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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date:

JUL 13 2011

Office: TEXAS SERVICE CENTER

FILE



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 \$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,

Kerry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition and a subsequent motion to reopen and reconsider were 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 company. It seeks to employ the beneficiary permanently in the United States as a drywall installer. 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 established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The petitioner then filed a motion to reopen and reconsider the director's decision. The director denied the motion to reopen and reconsider because 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 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 May 22, 2009 decision denying the petitioner's motion to reopen and reconsider, the single 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 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 ETA Form 9089 was accepted on January 10, 2006. The proffered wage as stated on the ETA Form 9089 is \$15.50 per hour (\$32,240 per year). The ETA Form 9089 states that the position requires two years of experience in the proffered position.

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.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089 signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from July 1, 2002 until December 13, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 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 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, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2006, or subsequently.

The beneficiary claims to have previously worked for the petitioner. In support of that assertion, the petitioner submitted a Form 1099 showing wages paid to [REDACTED] in 2006 (\$20,000), 2007

¹ 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).

(\$13,720) and 2008 (\$30,983). As set forth on the Form I-140 and the ETA Form 9089, the beneficiary's name is not [REDACTED]. The petitioner does not address the name discrepancy, nor does the record establish that the beneficiary and [REDACTED] are one and the same person. The Form 1099 wage information is, therefore, of no evidentiary value as it does not establish that the petitioner paid wages to the beneficiary during the requisite period. It is incumbent on the petitioner to 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). The AAO issued a Notice of Intent to Deny (NOID) on February 22, 2011 and asked the petitioner to address this issue among other issues. The petitioner failed to submit evidence or address this question. 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).²

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

The AAO recognized that a depreciation deduction is a systematic allocation of the

² Counsel sent a partial response to the AAO's Request For Evidence (RFE) on March 24, 2011 and indicated that the petitioner's owner was "presently out of the country." Counsel indicates that, "we will supplement further documents immediately upon his return." However, more than three months after counsel sent his initial response, the petitioner has failed to send any further documents. Nothing in the letter states when the petitioner will return to the country. Nothing in the letter specifically requests more time to respond to the RFE.

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).

The record before the director closed on December 3, 2008 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 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 was the most recent return available. The petitioner, however, submitted copies of its 2008 and 2009 tax returns in response to the AAO’s NOID. The petitioner’s tax returns demonstrate its net income for 2006 through 2009 as shown in the table below.

- In 2006, the Form 1120S stated net income³ of (\$22,681).⁴
- In 2007, the Form 1120S stated net income of \$2,804.
- In 2008, the Form 1120S stated net income of (\$28,119).
- In 2009, the Form 1120S stated net income of (\$59,738).

³ 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. However, 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. In this instance, the Schedule K does not have relevant entries for additional income, credits, deductions or other adjustments.

⁴ The petitioner also submitted a copy of its 2005 tax return which shows ordinary income of \$41,676. That tax return is for a year which precedes the priority date and will be considered only generally.

Therefore, for the years 2006 through 2009, the petitioner's tax returns do not state sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Total assets will not be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets would include depreciable assets that the petitioner uses in its business, including real property. 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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, however, do not demonstrate its end-of-year net current assets as Schedule L for tax years 2006 through 2009 contain no entries.⁶ Thus, it cannot be determined that the petitioner had sufficient net current assets to pay the proffered wage in those years. As the Form 1120S, Schedule L, contained no entries, and no information about current assets or liabilities, the petitioner was asked to explain this discrepancy, as a drywall company would likely have equipment, accounts payable, cash or other likely entries based on the gross receipts that the petitioner reported. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner was asked to address this issue in the AAO's NOID but failed to respond to that request. 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).

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

⁶ Schedule L to IRS Form 1120S is not required to be completed if the corporation's total receipts for the tax year and its total assets at the end of the tax year are less than \$250,000. *See* <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 23, 2011). It is unclear why the petitioner did not complete Schedule L as it reports gross receipts in each applicable year which are substantially higher than \$250,000.

Therefore, from the date the ETA Form 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.

USCIS records indicate that the petitioner has filed multiple Form I-140 and I-129 petitions on behalf of various workers. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. The petitioner was asked to provide information about sponsored workers. The petitioner did not respond to that request. 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).

Counsel asserts on appeal that the totality of the petitioner's financial circumstances demonstrate its ability to pay the proffered wage.

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 (BIA 1967). 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 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 *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 the instant case, the petitioner has a negative net income of (\$22,681) in 2006, a net income in 2007 of \$2,804, a negative net income in 2008 of (\$28,119) and a negative net income in 2009 of (\$59,738), all of which are insufficient to pay the proffered wage. As previously noted, the petitioner has not established that it paid the beneficiary wages during any portion of the requisite

period. The petitioner's tax returns do not permit the examination of net current assets as the petitioner made no entries on Schedule L of its tax returns. The petitioner sponsored other workers, but did not address this issue in response to the AAO's NOID. The petitioner paid no officer compensation in 2006 or 2007, and the total wages paid to employees (2006 - \$163,293; 2007 - \$90,000) are those that would be paid by a small business enterprise. The petitioner was afforded an opportunity to address and resolve a number of inconsistencies in the record in response to the AAO's NOID, but failed to do so. 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).

Counsel notes on appeal, however, that the petitioner's gross receipts are substantial and that the petitioner is a successful drywall company that has been in business since 2002. However, as noted above, 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). The petitioner's tax returns also reflect substantial additional labor costs for outside labor. This brings into question whether the petitioner would be the actual employer of the beneficiary.⁷ The

⁷ It is unclear that the petitioner will be the beneficiary's actual employer and would be the proper petitioner. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 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.

In this case, the petitioner's costs of labor, which costs substantially exceed the petitioner's salaries paid, raises the question of what company would actually employ the beneficiary. From the tax returns, it appears that the vast majority of the service/labor provided by the petitioner is performed by third parties/contractors who do not appear to be directly employed by the petitioner.

In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In the present matter, it is unclear that the petitioning entity would be the beneficiary's actual employer.

In *Clackamas*, the specific inquiry was whether four physicians, actively engaged in medical practice as shareholders, could be considered employees to determine whether the petitioner to

AAO asked the petitioner to address this issue in its NOID. Specifically, the petitioner was asked to supply the following:

- Evidence establishing the physical location(s) where the beneficiary will be working.
- Evidence establishing who the beneficiary will be working for, who will pay the beneficiary by tax identification number, and who will actually control the day-to-day work activities of the beneficiary.
- What entity, by tax identification number, will supervise, assign and control the work of the beneficiary.
- What entity, by tax identification number, owns the work equipment which the beneficiary will use to perform the duties set forth on the labor certification.
- Copies of any and all contracts under which the beneficiary will provide services.
- Identify whether the salary is set by contract, or is regular and ongoing.

qualify as an employer under the American with Disabilities Act of 1990 (ADA), which necessitates an employer have fifteen employees. The court cites to *Darden* that “We have often been asked to construe the meaning of ‘employee’ where the statute containing the term does not helpfully define it.” *Clackamas*, 538 U.S. at 444, (citing *Darden*, 503 U.S. at 318, 322). The court found the regulatory definition to be circular in that the ADA defined an “employee” as “individual employed by the employer.” *Id.* (citing 42 U.S.C. § 12111(4)). Similarly, in *Darden*, where the court considered whether an insurance salesman was an independent contractor or an “employee” covered by the Employee Retirement Income Security Act of 1974 (ERISA), the court found the ERISA definition to be circular and adopted a common-law test to determine who would qualify as an “employee under ERISA. *Id.* (citing *Darden*, 503 U.S. at 323). In looking to *Darden*, the court stated, “as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning in common law. Congress has overridden judicial decisions that went beyond the common law.” *Id.* at 447 (citing *Darden*, 503 U.S. at 324-325).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master’s control over the servant. The court cites to definition of “servant” in the Restatement (Second) of Agency § 2(2) (1958): “a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other’s control or right to control.” *Id.* at 448. The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, “the first of which is ‘the extent of control’ that one may exercise over the details of the work of the other.” *Id.* (citing § 220(2)(a)). The court also looked to the EEOC’s focus on control⁷ in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered an employer can hire and fire employees, assign tasks to employees and supervise their performance, can decide how the business’ profits and losses are distributed. *Id.* at 449-450.

The petitioner failed to respond to the above inquiries which are material to determining who would be the beneficiary's actual employer. 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). The petitioner was asked to provide copies of contracts under which the beneficiary would provide services. In response to that request, the petitioner submitted copies of documents entitled "Partial Payment Certification, Waiver And Release," all dated for the week ending October 30, 2010, and signed on November 4, 2010, which show that the petitioner performed labor on a number of jobs for [REDACTED] in 2010.⁸ There is no indication that the beneficiary was employed on any of those jobs. The petitioner provided no additional evidence of contracts under which the beneficiary was employed from the 2006 priority date onward, or contracts that the beneficiary was expected to work under.

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.

⁸ The payment certifications state that the petitioner subcontractor "warrants that (i) all laborers and subcontractors employed . . . have been paid." While it would appear that the petitioner is responsible for payment under these certifications, the documents are insufficient to fully establish who will be the actual employer, as the certifications alone do not address the issues of work supervision, control of the work product, the ability to hire and fire, and other factors necessary to this determination. The petitioner must address this issue in any further filings.