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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:



Office: NEBRASKA SERVICE CENTER

Date: **MAY 28 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home improvements and remodeling company. It seeks to employ the beneficiary permanently in the United States as mason. 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. 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 27, 2007 denial, the primary issue in this case 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.

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.

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$1,520.00 weekly which equates to \$79,040 per year. The labor petition states that the position requires two years of experience in the position offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The record of proceeding reveals that the petitioner is structured as a C corporation. On the petition, the petitioner claims to have been established on December 28, 2000 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 28, 2001, the beneficiary claimed to have worked for the petitioner as a mason from October 2000 to the date of signing the Form ETA 750B.

In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns, for the years 2001 through 2005, and an un-dated letter stating that it had employed the beneficiary steadily at a weekly salary of \$750.00.

On August 1, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit additional documentation including photocopies of: its tax forms, annual report, or audited financial statements for 2006; the beneficiary's Forms W-2, Wage and Tax Statements, for the 2001 through 2006 tax years; and, the beneficiary's four most recent pay vouchers.<sup>2</sup>

In response to the RFE, counsel submitted a letter from a [REDACTED], a certified public accountant (CPA), dated September 5, 2007. [REDACTED] stated: "In regard to the corporate tax returns of [the petitioner] prepared by me from the books and records of the corporation, payments for services which could have been rendered by [the beneficiary] are included in Cost of Sales."<sup>3</sup> Counsel did not provide the petitioner's 2006 tax forms, annual report, or audited financial statements, nor did counsel provide any additional documentation regarding the petitioner's employment of the beneficiary.<sup>4</sup> Therefore, the director denied the application.

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<sup>1</sup> 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).

<sup>2</sup> The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8) and (12).

<sup>3</sup> The petitioner's tax returns indicate [on Form 1120A, page one, line 13, "Salaries and Wages (less employment credits)"] that the petitioner did not pay salaries and wages from 2001 through 2005. The petitioner's CPA states that payments for "outside services" are included in "Cost of Sales" (on Form 1120A, page 1, line 2 "Cost of Goods Sold."). The petitioner's tax forms show that "[REDACTED]" were \$215,350.00 in 2001; \$182,417.00 in 2002; \$124,200.00 in 2003; \$338,910.00 in 2004; and, \$241,184.00 in 2005.

<sup>4</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide the requested documentation. The petitioner's failure to submit these documents

Counsel filed the instant appeal on November 26, 2007. On appeal, counsel asserts that the CPA has stated the issue and his statements are correct; that in light of the fact that the petitioner is a small corporation with one shareholder, the discretion to pay for outside services was in the sole discretion of the shareholder; the money shown for outside services could have been used to pay the beneficiary; and, the one shareholder has sole discretion how the profit of the company could have been distributed. Counsel indicates that no supplemental brief and/or additional evidence will be submitted in support of the appeal.

Contrary to counsel and [REDACTED] statements, however, no specific evidence was provided to establish that the line item "Cost of Goods Sold" included wages paid for outside masonry services. 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)).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, United 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).

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. The beneficiary represented on the Form ETA 750B that he had been employed by the petitioner since October 2000, and the petitioner submitted an undated letter claiming to be employing and paying the beneficiary \$750 per week. However, no corroborating evidence was submitted. 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)). Furthermore, both [REDACTED] and counsel state that the beneficiary "could have" been paid out of "Costs of Goods Sold" on the petitioner's tax forms, which included payments to outside workers, thereby implying that the beneficiary would replace an outside worker. These statements contradict the previously noted claims of the beneficiary and petitioner that the petitioner was already employing and paying the beneficiary. It is incumbent on the petitioner to

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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).

resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the requisite time 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 (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 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 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120, U.S. Corporation Income Tax Return, or (prior to 2007), line 24 of Form 1120-A.

The record before the director closed on September 7, 2007 with the receipt by the director of the petitioner's submissions in response to the director's Request for Evidence (RFE). Therefore, the petitioner's tax return for 2006 would be the most recent return available. However, as previously stated, the petitioner did not submit photocopies of its 2006 tax forms. The petitioner's Forms 1120-A tax forms demonstrate its net income/loss for 2001 through 2005 as:

<u>Year</u>	<u>Net Income/Loss (\$)</u>
2001	-443.00
2002	-345.00
2003	-124.00
2004	- 2,141.00
2005	823.00
2006	nothing submitted

Therefore, for the years 2001 through 2006, the petitioner did not establish sufficient net income to pay the proffered wage.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Form 1120, Schedule L, lines 1 through 6, or Form 1120-A, Part III, lines 1 through 6, and include cash-on-hand. Its year-end current liabilities are shown on Form 1120, lines 16 through 18, or Form 1120-A, Part III, lines 13 through 14. 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 Forms 1120A tax returns demonstrate its end-of-year net current assets/liabilities for 2001 through 2006 as:

<u>Year</u>	<u>Net Current Assets/Liabilities (\$)</u>
2001	-10,389.00
2002	-2,062.00
2003	-1,357.00
2004	-3,489.00
2005	4,326.00
2006	nothing submitted

Therefore, for the years 2001 through 2006, the petitioner did not establish sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

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<sup>5</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 since 1990, to employ four individuals, and indicates that the beneficiary is not filling a new position or replacing a former employee. The historical growth of the company has not been established. The petitioner's total assets and gross receipts or sales were inconsistent during the years 2001 through 2005, and, in fact, declined from 2001 to 2005.<sup>6</sup> The petitioner also has not established the occurrence of any uncharacteristic business expenditures or losses or its reputation within its industry, or any other evidence that would be relevant to its ability to pay the proffered wage. As previously indicated, the petitioner failed to submit its tax returns, an annual report, or audited financial statement as required and requested for 2006, which in itself is a ground for denial of the petition.

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 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. Here, the petitioner has not met that burden.

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<sup>6</sup> The petitioner's tax forms reflect total assets were \$16,680; \$16,016; \$15,124; \$14,485; and \$13,382 and gross sales were \$305,574; \$259,985; \$190,418; \$422,923; and, \$304,160 respectively from 2001 through 2005.

**ORDER:** The appeal is dismissed.