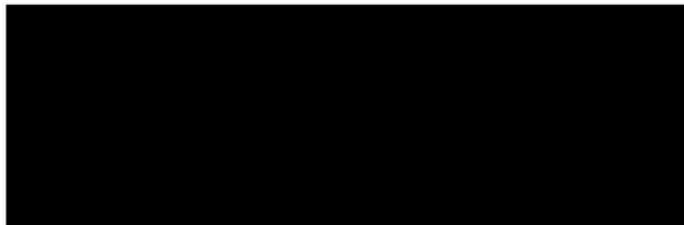
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
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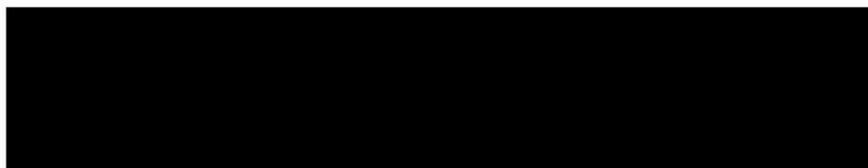
Date: JUN 01 2009

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.

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, 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 construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. 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.

On appeal, counsel submits an affidavit from the owner of the petitioner claiming that the company is financially sound and has never failed to meet its payroll obligations; Forms W-2, Wage and Tax Statement, for 2002, 2003, 2004 and 2005 for individuals the petitioner claims are former employees; and the petitioner's Forms 1120S, U.S Income Tax Return for an S Corporation, for 2002, 2003, 2004 and 2005. Counsel did not submit an appeal brief.

As set forth in the director's October 15, 2007 denial, the 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. The AAO will also consider whether the petitioner has established that the beneficiary is qualified to perform the duties of the offered position.¹

On June 8, 2007, the director issued a request for evidence (RFE). The RFE required the petitioner to submit its tax returns or audited financial statements from 2002 through 2006. In response to the RFE, counsel provided the petitioner's 2006 tax return; the petitioner's bank statements from 2002 through 2005; the beneficiary's Forms W-2 for 2002 through 2006; and the beneficiary's pay stubs for 2007. Now, on appeal, counsel provides for the first time the petitioner's tax returns for 2002, 2003, 2004 and 2005. The purpose of the RFE is to elicit information that establishes eligibility for the benefit sought as of the time the petition was 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 Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted its 2002, 2003, 2004 and 2005 tax returns to be considered, it should have

¹An 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 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

submitted them in response to the director's RFE. Under the circumstances, the AAO need not, and does not, consider the petitioner's tax returns submitted for the first time on appeal.

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 at 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 labor certification, was accepted for processing by 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 the labor certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the labor certification was accepted for processing by the DOL on April 18, 2002. The proffered wage stated on the labor certification is \$16.89 per hour (\$35,131.20 per year). The labor certification states that the position requires a high school diploma and two years of experience in the job offered.

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*, 891 F.2d at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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 that were not previously requested in the director's RFE. *See Soriano*, 19 I&N Dec. 764.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to employ 25 workers. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On

the labor certification, signed by the beneficiary on April 10, 2002, the beneficiary claimed to have worked for the petitioner since February 2001. Additional evidence in the record includes:

- Affidavit from the owner of the petitioner attesting that the company is financially sound and has never failed to meet its payroll obligations.
- Forms W-2, Wage and Tax Statement, for 2002, 2003, 2004 and 2005 issued by the petitioner to individuals the petitioner claims are former employees.
- Form 1120S, U.S Income Tax Return for an S Corporation, for 2006.
- Unaudited financial statements for 2002, 2003 and the six month period ended June 30, 2004.
- Forms W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary for 2002 through 2006.
- Bank statements from February 1, 2002 through November 30, 2005.
- Pay stubs issued by the petitioner to the beneficiary for the periods from May 14, 2007 to July 6, 2007 and from September 12, 2005 to October 29, 2005.
- Letter claiming that the beneficiary was employed abroad as a bricklayer from January 12, 1995 to February 16, 1998.
- Letter from the petitioner confirming its offer of permanent employment to the beneficiary at a wage of \$20.00 per hour.²

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for any immigrant petition later based on it, 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 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner is obligated to establish

²The \$20.00 per hour proffered wage in the letter is substantially higher than the \$16.89 per hour proffered wage listed on the labor certification and the Form I-140, Immigrant Petition for Alien Worker. Notwithstanding the higher wage stated in the letter, for the purposes of this appeal, the petitioner is only required to establish its ability to pay the \$16.89 per hour proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

that it could pay the difference between the wages actually paid to the beneficiary, if any, and the \$35,131.20 proffered wage.

The record contains the beneficiary's Forms W-2 for 2002, 2003, 2004, 2005 and 2006. These documents indicate wages paid to the beneficiary by the petitioner, as shown in the table below.

<u>Year</u>	<u>Wages Paid (\$)</u>	<u>Remaining Amount (\$)</u>
2002	16,499.00	18,632.20
2003	24,888.25	10,242.95
2004	30,400.00	4,731.20
2005	23,359.92	11,771.28
2006	27,958.32	7,172.88

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*, 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 USCIS 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's 2006 Form 1120S demonstrates that its net income for 2006 was \$30,424.³ Therefore, for 2006, the petitioner established that it had sufficient net income to pay the difference between the actual wage paid and the proffered wage. For 2002, 2003, 2004 and 2005 the petitioner did not establish that it had sufficient net income to pay the difference between the wage paid and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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. The petitioner's 2006 Form 1120S demonstrates that its end-of-year net current assets for 2006 was -\$533,546. Accordingly, for 2002, 2003, 2004, 2005 and 2006, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wage paid and the proffered wage.

Therefore, from the date the labor certification was accepted for processing by the DOL, the petitioner has 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 for 2002, 2003, 2004 and 2005.⁵

The record contains additional evidence submitted by counsel pertaining to the petitioner's ability to pay the proffered wage. In response the director's RFE, counsel submitted the petitioner's bank statements for the period from February 1, 2002 to November 30, 2005. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the

³Ordinary income (loss) from trade or business activities is reported on Line 21, and Income/loss reconciliation is reported on Schedule K, Line 18. When the two numbers differ, as is the case here, the number reported on Schedule K, Line 18 is used for net income. The director's denial incorrectly used the net income from Line 21.

⁴According 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.

⁵Even considering the petitioner's tax returns for 2002, 2003, 2004 and 2005, the petitioner has not established its ability to pay the proffered wage during those years. The petitioner reported negative income and asset figures for all four tax years.

sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income or the cash specified on the petitioner's tax return used in determining the petitioner's net current assets. Fourth, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

The record also contains the petitioner's unaudited financial statements for the years ended December 31, 2002 and 2003, and for the six month period ended June 30, 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The petitioner claims to have been in business since 1997 and employ 25 employees. The petitioner's 2006 tax return shows gross sales of \$3,380,304. This, by itself, is not sufficient to demonstrate ability to pay the proffered wage. There is no evidence in the record of the petitioner's reputation or historical growth. There is no evidence of any uncharacteristic business expenditures or losses.

Counsel submits an affidavit from the owner of the petitioner claiming that the company is financially sound and has never failed to meet its payroll obligations. Counsel also submits Forms W-2, Wage and Tax Statement, for 2002, 2003, 2004 and 2005 for individuals the petitioner claims are "former employee(s) whose salary paid in the past is now available to pay the proffered wage." Counsel's reliance on the Forms W-2 of its former employees is misplaced. In general, wages paid to former employees are not relevant to the petitioner's ability to pay the proffered wage to the beneficiary. In addition, on June 5, 2008, the petitioner filed another pending immigrant visa petition on behalf of a beneficiary named [REDACTED].⁶ The petitioner submitted a 2003 Form W-2 for this individual, claiming that he was no longer employed by the company. Although it is not necessarily inconsistent to file an immigrant visa petition on behalf of an individual no longer employed by the petitioner as long as there is a continuing intent to resume the employment upon the issuance of lawful permanent residence, the petitioner is required to establish that it had sufficient income to pay all the wages of both beneficiaries as of the respective priority dates. The petitioner has not established its continuing ability to pay the proffered wages to both beneficiaries for the required periods.

Thus, assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. Section 203(b)(3)(A)(i) of the Act 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. While no degree is required for this classification, 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual 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. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

⁶SRC-08-195-51662.

In the instant case, the submitted labor certification states that the offered position requires an individual with a high school diploma and two years experience in the job offered.⁷ The record contains a letter claiming that the beneficiary was employed abroad as a bricklayer from January 12, 1995 until February 16, 1998. However, there is no evidence in the record that establishes that the beneficiary's obtained a U.S. high school diploma or foreign equivalent degree by the priority date. Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the proffered position. 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)).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

⁷On Item 14 of Form ETA 750A, the petitioner marked the box entitled "High School" with a "4". Accordingly, the position requires an individual with a high school diploma or foreign equivalent.