

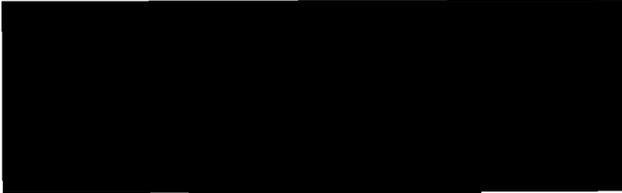


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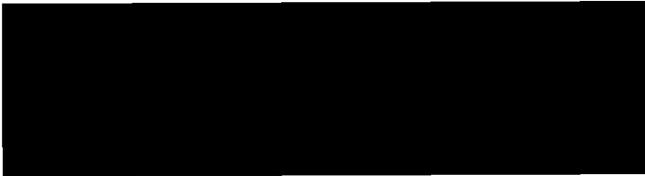
Petitioner:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director for further consideration of the petitioner's ability to pay the proffered wage as of the April 30, 2001 priority date, and for further consideration of the beneficiary's actual employer.

The petitioner is a building and restoration company. It seeks to employ the beneficiary permanently in the United States as a stone mason. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not submitted its tax returns or any other regulatorily prescribed evidence identified at 8 C.F.R. § 204.5(g)(2), and thus 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 November 3, 2007 denial, the issue in this matter is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also consider whether the petitioner remains the actual employer of the beneficiary in these proceedings.

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 either 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 ETA Form 9089, Application for Permanent Employment 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 ETA Form 9089, Application for Permanent Employment

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).

Here, the Form ETA 9089 indicates it was filed on April 30, 2001.¹ The proffered wage as stated on the Form ETA 9089 is \$22.59 per hour (\$46,987.20 per year). The Form ETA 9089 states that the position requires two years of work experience in the proffered 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 upon appeal.²

As the director noted in his decision, the petitioner did not submit its tax returns to the record. Therefore the record of proceeding does not establish the petitioner's business structure. On the petition, the petitioner claimed to have been established on March 4, 1993, to have a gross annual income of \$4,117,000, and to currently employ eight workers. The beneficiary claimed on Form ETA 9089 that he had worked for the petitioner from May 15, 1998 to July 11, 2006.³

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, United

¹ The AAO notes that the PERM program came into effect in March 2005, and the petitioner could not have filed the instant ETA Form 9089 in April 2001. On page 1 of the ETA 9089, the petitioner indicates that the earlier ETA Form 750 was converted to a PERM filing. Thus, the priority date for the instant petition is April 30, 2001. Thus, the petitioner has to establish that it has the ability to pay the proffered wage as of April 30, 2001 and onward.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

³ The director, in an RFE dated June 25, 2007, noted that counsel, petitioner and the beneficiary failed to sign the ETA Form 9089 submitted with the instant I-140 petition. The AAO notes that both counsel and the petitioner had dated but not signed the document, while the beneficiary had neither dated nor signed the document. The director requested that the petitioner complete Sections L, M, and N on pages 8 and 9. The petitioner submitted the requested date and signatures in its response to the RFE.

States 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The regulation at 8 C.F.R. § 204.5(g) (2) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director in his RFE, the petitioner declined to provide copies of the first four pages of its 2005 and 2006 tax returns. The petitioner's 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 could be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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, the petitioner established that it paid the beneficiary compensation of \$41,384.38 in 2005 and \$47,308.12 in 2006. Thus the petitioner has established that it employed and paid the beneficiary wages greater than the proffered wage of \$46,987.20 in tax year 2006. However, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in the 2005 priority tax year, namely, \$5,602.82.

The petitioner provided credible verifiable evidence of the beneficiary's employment in tax years 2002, 2003, 2005 and 2006. In response to the director's RFE, the petitioner submitted copies of the beneficiary's Forms 1099-MISC for tax years 2005 and 2006 that indicates compensation of \$41,384.38 in 2005 and \$47,308.12 in 2006. The record also contains copies of two additional Forms 1099-MISC for tax years 2002 and 2003 that indicate the petitioner provided compensation to the beneficiary of \$50,584.73 in 2002 and \$43,692.37 in 2003.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st 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 insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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.

Further, 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 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.⁴ 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.

As noted by the director in his decision, the petitioner did not submit the first four pages of its 2005 or 2006 tax returns. These four pages identify both the petitioner's net income, and based on Schedule L, its net current assets. Without an examination of the petitioner's net income and net current assets in tax year 2005, the AAO cannot examine whether the petitioner had sufficient net income or net current assets (if structured as a corporation) to pay the difference between the beneficiary's 2005 actual wages and the proffered wage. Further, as discussed previously, the priority date for the instant petition is April 30, 2001. The petitioner needs to provide its complete tax returns for tax years 2001 through 2006 to establish its ability to either pay the entire proffered wage or the difference between the beneficiary's actual wages in relevant years and the proffered wage.

Therefore, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had not established 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, except for tax year 2005.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Beyond the decision of the director, the AAO would question whether the instant petitioner remains the actual employer of the beneficiary. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In the petitioner's response to the director's RFE, counsel submitted a letter from [REDACTED], dated September 12, 2007. [REDACTED] stated that a new corporation, [REDACTED] was established on May 4, 2005. He indicated that [REDACTED] the petitioner's president, was also the president of the new corporation. [REDACTED] added that the beneficiary received the proffered salary of \$903.60 per week from [REDACTED] and that [REDACTED] was willing to continue the beneficiary's offer of sponsorship under the same terms and conditions as assigned by the petitioner. Counsel also submitted four 2007 weekly pay statements from [REDACTED] that indicated the beneficiary earned \$180.72 a day.

With regard to the identification of actual employers, the regulation at 20 C.F.R. § 656.3^[1] states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Based on the letter and wage statements submitted to the record, [REDACTED], a business distinct from the petitioner, employed the beneficiary as of some unspecified date, and is providing compensation to the beneficiary as of 2007. Although counsel states that this corporation wishes to fulfill the conditions agreed to by the petitioner, the beneficiary's claimed new employer, as a distinct business, would have to file its own I-140 petition for the beneficiary. The transfer of an I-140 petition to a new employer, even one owned by the petitioner's president, is not contemplated by the regulations.

The petitioner also provides no evidence that [REDACTED] is a successor in interest to the instant petitioner. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of the business transfer until the beneficiary adjusts status to lawful permanent resident. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). If the petitioner no longer is pursuing the employment of the beneficiary, and the current employer is not a successor in interest to the initial ETA 9089 petitioner, the instant petition is moot.

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.

The appeal is remanded to the director for further consideration of the petitioner's ability to pay the proffered wage as of the 2001 priority date and further consideration of whether the petitioner remains the beneficiary's actual employer. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.