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U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 124 51554 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



MAR 05 2009

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: SELF-REPRESENTED

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 Director, Vermont Service Center, denied the Immigrant Petition for Alien Worker (I-140). The petitioner appealed. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The director issued a new decision, denied the petition again, and certified the decision to the AAO. The matter is now before the AAO on certification. The director's decision to deny the petition is affirmed.

The petitioner is a general construction firm engaged in interior and exterior renovation. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the Immigrant Petition for Alien Worker, (Form I-140). The I-140 was filed on March 19, 2004.

The director denied the petition on December 28, 2004, determining that the petitioner had not established its continuing financial ability to pay the proffered wage.

The petitioner appealed the director's denial, providing additional evidence and contending that the petitioner had demonstrated its ability to pay the proffered wage. On November 16, 2006, the AAO remanded the case to the director for further investigation relating to the petitioner's ability to pay and entry of a new decision.

On remand, the director issued a request for evidence to the petitioner, dated November 9, 2007, relating to the petitioner's ability to pay the proffered wage. The petitioner failed to respond. The director denied the petition again on January 9, 2009 and certified it to this office for review. This office has received no further evidence or argument from the petitioner.

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).¹

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:

¹ The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The approved Form ETA 750 established that the priority date of this petition was April 26, 2001. The proffered wage is \$19.45 per hour, annualized to \$35,399 per year.² The Form ETA 750, signed by the beneficiary on April 9, 2001, reflected that he claimed to have worked for the petitioner since November 1999.

The Form 1120, U.S. Corporation Income Tax Return(s) provided to the record indicates that the petitioner files its federal tax returns using a fiscal year running from October 1st to September 30th of the following year. Its 2000 tax return showed that neither its net income of \$28,604 nor its net current assets of \$12,822 could pay the proffered wage of \$35,399 for that year.³ Similarly, its 2001 federal tax return showed that its net income was -\$14,221. Schedule L

² As requested by this office, on remand, the director requested clarification of additional notations appearing on the Form ETA 750, which showed an increase of the proffered wage to \$37.36 per hour. As the petitioner failed to respond to the director's request for evidence, the lower wage will be used in this decision.

³ For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28. (taxable income before net operating loss deduction and special deductions) USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

reflects that its net current assets were -\$5,759. Neither its net income nor its net current assets shown on the 2001 tax return were sufficient to pay the proffered wage.

In its decision of November 16, 2006, the AAO also noted that the record failed to support the petitioner's assertion that the beneficiary would replace subcontractors. No evidence was provided that identified the subcontractor, job duties, date of termination or otherwise overcame the financial documentation already provided, which showed that the petitioner failed to establish its ability to pay the proposed wage offer to the beneficiary. 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)).

In reviewing a petitioner's ability to pay the proffered wage, the AAO further noted that USCIS will examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Because the record indicated that the petitioner had employed the beneficiary, the case was remanded to the director to solicit evidence of payment of compensation, as well as to seek clarification from the petitioner relevant to the notations appearing on the Form ETA 750.

The director's request for evidence issued to the petitioner on November 9, 2007, specifically instructed the petitioner to submit evidence of payment of wages to the beneficiary during the period from 2001 to 2006. The director also directed the petitioner to provide evidence that changes on the Form ETA 750 consisting of notations initialed by "PD" were approved by DOL. He additionally instructed the petitioner to supply financial documentation, consisting of federal income tax returns or annual reports accompanied by reviewed or audited financial statements, which covered the period from 2001 to 2006.

Based on the petitioner's failure to respond to the director's request for additional evidence, which demonstrated its continuing financial ability to pay the proffered wage, the director again denied the petition. The AAO concurs with the director's decision. Neither the net income nor net current assets reported on the petitioner's 2000 and 2001 federal tax returns was sufficient to cover the proffered wage. The petitioner failed to respond to the director's request for additional evidence relating to its payment of compensation to the beneficiary or any other documentation requested. The petitioner failed to demonstrate its continuing ability to pay the proffered wage as of the priority date, according to the requirements of the regulation at 8 C.F.R. § 204.5(g)(2).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition will remain denied.