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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED]  
SRC-07-800-03025

Office: TEXAS SERVICE CENTER

Date: JUN 10 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:

[REDACTED]

**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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a brick paver installer. It seeks to employ the beneficiary permanently in the United States as an installer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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.

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 13, 2007 denial, the single issue in this case is whether or not the petitioner has established that it 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 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 on December 7, 2005. The proffered wage as stated on the labor certification is \$405.60 per week (\$21,091.20 per year). The labor certification states that the position requires two years 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.*, 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.<sup>1</sup>

The submitted evidence in the record includes:

- Form 1120S, U.S Income Tax Return for an S Corporation, for 2005.
- Profit & loss report for the period from January 2006 to June 2007.
- Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2005 and the first quarter of 2006.
- 2006 annual report filed with the Florida Department of State.
- Letter of [REDACTED], confirming the petitioner's payments to Jack Melo Corporation in the amounts of \$145,979.00 in 2005 and \$115,006.00 in 2006.
- Report of payments to Jack Melo Corporation from January 14, 2005 to October 13, 2006.
- Forms W-2, Wage and Tax Statement, for 2005 and 2006, issued by Jack Melo Corporation to the beneficiary.
- Local newspaper article about the petitioner.
- Letter confirming the beneficiary's employment by Nobre Corporation as a pavers installer from March 15, 2000 until July 17, 2002.

The petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000 and to employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the labor certification, signed by the beneficiary on December 11, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel claims that the petitioner paid Jack Melo Corporation \$145,979.00 in 2005 and \$115,006.00 in 2006. Counsel also claims that Jack Melo Corporation paid the beneficiary wages of \$15,000.00 in 2005 and \$21,500.00 in 2006. **Counsel asserts that these facts establish the petitioner's continuing ability to pay the proffered wage to the beneficiary.**

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application 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.

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<sup>1</sup>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. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, U.S. 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 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 claimed to have employed the beneficiary.

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. 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 income tax return for 2005 is the most recent return available. The petitioner's 2005 Form 1120S stated net income of -\$3,634.00.<sup>2</sup> Therefore, for 2005, the petitioner did not have sufficient net income to pay 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. Petitioner's total assets are not 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, including real property. 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.<sup>3</sup> 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 2005 Form 1120S stated net current assets of \$5,728.00, which is not sufficient to pay the proffered wage.

It is noted that the record is devoid of required evidence pertaining to the petitioner's ability to pay the proffered wage in 2006. The petitioner did not submit a tax return, audited financial statements, or an annual report for 2006. *See* 8 C.F.R. § 204.5(g)(2). The burden of proof in these proceedings rests solely on the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Therefore, from the date the labor certification 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.

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<sup>2</sup>On the 2005 Form 1120S, ordinary income (loss) from trade or business activities is reported on Line 21, and Income/loss reconciliation is reported on Schedule K, Line 17e. When the two numbers differ, as is the case here, the number reported on Schedule K, Line 17e is used for net income. The director's denial incorrectly used the net income from Line 21.

<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The record contains additional documents submitted by the petitioner to establish its ability to pay the proffered wage. The petitioner submitted an unaudited profit & loss report for the period from January 2006 to June 2007. 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. Even if the submitted profit & loss report were reliable evidence, it undermines counsel's argument that the petitioner had the ability to pay the proffered wage. The report states that the petitioner had net income of -\$18,324.23 in 2006 and -\$19,771.03 for the six months ended June 2007.

Counsel asserts in his brief accompanying the appeal that the petitioner's payments to Jack Melo Corporation in 2005 and 2006 demonstrate its continuing ability to pay the proffered wage from the priority date. Specifically, counsel claims that the petitioner paid Jack Melo Corporation \$145,979 in 2005 and \$115,006 in 2006. Counsel also claims that Jack Melo Corporation paid the beneficiary a salary of \$15,000.00 in 2005 and \$21,500.00 in 2006. Counsel's reliance on these payments is misplaced. The petitioner's payments to Jack Melo Corporation and the salary Jack Melo Corporation paid the beneficiary are not relevant to the analysis of whether the petitioner has had the ability to pay the proffered wage for the required period. First, the amounts the petitioner paid to Jack Melo Corporation could have been for any number of goods or services, such as materials, tools, transportation or labor. Second, Jack Melo Corporation is a separate corporate entity.<sup>4</sup> The salary that Jack Melo Corporation paid the beneficiary has nothing to do with whether the petitioner is financially able to pay the proffered wage.<sup>5</sup>

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the petitioner's tax return, which demonstrates that the petitioner could not pay the proffered wage from the day the labor certification was accepted for processing by the DOL.

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 Matter of 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

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<sup>4</sup>The record contains evidence that the beneficiary's wife is an officer and/or director of Jack Melo Corporation. This does not change the fact that the petitioner and Jack Melo Corporation are separate entities and that any salary that Jack Melo Corporation paid the beneficiary cannot be imputed to the petitioner.

<sup>5</sup>Even if, *arguendo*, the petitioner could be credited for the beneficiary's 2005 salary, neither the petitioner's net income nor its net current assets for 2005, when added to the beneficiary's salary, meet the proffered wage.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

It is noted that the petitioner's 2005 tax return states that it had gross sales of \$1,043,934. The petitioner also submitted a copy of an undated local newspaper article about how its business has been expanding due to a local construction boom. This is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. It is noted that the petitioner claims it was established on June 19, 2000. However, a review of the petitioner's annual reports filed with the Florida Department of State shows that it was reinstated on March 4, 2004.<sup>6</sup> This calls into question the number of years the petitioner has been in business and its historical growth. The petitioner has not submitted evidence of the occurrence of any uncharacteristic business expenditures or losses. Further, the petitioner did not establish whether that hiring the beneficiary would replace its use of Jack Melo Corporation or any other outsourced service; and there is no evidence of what amounts of the petitioner's payments to Jack Melo Corporation were specifically attributable to the beneficiary's labor.

Thus, assessing the totality of the circumstances in this individual case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>6</sup>Annual reports filed with the Florida Department of State are available at <http://sunbiz.org>.