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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 28 2011

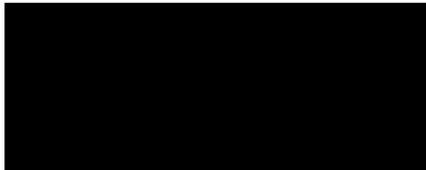
IN RE:

Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

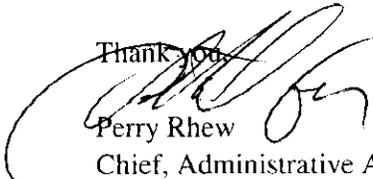


INSTRUCTIONS:

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 your 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 \$630. 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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is an auto body repair firm. It seeks to employ the beneficiary permanently in the United States as an auto body & related repairer. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director also determined that the petitioner had failed to establish that it had the ability to pay the proffered wage, and denied the petition accordingly.

The petitioner filed an appeal. The AAO dismissed the appeal on June 25, 2010, concluding that the visa category of any other worker (requiring less than two years of training or experience) selected on the Form I-140, Immigrant Petition for Alien Worker (Part 2, paragraph g) was not supported by a Form ETA 750.<sup>1</sup> The AAO also concluded that the petitioner had not established its continuing financial ability to pay the proffered wage of \$43,846.40 as of the priority date of June 10, 2004. 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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(l) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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<sup>1</sup> The Form ETA 750 submitted would only support a filing for a skilled worker.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Through counsel, the petitioner submits a motion to reopen and a motion to reconsider the AAO's decision. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The AAO accepts counsel's submission as a motion to reopen and reconsider. Accompanying the motion is a copy of an unaudited profit and loss statement presenting the petitioner's financial information from January to August 2010, as well as a copy of the petitioner's principal shareholder's unaudited personal profit and loss statement for 2009.

As stated in the AAO's prior decision, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its continuing ability to pay the proffered wage as of the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

In reviewing the petitioner's ability to pay the proffered wage, the AAO noted in its decision of June 25, 2010 that the record failed to indicate that the petitioner had employed or paid wages to the beneficiary although Part B of the Form ETA 750 indicated that the beneficiary claims to have worked for the petitioner. This has not been addressed or clarified on motion. The AAO additionally noted that the petitioner's corporate tax returns reflected the following:

| Year                    | 2004      | 2005     | 2006    | 2007    |
|-------------------------|-----------|----------|---------|---------|
| Net Income <sup>2</sup> | \$136,599 | -\$ 324  | \$7,587 | \$2,560 |
| Current Assets          | \$ 4,810  | \$4,486  | \$4,106 | \$3,909 |
| Current Liabilities     | \$ -0-    | \$ -0-   | \$ -0-  | \$ -0-  |
| Net Current Assets      | \$ 4,810  | \$ 4,486 | \$4,106 | \$3,909 |

The AAO observed that although the petitioner's tax returns indicated that it demonstrated its ability to pay the proffered wage of \$43,846.40 in 2004 because its net income of \$136,599 could cover payment of the wage offer, it could not demonstrate its continuing financial ability to pay the proffered wage in 2005, 2006 or 2007.

In 2005, neither the petitioner's -\$324 in net income nor its \$4,486 in net current assets could cover the proffered salary or establish the petitioner's ability to pay in that year.

In 2006, the petitioner reported \$7,587 in net income and \$4,106 in net current assets. Neither amount was sufficient to pay the proffered wage of \$43,846.40 or demonstrate the petitioner's ability to pay in that year.

In 2007, neither the petitioner's net income of \$2,560 nor its \$3,909 in net current assets was sufficient to cover the proffered wage or establish the petitioner's ability to pay in that year. The petitioner has not demonstrated its continuing financial ability to pay the certified wage.

Relevant to the principal shareholder's personal profit and loss figures, it is noted that the petitioning business is a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8

<sup>2</sup> Where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004, 2005); and on line 18 (2006, 2007) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 17e in 2004 and on line 21 of page one in 2005, and on line 18 in 2006 and 2007).

C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

With regard to the petitioner’s 2010 profit and loss statement submitted on motion covering the first eight months of that year, the AAO observes that as is specified on the document, it has not been audited. Therefore it is of limited probative value as it is based upon the representations of the petitioner’s management. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. It is additionally noted that this document does not overcome the petitioner’s failure to establish its ability to pay the proffered wage in 2005 through 2007. Even the court in *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) as relied upon by counsel, did not contemplate that unaudited financial statements would be acceptable evidence as a petitioner’s ability to pay the proffered wage.

The AAO finds that the petitioner has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of the priority date. It is further noted that no new evidence or argument has been submitted on motion that would reverse the AAO’s previous finding that the labor certification provided does not support the approval of the petition for an unskilled worker visa category sought by the petitioner on the Form I-140.<sup>3</sup>

The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The motion to reconsider and motion to reopen is granted. The prior decision of

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<sup>3</sup> The AAO noted in its previous decision:

. . .The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. It is additionally noted that the director requested clarification of the visa category from the petitioner in the director’s request for evidence issued on February 6, 2008. The petitioner submitted a response to this request with respect to its ability to pay the proffered wage but failed to provide any clarification of the selected visa category. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. As the labor certification required two years of experience, the petition may not be filed as an unskilled worker petition.

the AAO, June 25, 2010 is affirmed. The petition remains denied.