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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

B6

FILE:

SRC 06 800 00961

Office: TEXAS SERVICE CENTER

Date: JUN 23 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a tile installer. As required by statute, the petition is accompanied by ETA Form 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 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 October 3, 2006 denial, the single 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 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 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 August 12, 2005. The proffered wage as stated on the Form ETA 9089 is \$447.60 per week (\$23,275.20 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, counsel submits a brief and its previously submitted IRS Form 1120, U.S. Corporation Income Tax Return, for 2005. Relevant evidence in the record includes the petitioner's monthly bank statements from Bank Atlantic for January 31, 2006 through June 30, 2006; the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004;² and the petitioner's unaudited financial statement for 2004.³ 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 petition, the petitioner claimed to have been established on June 26, 2002, to have a gross annual income of \$205.00, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

Counsel asserts in his brief accompanying the appeal that the petitioner paid a total of \$135,304.00 to five subcontractors in 2005. Counsel also notes that the petitioner's 2005 income tax return indicates sufficient net income to pay the proffered wage.

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 Evidence preceding the priority date in 2005 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

³ 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 onward.

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 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 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 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. [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

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 petitioner's IRS Form 1120 stated net income of \$28,061.00 in 2005. Therefore, for the year 2005, the petitioner's tax return indicates that it more likely than not had sufficient net income to pay the proffered wage. However, there are irregularities

in the petitioner's tax returns for 2004 and 2005. Specifically, on the petitioner's Schedule L to its 2004 IRS Form 1120, the petitioner lists its end of year total assets as \$4,041 and its end of year total liabilities and shareholders' equity as \$4,041. On the petitioner's Schedule L to its 2005 IRS Form 1120, the petitioner lists its beginning of year total assets as \$2,864 and its end of year total liabilities and shareholders' equity as \$2,864. The petitioner provides no explanation as to why the end of the year figures for 2004 do not match the beginning of the year figures for 2005. Similarly, the end of year balance listed on the petitioner's Schedule M-2 to its 2004 IRS Form 1120 is -\$19,381, while the beginning of year balance listed on the petitioner's Schedule M-2 to its 2005 IRS Form 1120 is -\$18,334. The petitioner provides no explanation as to why the end of the year figures for 2004 do not match the beginning of the year figures for 2005. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not resolved the inconsistencies in its tax returns with independent, objective evidence. Therefore, the petitioner's tax returns do not credibly establish the petitioner's ability to pay the proffered wage in 2005.

In response to the director's Notice of Intent to Deny (NOID) dated October 26, 2005, the petitioner provided its monthly bank statements from Bank Atlantic for January 31, 2006 through June 30, 2006. The director determined in her review of the bank statements that they did not show the petitioner's continued ability to pay the proffered wage. 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. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, the petitioner has not provided bank statements for each month in 2006, nor has it provided its federal income tax return, annual report or audited financial statements to establish its ability to pay the proffered wage in 2006 as requested in the AAO's Notice of Derogatory Information (NDI) dated March 31, 2009. The petitioner did not respond to the AAO's NDI. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner has not established its ability to pay the proffered wage in 2006.

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 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.

In the instant case, the petitioner was incorporated in 2002 and had been in business approximately three years when the Form I-140 was filed. The petitioner has not established the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Furthermore, as noted above, the petitioner failed to submit requested evidence pertaining to its ability to pay the proffered wage in 2006. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has not established that it has made a *bona fide* job offer to the beneficiary. 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). Under 20 C.F.R. § 656.20(c)(8) and § 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

In the instant case, the Florida Department of State Division of Corporations website showed on September 4, 2008, that the petitioner, a C corporation, is owned 80% by [REDACTED], who is also a director and President of the petitioner, and 10% by [REDACTED], who is also a director

of the petitioner.⁴ The other director of the petitioner is [REDACTED]. The beneficiary of the instant petition is [REDACTED]. Two of the petitioner's shareholders, its directors and the beneficiary appear to be related. The AAO's NDI to the petitioner requested a listing of the shareholders, officers and directors of the petitioner and a listing of each individual's relationship to the beneficiary.⁵ In failing to respond to the NDI, the petitioner has not established that it has made a *bona fide* job offer to the beneficiary and that the relationship between the petitioner and the beneficiary, if one exists, was disclosed to the DOL during labor certification proceedings. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986). Once again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Finally, beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. 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. at 406; 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).

In the instant case, the Form ETA 9089, Section H, Items 4-6, set forth the minimum education, training, and experience that an applicant must have for the position. In the instant case, Section H describes the requirements of the proffered position as follows:

4. Education	None
5. Training	No
6. Experience	Yes
6-A. If Yes, number of months experience required:	24

The beneficiary set forth his credentials on Form ETA 9089. At Section J, he represented that he worked full-time for Penetra Floor Covering Corp. as a tile installer from September 13, 2001 to November 2, 2003. He does not provide any additional information concerning his employment background on that form.

⁴See http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=P02000070182&inq_came_from=NAMFWD&cor_web_names_seq_number=0001&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=AZAPH&names_filing_type= (accessed September 4, 2008). The remaining 10% of the petitioner's shares is listed as being held by [REDACTED]

⁵ On Form ETA 9089, Part C.9., the petitioner indicated that there was not a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators and the beneficiary.

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.

In response to the director's NOID, the petitioner submitted a letter dated November 14, 2005 from [REDACTED] of C Penetra Floor Coverings indicating that the beneficiary worked for the company as a tile installer from September 13, 2001 through November 14, 2003.⁶ The letter is signed by [REDACTED] and details [REDACTED]'s phone numbers and e-mail address. However, the letter does not list the physical address of C Penetra Floor Coverings and does not give a description of the beneficiary's duties. The AAO's NDI requested that the petitioner provide proper evidence that the beneficiary meets the requirements of the proffered position as required by 8 C.F.R. § 204.5(1)(3). The petitioner did not respond to the NDI. Once again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

⁶ The AAO noted in its NDI that pursuant to the Florida Department of State Division of Corporations website, Penetra Floor Coverings, Corp. was not incorporated until January 1, 2004. http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=P03000125169&inq_came_from=NAMFWD&cor_web_names_seq_number=0000&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=PENETRA&names_filing_type= (accessed September 4, 2008). If this entity was the beneficiary's prior employer, the petitioner has not indicated how the beneficiary was employed by Penetra Floor Coverings prior to its incorporation.