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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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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2009
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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:



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).

Joan F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Nebraska Service Center. 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 and 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 an interior design firm. It seeks to employ the beneficiary permanently in the United States as an interior designer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. On August 7, 2007, 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 and denied the petition accordingly.

On June 2, 2008, the AAO remanded the petition to the director to obtain additional evidence of the petitioner's ability to pay the proffered salary.

On remand, the director issued a request for evidence, dated June 17, 2008, to the petitioner. Based upon the response provided by the petitioner, the director denied the petition on February 23, 2009 and certified it to this office for review.¹ The AAO resent the notice of certification to counsel on March 30, 2009, based on a postal return of the director's notice and counsel's change of address. As nothing further has been received to this office, this decision will be rendered on the current record.

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

¹ The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).²

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on October 17, 2006. The proffered wage as stated on Part G of the ETA Form 9089 is \$31,907 per year.

The I-140 was filed on December 15, 2006. The evidence submitted in support of the petitioner's ability to pay the proffered wage of \$31,907 consisted only of copies of the fronts of three checks written in 2006 for \$840.00 by the petitioner to the beneficiary's corporation, [REDACTED]

² 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.

Counsel asserted that the petitioner had employed the beneficiary as an independent contractor and paid compensation to the beneficiary's corporation.

The director requested financial documentation from the petitioner consistent with the requirements of the regulation at 8 C.F.R. § 204.5(g)(2) advising the petitioner that such evidence must include copies of the petitioner's federal tax return, annual reports or audited financial statements.

In response, counsel advised that the petitioner's 2006 income tax return had not been prepared. Counsel submitted copies of the petitioner's internal vendor accounting record indicating that it had paid \$48,119.52 to the beneficiary's corporation from January to December 2006. Counsel also provided a copy of a July 27, 2007 e-mail from the petitioner's bookkeeper explaining that a Form 1099 was not issued to the beneficiary in 2006 or 2007 because it was not required for corporations and that the petitioner would incur additional penalties if one was issued for 2006 because the deadline had passed.

Following a review of the evidence submitted, the director denied the petition on August 7, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage. The director noted that the petitioner's vendor accounting record failed to establish that the petitioner had the ability to pay the beneficiary's proposed wage offer of \$31,907 per year.

On appeal, the petitioner, through counsel, contends that the petitioner demonstrated its ability to pay the proffered wage. Counsel cites the petitioner's payment of compensation to the beneficiary as an independent contractor in 2006. He also provides a copy of an Internal Revenue Service (IRS) application for a six-month extension of time related to the petitioner's 2006 income tax return, a copy of a Form 1099 for 2006 showing \$48,119.52 paid to the beneficiary's corporation, and a duplicate of the July 27, 2007, e-mail submitted by the petitioner's bookkeeper. Counsel states that since the petitioner has now issued a Form 1099 for \$48,119.52 to the beneficiary for 2006, that this conclusively demonstrates that the petitioner paid in excess of the proffered wage and had established its financial ability to pay.

On remand, the AAO noted that the compensation alleged to have been paid in 2006 exceeded the proffered wage of \$31,907, but was not shown to be paid to the beneficiary directly but to the beneficiary's corporation. We noted that it must be established that the compensation must represent funds available to pay the proffered wage to the beneficiary if she were directly hired. The case was remanded to the director to determine: 1) the number and identity of the shareholders and employees of the beneficiary's company during the relevant period so that a determination may be made as to whether the proffered wage of \$31,907 out of the \$48,119.52 in compensation asserted to have been paid through the beneficiary's corporation in 2006 (or any other period) may be attributed to the beneficiary individually; 2) that the amounts paid to the beneficiary are sufficiently corroborated by such evidence as copies of negotiated checks; as well as 3) evidence that the Form 1099 provided on appeal was filed with the IRS, given the suggestion by the record that additional penalties would be incurred if such a form was filed past the deadline. It was also noted that the petitioner's 2006 federal tax return should be available.

On remand the director issued a request for evidence on June 17, 2008. The petitioner was instructed to submit:

1. The number and identity of the shareholders and employees, along with an organizational chart of the beneficiary's company during 2006 and 2007.
2. The wages paid to the beneficiary need to be substantiated by documentary evidence. Such evidence may include but is not limited to the front and back copies of negotiated checks.
3. Evidence that the Form 1099 submitted on appeal was filed with the IRS.

In response, as noted by the director, the petitioner through counsel submitted copies of the fronts of fifty-five checks payable to the beneficiary's company weekly for 2006; a copy of the Form 1099 for \$48,119.52 issued to the beneficiary's company; a copy of a 2007 Form 1099 issued to the beneficiary's company for \$18,894.38; a copies of thirty-six checks payable to the beneficiary's company during January to September 2007; copies of various Florida documents relating to the beneficiary's company; a copy of the petitioner's December 31, 2007 bank statement and a letter, dated July 15, 2008, from the petitioner's president, [REDACTED] to her counsel informing him that the petitioner's federal income tax returns were unavailable because it was against company policy to release such sensitive information.

Counsel has submitted a brief in response to the notice of certification, asserting that the 2006 Form 1099 for \$48,119.52 reflected that the petitioner had paid the beneficiary in excess of the proffered wage and established its ability to pay during this year and that the shortfall between the \$18,894.38 paid to the beneficiary in 2007 and the proffered wage of \$31,907 could be covered through the petitioner's bank funds.

As set forth in the AAO's previous decision, in determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first 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,³ the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

³Besides 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

As noted by the director, the petitioner failed to show that the Form 1099 issued in 2006 was ever filed with the IRS, that the checks, which were issued to the beneficiary's company were ever negotiated or cashed as evidenced by bank stamps or endorsements. There is also no first-hand evidence that, even if the funds were cashed or negotiated, that establishes that the funds were paid directly to the beneficiary as wages and not distributed in another manner. Similar concerns relate to the checks written by the petitioner in 2007 to the beneficiary's company. No evidence was shown that the checks were negotiated and that the beneficiary was the sole recipient of the money and no evidence was submitted that the 2007 Form 1099 was filed with the IRS. Counsel's unsupported assertions in this regard do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [USCIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

In this case, the petitioner declined to provide either federal tax returns, audited financial statements or annual reports in response to the director's request. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. 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). Moreover, the evidence submitted in lieu of the requested proof was not sufficient to establish the petitioner's ability to pay the proffered wage. It is noted that with regard to 2007, the bank statement offered was insufficient to show the petitioner's ability to pay the proffered wage in that year. Bank statements are not among the three types of evidence,

difference between the petitioner's current assets and current liabilities.³ 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. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. 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.

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, other than to refuse to offer the petitioner's tax returns, has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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 director's decision to deny the petition is affirmed. The petition will remain denied.