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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: TEXAS SERVICE CENTER

Date: FEB 03 2011

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:

SELF-REPRESENTED

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,

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 computer consulting and software development company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 June 2, 2008 denial, the 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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, Application for Alien 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 Form ETA 750, Application for Alien 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 750 was accepted on November 3, 2003. The proffered wage as stated on the Form ETA 750 is \$70,000 per year.¹ The Form ETA 750 states that the position requires a bachelor's degree in any field of study and four years of experience in the proffered position or four years of experience in a related occupation.²

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.³

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 1993 and to currently employ "7+" workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

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

¹ This case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. It is noted that the petitioner failed to submit with the Form I-140 a Form ETA 750B for the substituted beneficiary.

² The petitioner does not specify the titles of any accepted related occupation. The Form ETA 750 includes "see attachment" in a number of places, including block 13 job duties. However, none of the attachments set forth accepted titles of any specified related occupation.

³ 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).

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 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 employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 or subsequently. The petitioner provided evidence to show that the beneficiary was paid wages as follows since the priority date:

- 2005 W-2 - \$12,446.19
- 2006 W-2 - \$34,637.49
- 2007 pay stub showing wages paid as of December 31, 2007 - \$27,444.77⁴

Thus, the petitioner must establish the ability to pay the full proffered wage of \$70,000 for 2003 and 2004. The petitioner must establish the ability to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2005, 2006 and 2007. Those sums are as follows:

- 2005 - \$57,553.81
- 2006 - \$35,362.51

⁴ The record contains a paystub for the beneficiary for 2007 showing wages earned from a separate entity in the amount of \$48,768 as of June 30, 2007. The paystub is of little evidentiary value. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 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."

- 2007 - \$42,555.23

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 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 118. "[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 April 22, 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 2007 federal income tax return was the most recent return available. The petitioner’s tax returns demonstrate its net income for 2003 through 2007 as shown in the table below.

- In 2007, the Form 1120S stated net income⁵ of \$15,619.
- In 2006, the Form 1120S stated net income of \$7,410.
- In 2005, the Form 1120S stated net income of (\$6,888).
- In 2004, the Form 1120S stated net income of (\$18,390).
- In 2003, the Form 1120S stated net income of \$14,128.

Therefore, for the years 2003 and 2004, the petitioner’s tax returns do not establish sufficient net income to pay the full proffered wage. In 2005 through 2007, the petitioner’s tax returns do not establish sufficient net income to pay the difference between wages paid to the beneficiary and the full 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. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁶ 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

⁵ 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. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its Schedule K for 2003 through 2007, the petitioner’s net income is found on Schedule K of its tax returns.

⁶According 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.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003 through 2007, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of \$7,082.
- In 2004, the Form 1120S stated net current assets of \$2,789.
- In 2005, the Form 1120S stated net current assets of (\$2,867).
- In 2006, the Form 1120S stated net current assets of \$0.
- In 2007, the Form 1120S stated net current assets of \$9,228.

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the full proffered wage. For the years 2005 through 2007, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary.

Therefore, from the date the Form ETA 750 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.

It must be noted that 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. USCIS records indicate that the petitioner has filed 127 Form I-140 or I-129 petitions on behalf of other workers. The record does not establish the ability of the petitioner to pay the proffered wage, or difference between wages paid to the beneficiary and the full proffered wage, in any relevant year, much less the wages of any additional petitioned workers.

On appeal, the petitioner's former counsel states that the record establishes the petitioner's ability to pay the proffered wage. Counsel stated that the petitioner paid subcontractors wages for work that would have been performed by the beneficiary and that those wages should be considered as wages available to pay the proffered wage. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel also submitted bank records and tax returns of a separate corporation and says that the funds of that unrelated company were available to pay the proffered wage.

In support of its ability to pay the proffered wage, the petitioner submitted copies of 20 work orders stating that those work orders were for work the beneficiary would have performed and that sums paid to those subcontractors would have been available to pay the beneficiary's proffered wage. The work orders submitted do not support the petitioner's ability to pay. The work orders do not contain specific descriptions of the duties to be performed. Thus, it is not possible to determine that the duties performed by those individuals are the same duties the beneficiary would perform which are set forth on

the Form ETA 750. The work performed on all of the work orders predates the priority date of the Form ETA 750 and thus could not have been work the beneficiary would have performed. Finally, some of the work orders are for work which was performed in [REDACTED] which is not the location on the certified labor certification. The petitioner further referred to sums listed on the petitioner's tax returns for outside labor and states that those sums could have been used to pay the proffered wage as the beneficiary would have performed those services as a full-time employee. The record is not sufficient to establish that any labor costs noted on the referenced tax returns was for the same labor the beneficiary would be authorized to perform under the terms of the Form ETA 750, or that the labor was performed at a location where the beneficiary was authorized to work, which the labor certification states only as [REDACTED]

Regarding the bank statements and tax returns of an unrelated entity, the petitioner's reliance upon the ability of an unrelated third party corporation to assist the petitioner in paying the proffered wage is also misplaced. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 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." Consequently, the assets of XML Frameworks, a separate company from the petitioner, cannot be used to show the petitioner's ability to pay the proffered wage.

Former counsel cites to *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) as well as a number of non precedent AAO cases. *Matter of Chawathe* provides:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. See e.g. *Matter of Martinez*, 21 I & N Dec. 1035, 1036 (BIA 1977) (noting that the petitioner must prove eligibility by a preponderance of the evidence in visa petition proceedings) . . .

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I & N Dec. 77, 79-80 (Comm. 1989) . . .

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as greater than 50 percent probability of something occurring.)

Counsel asserts that the evidence provided would reflect by a preponderance of the evidence that the petitioner has established its ability to pay the proffered wage from the priority date onward. For the reasons set forth herein, the AAO does not agree. Counsel also refers to a number of non precedent AAO decisions in support of its position. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The non precedent decisions referenced by the petitioner, therefore, will not support its assertions. Nothing in the petitioner's tax returns establish its ability to pay the proffered wage from the priority date onward.

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 lacks sufficient net income or net current assets in any year since the priority date to pay the proffered wage or difference between the proffered wage and wages actually paid to the beneficiary. While the petitioner has petitioned for multiple workers, the record does not establish the ability of the petitioner to pay the wages of any of these workers. There is nothing in the record to establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the priority date onward. The petitioner's tax returns reflect a drop in gross receipts from 2003 to 2007. The petitioner's net income and net current assets in all relevant years were minimal or at negative levels. 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.

Additionally, the petitioner states on its Form I-140 that it only employs “7+” employees. However, as noted above, the petitioner has filed at least 127 Form I-140 or I-129 petitions. Thus, an issue is raised as to whether the petitioner would be the actual employer of the petitioned workers. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). (noting that the AAO reviews appeals on a *de novo* basis).

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. § 656.3⁷ 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 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

⁷ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

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 as the petitioner has petitioned for over 100 other workers, many of which it apparently does not now employ or perhaps has never employed as the petitioner states it has only seven employees.⁸

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 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

⁸ We note that the beneficiary received payment from a separate employer in 2007. It is unclear whether the beneficiary left the petitioner temporarily or if he was subcontracted out to another employer.

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."⁹ *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 control¹⁰

⁹ Section 220, Definition of a Servant, in full states:

- (1) 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 the services is subject to the other's control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - a. The extent of control which, by the agreement, the master may exercise over the details of the work;
 - b. Whether or not the one employed is engaged in a distinct occupation or business;
 - c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - d. The skill required in the occupation;
 - e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - f. The length of time for which the person is employed;
 - g. The method of payment, whether by the time or by the job;
 - h. Whether or not the work is a part of the regular business of the employer;
 - i. Whether or not the parties believe they are creating the relation of master and servant; and
 - j. Whether the principal is or is not in business.

¹⁰ Additionally, as set forth in the recent Memorandum from Donald Neufeld, Associate Director, Service Center Operations, Determining Employer-Employee Relationship for Adjudication of H-1B

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.

As the petitioner has a low number of stated employees, but has filed for a high number of individuals, relies on work orders and contracts, and the beneficiary received payment from an outside source in 2007, it is unclear that the petitioning entity will be the beneficiary's actual full-time employer.

Finally, the experience letters submitted by the petitioner do not establish that the beneficiary has four years of experience in the proffered position or four years in a related occupation as required by the Form ETA 750. Experience letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Two experience letters (██████████ dated May 7, 2007 verifying experience since September 1, 2006, and ██████████ dated May 12, 2006 stating that the beneficiary was employed from October 15, 2003 to November 7, 2005) indicate that all, or a portion of, the referenced experience was obtained after the priority date (November 4, 2003) and may not, therefore, may be considered. The experience letters from ██████████ dated October 21, 2003 confirming experience from February 19, 2001 to May 25, 2002, and ██████████ dated September 5, 2000 confirming experience from July 1998, establish only about three years experience by the time of the priority date, not four years as required by the Form ETA 750. For this additional reason, the petition may not be approved.

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.

Petitions, Including Third Party Site Placements, HQ 70/6.2.8, January 8, 2010, the memo looks to whether the employer has the "right to control" where, when and how the beneficiary performs the job. The memo considers many of the factors set forth in *Darden, Clackamas*, and the Restatement, including who provides the tools necessary to perform the job duties, control to the extent of who hires, pays and fires, if necessary, the beneficiary, and who controls the manner and means by which the beneficiary's work product is completed.