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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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Services

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FILE:

SRC 07 126 51424

Office: TEXAS SERVICE CENTER

Date: MAY 07 2009

IN RE:

Petitioner:

Beneficiary:

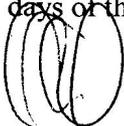
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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, Texas 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 ETA Form 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.

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 12, 2007 denial, the primary issue in this case is whether 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 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 this petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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. The submission of additional evidence on appeal is allowed by the instructions to 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).

Here, the labor certification was accepted on August 2, 2004. The proffered wage as stated on the labor certification is \$46,397.00 per year. The labor certification states that the position requires two years of training in bricklaying. On the ETA Form 750B, the beneficiary claimed to have worked for the petitioner since September 2001.

The petitioner is a corporation headquartered in Northbrook, Illinois. On the petition, the petitioner claimed to have been established in 1950, to have gross annual income of \$1,418,944, and to employ 10 workers.¹ The record includes the beneficiary's Forms W-2 for 2001, 2002, 2003, 2004, 2005 and 2006.

On September 5, 2007, the director issued a request for evidence, requesting, *inter alia*, that the petitioner provide copies of its annual reports, federal income tax returns, and/or audited financial statements in order to demonstrate its ability to pay the proffered wage. In its response, the petitioner did not provide the requested financial documents. Accordingly, on October 12, 2007, the director denied the petition for failure to provide the requested financial documents and because the submitted Forms W-2 failed to establish that the petitioner was able to pay the proffered wage in 2005.

On appeal, counsel claims that the petitioner paid the beneficiary the proffered wage in 2004 and 2006, and that the petitioner's years in business, reputation and history of profitability justifies an approval of the petition despite the partial wages paid in 2005. Counsel further claims that the petitioner "elects not to provide their income tax returns due to the highly confidential private nature of the owner's substantial assets and income."

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 the labor

¹There is conflicting information in the record regarding date the petitioner was established. Counsel's appeal brief and petitioner's letter of September 14, 2007, claim that the company has existed since January 1955. The Corporation File Detail Report from the website of the Office of the Secretary of State for the State of Illinois (www.ilsos.gov/corporatellc/) states that the petitioner was incorporated in 1985. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

certification, 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, 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 petitioner will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The regulation 8 C.F.R. § 204.5(g)(2) states that evidence of the petitioner's ability to pay the proffered salary "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.) The petitioner's failure to provide this required evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for the primary evidentiary requirements. In addition, 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). 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 cases where the petitioner has submitted the required primary evidence of its ability to pay the proffered wage, 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.

The record contains the beneficiary's Forms W-2 for 2001, 2002, 2003, 2004, 2005 and 2006. These documents demonstrate compensation from the petitioner to the beneficiary on and after the August 2, 2004 priority date. The Forms W-2 for 2004, 2005 and 2006 establish that the petitioner paid the beneficiary the amounts shown in the table below during the required period.

- The 2004 Form W-2 stated compensation of \$46,960.95.
- The 2005 Form W-2 stated compensation of \$35,862.36.
- The 2006 Form W-2 stated compensation of \$48,972.54.

Therefore, the submitted Forms W-2 do not establish that the petitioner paid the beneficiary the proffered wage. Instead, for 2005, the petitioner paid partial wages in the amount of \$35,862.36, which is \$10,534.64 less than the proffered wage.

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 petitioner's net income. 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. If the petitioner's net income, 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 then review the petitioner's net current assets. However, since the petitioner did not provide copies of its annual reports, federal income tax returns or audited financial statements, this analysis pertaining to income and assets cannot be performed. Once again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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 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.

In the instant case, the petitioner claims to have been in business for approximately 50 years. In the response to the director's request for evidence, counsel claimed that, in 2005, "the beneficiary was unable to work for some time due to illness, explaining the lower income." In the appeal brief, counsel claims that the beneficiary was unable to work the full year in 2005 because the petitioner "had less income due to an anomaly in which construction income was decreased." Counsel further claims that the petitioner is well known in the Chicago area "and is profitable for over 51 years." Counsel also asserts that the petitioner paid the offered wage in 2004 and 2006, "thus proving his financial ability to pay the proffered wage" in 2005.² However, the appeal contained no supporting evidence for counsel's claims about the petitioner's reputation, historical profitability, and the reasons for the partial wage paid in 2005. Once again, going on record without supporting

²In the brief submitted with the appeal, counsel misstates the proffered wage as \$42,828.00. The correct wage is \$46,397.00.

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The beneficiary's Forms W-2 for 2004 and 2006 are not sufficient evidence, by themselves, to establish the petitioner's ability to pay the proffered wage for the required period. Finally, as the petitioner precluded a material line of inquiry as to the petitioner's ability to pay the proffered wage by failure to submit requested evidence, the petitioner has failed to establish eligibility to the benefit sought and the petition must be denied. *See* 8 C.F.R. § 103.2(b)(14).

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 beginning on the priority date.

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.