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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: FEB 18 2010

SRC 07 177 52923

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).

Perry Rhew  
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 drywall and ceiling tile installer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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. Therefore, the director denied the petition.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.<sup>1</sup> 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.

According to the director's December 8, 2007 denial, at 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 at 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.

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<sup>1</sup> Counsel in this matter has filed the Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner. Counsel also signed the Form I-290B, Notice of Appeal or Motion. However, counsel failed to list the petitioner as the party filing the appeal on the Form I-290B. Instead, counsel indicated that the beneficiary was filing the appeal. U.S. Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Nevertheless, the AAO in its discretion will accept this filing as there is evidence in the record noted herein that the petitioner consented to counsel's representation and to the filing of the appeal.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 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 Form ETA 750 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 750 was accepted on August 19, 2004.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$16.76 per hour (\$34,860.80 per year).<sup>3</sup> The Form ETA 750 states that the position requires two years of experience as a construction-related carpenter. The position also requires the beneficiary to provide verifiable employment references. It requires him to work Monday to Sunday with two rotating days off. In addition, the position requires the beneficiary to work in Fairfax County 30% of the time; in Arlington County 30% of the time; in the District of Columbia 30% of the time; and in Loudon (sic)<sup>4</sup> County 10% of the time. There are no other special requirements for the position.

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 on appeal.<sup>5</sup>

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 in 1995, to have a gross annual income of \$754,371, and to currently employ 10 workers. According to the tax returns in the record, the petitioner’s fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on July 6, 2004, the beneficiary claimed to have worked for the petitioner from October 1998 through the date that form was signed.

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<sup>2</sup> USCIS records indicate that the petitioner also filed a Form ETA 750 for a different beneficiary on February 2, 2004. The related Form I-140, Immigrant Petition for Alien Worker, was approved on September 10, 2007. The related Form I-485, Application to Register Permanent Residence or Adjust Status, for the beneficiary in that matter is still pending as of the date of this decision. The AAO notes that the other beneficiary is also an individual from Bolivia with the last name [REDACTED]

<sup>3</sup> The director indicated that the proffered annual wage was \$32,179.20. Using that lower, incorrect figure did not harm the petitioner in that the petitioner has not shown the continuing ability to pay this lesser amount or the actual proffered wage.

<sup>4</sup> The correct spelling is Loudoun County.

<sup>5</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, 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 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, a Certified Public Accountant (C.P.A.) acting on behalf of the petitioner submitted a statement on appeal which indicates, among other things, that the petitioner paid the beneficiary more than the proffered wage in 2004, 2005 and 2006. The C.P.A. claimed that this compensation was documented on the Forms 1099-MISC, Miscellaneous Income. However, the petitioner provided no documentation to support this assertion or to document that it had paid the beneficiary any amount during the relevant period of analysis. The unsupported representations of the petitioner's agents are not reliable evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage or a portion of that wage from the priority date onwards. 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)).

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, contrary to assertions made on appeal. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). 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 not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[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." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on December 5, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2004 and 2006, as shown in the table below.

- In 2004, the Form 1120 stated net income of \$0.
- In 2006, the Form 1120 stated net income of \$43,895.

The petitioner did not provide the 2005 Form 1120. It submitted an attachment to that form: the 2005 Form 4562, Depreciation and Amortization (Including Information on Listed Property). The petitioner also submitted Form 1120 comparison charts and summary worksheets which are forms that are not submitted to the Internal Revenue Service (IRS) but are instead compiled for the

petitioner's own records. On one comparison chart, the petitioner apparently listed information copied from its Forms 1120 for 2004 and 2005. Another comparison chart listed information purportedly taken from its 2001 through 2005 tax returns. The AAO notes that the petitioner indicated on Line 28 of the 2004/2005 two year comparison chart that its net income for 2005 was \$14,382, or \$20,028.80 less than the proffered wage. The documents submitted do not list all the information needed to determine the petitioner's 2005 net current assets. They list only certain amounts apparently taken from the 2005 Schedule L such as line 6 (\$307,862) and Line 18 (\$504,793).

The regulation at 8 C.F.R. § 204.5(g)(2) states that the petitioner's evidence of its ability to pay the wage shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. The regulations do not allow the AAO to accept forms that summarize and compare tax returns that the petitioner compiled for its own use in lieu of its official tax returns, annual reports or audited financial statements as evidence of its ability to pay. Also, the petitioner has presented no special circumstances in this case which establish that its tax returns somehow paint a less accurate picture of its financial position than do the summaries and comparison charts provided for the record.

The director stated in the notice of decision that the petitioner had failed to show an ability to pay through its 2005 net income or 2005 net current assets. Thus, it appears that the director incorrectly accepted the information listed on the comparison charts in lieu of the petitioner's 2005 tax return. The AAO finds that the petitioner was not harmed by this error as it was put on notice that it had failed to establish that it could have paid the wage in 2005 through its net income or net current assets. If the petitioner's actual 2005 tax return refutes this finding, the petitioner could have provided a copy of that tax return on appeal, but it did not.

Therefore, for the years 2004 and 2005, the petitioner has not established that it had sufficient net income to pay the proffered wage.

In the notice of decision, the director indicated that the petitioner has demonstrated an ability to pay the wage in 2006 using its net income.<sup>6</sup> Yet, the director was not made aware of the other Form ETA 750 filed by the petitioner during February 2004. The record does not include evidence related to the other Form ETA 750 which led to an approved immigrant petition in September 2007. The petitioner must show the ability to pay the proffered wage as defined in that other proceeding as an additional expense each year from 2004 through 2007 when this record closed, before USCIS may find that it had the ability to pay the instant wage during any of those years. Thus, the AAO withdraws the director's finding that the petitioner has shown the ability to pay the wage in 2006.<sup>7</sup>

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<sup>6</sup> The director found that the petitioner had only shown the ability to pay in 2006, and that it had not shown the continuing ability to pay throughout the relevant period of analysis. The director then indicated that 2004 was the most crucial year in which to establish the ability to pay as this is the year of the priority date. This point in the notice of decision is withdrawn. A petitioner must show the continuing ability to pay from the priority date onwards. Each year in the relevant period of analysis is equally important when analyzing a petitioner's ability to pay the wage.

<sup>7</sup> The petitioner is not harmed by the withdrawal of this finding from the director's decision as the

If the net income the petitioner demonstrates it had available during that period, 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 review the petitioner's assets. The petitioner's total assets, however, will not be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 and 2006, as shown in the table below.

- The 2004 Form 1120 stated net current assets (liabilities) of -\$23,641.
- The 2006 Form 1120 stated net current assets (liabilities) of \$13,348.

Thus, for the years 2004 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage. As noted earlier, the petitioner did not provide its 2005 Form 1120. As such, the petitioner has also not established that it had sufficient net current assets in 2005 to cover the wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not shown that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel submits the letter of [REDACTED] acting on behalf of the petitioner, and reviewed financial statements from the relevant period with accompanying information. Mr. [REDACTED] letter indicates that petitioner's tax returns do not accurately reflect the petitioner's financial position, and that the petitioner's reviewed financial statements, submitted on appeal, paint a more accurate picture of its ability to pay the wage.

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outcome of the analysis is not changed by this withdrawal. The outcome remains that the petitioner has not shown the continuing ability to pay the wage from the priority date onwards.

<sup>8</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

This assertion is not persuasive. By [REDACTED]'s own acknowledgement, the information on the reviewed financial statements is the representation of the petitioner's management and is based on estimates and assumptions of management related to the petitioner's financial position, rather than actual funds available to pay the wage as reflected on the petitioner's tax returns. The representations of management are not reliable evidence and are not sufficient to meet the burden of proof in these proceedings. The regulation at 8 C.F.R. § 204.5(g)(2) states that the petitioner's evidence of its ability to pay the wage shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. Thus, where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The CPA's letter that accompanied the financial statements in the record makes clear that these are reviewed statements, not audited statements, and the CPA gives no opinion regarding their accuracy. Unaudited financial statements are not persuasive evidence. Finally, the petitioner has presented no special circumstances in this case which establish that its official tax returns paint a less accurate picture of its financial position than do management's estimates and assumptions related to anticipated earnings and uncompleted contracts as presented in the reviewed financial statements in the record.

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 lists of the best-dressed women in California. 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 this case, according to the record, the petitioner was established in 1995 and it has 10 employees. The petitioner has not shown consistent historical growth since incorporating. Its gross sales or receipts have not steadily increased; rather, the record indicates that they have fluctuated as follows:

\$2,241,813 in 2001; \$1,830,510 in 2002; \$2,322,947 in 2003; \$2,479,013 in 2004; \$2,040,055 in 2005; and \$3,089,981 in 2006. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. 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.

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.