

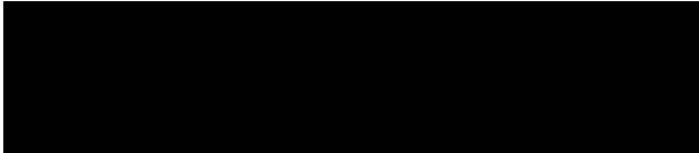


U.S. Citizenship
and Immigration
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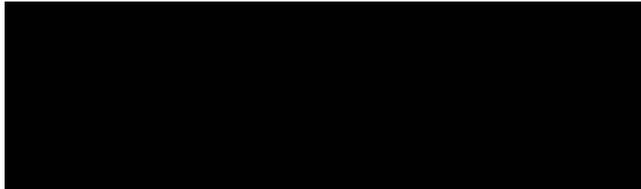
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FILE: LIN-06-193-52042 Office: NEBRASKA SERVICE CENTER

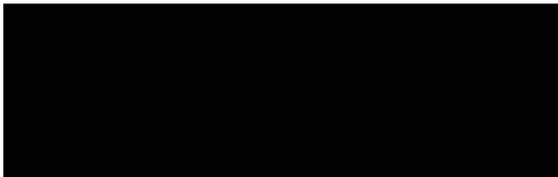
Date: **MAY 12 2009**

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the appeal will be sustained.

The petitioner is a manufacturer of steel doors. It seeks to employ the beneficiary permanently in the United States as a steel door setter/welder. As required by statute, the petition is accompanied by an 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 May 17, 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 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 labor certification 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).

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 April 27, 2001. The proffered wage as stated on the labor certification is \$20.93 per hour (\$43,534.40 per year). The labor certification states that the position requires two years experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation.¹ On the petition, the petitioner claimed to have been established in 1990 and to currently employ 30 workers. On the ETA Form 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner since January 1999.

Relevant evidence in the record of proceeding includes, *inter alia*, the beneficiary's Forms W-2, Wage and Tax Statement for 2001, 2002, 2003, 2004, 2005 and 2006; the petitioner's Forms 1120, U.S. Corporation Income Tax Return for 2001, 2002, 2003, 2004, 2005; and the petitioner's Form 941, Employer's Quarterly Federal Tax Return for the first quarter of 2006.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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 does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the required period, USCIS will next examine the petitioner's net income. Specifically, the petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage, using 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

¹Counsel's appeal brief claims that the petitioner is an S corporation. This is not supported by the evidence in the record. The petitioner files its federal income tax returns on Form 1120, U.S. Corporation Income Tax Return, whereas S corporations are required to file tax returns on Form 1120S, U.S. Income Tax Return for an S Corporation.

net current assets. The USCIS will examine whether the petitioner's net current assets, added to the wages paid to the beneficiary during the period, if any, equal or exceed 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 Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). 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 director's May 17, 2007 denial states that the petitioner established its ability to pay the proffered wage for 2002, 2003, 2004 and 2005. However, the denial states that the petitioner failed to establish its ability to pay the proffered wage for 2001. In 2001, the petitioner paid the beneficiary \$23,144.92, which is \$20,389.48 less than the \$43,534.40 proffered wage. The petitioner's net income in 2001 was \$4,765 and its net current assets totaled -\$1,678. Based on this analysis, the director concluded that the submitted evidence did not establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing to the present.

On appeal, counsel claims, *inter alia*, that the director failed to consider the totality of the circumstances in determining that the petitioner failed to establish that it had the ability to pay the proffered wage. In the instant case, the petitioner was founded in 1990. The petitioner's Form 941 for the first quarter of 2006 demonstrates that it has 30 employees. The petitioner's Forms 1120 for 2001, 2002, 2003, 2004 and 2005 demonstrate gross sales of approximately \$3 million each year. For 2001, the petitioner had gross sales of \$2,853,986. The overall magnitude of the petitioner's business activities demonstrate that it could pay the proffered wage from the day the labor certification was accepted for processing by the DOL.

In summary, considering the totality of the circumstances, the evidence in the record establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Accordingly, the director's decision will be withdrawn, and the appeal will be sustained.

ORDER: The appeal is sustained.