

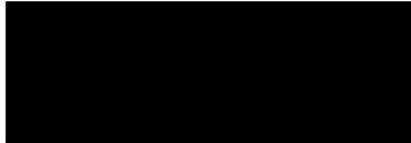
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



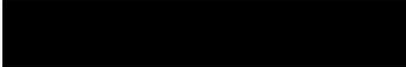
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Date: **MAY 11 2012**

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing business. It seeks to employ the beneficiary permanently in the United States as a supervisor for a roofing installation team. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continued ability to pay the proffered wage. The petition was denied 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 September 8, 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 resident status.

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.

Here, the Form ETA 750 was filed on April 30, 2001. We note the minimum proffered wage as stated on that form is \$40,755 per year (comprised of forty hours per week at \$16.50 per hour, and a required minimum of five hours of overtime at \$24.75 per hour).

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 on appeal.<sup>1</sup>

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<sup>1</sup> The submission of additional evidence on appeal is allowed. The record in the instant case reflects that the director issued a request for evidence (RFE) on April 22, 2008, noting that the

The director denied the petition because the petitioner failed to establish its continued ability to pay the proffered wage. In future filings, the petitioner must satisfactorily address this issue. Using the evidence in the record, the beneficiary has not carried its burden in that regard. Moreover, with its submissions on appeal it has inserted inconsistencies into the record that must be addressed in future filings.<sup>2</sup> See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), requiring petitioners to resolve any inconsistencies in the record. As stated on the Form ETA 750, the minimum proffered wage is \$40,755 per year. The following is noted from the petitioner's submissions:

Year	W-2 Wages <sup>3</sup>	Net Income <sup>4</sup>	Net Current Assets <sup>5</sup>
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petitioner had provided tax returns for the years 2001 and 2005 only, and had not established its ability to pay for all relevant years from the priority date onward. The RFE specifically requested the petitioner's financial information for 2002, 2003, 2004, 2006, and 2007. The RFE noted that the petitioner may also submit evidence that it paid the beneficiary the proffered wage during the relevant years, such as Forms W-2, Forms 1099, or copies of pay stubs listing the beneficiary and the petitioner. Although the RFE noted that Forms W-2 or Forms 1099 should be submitted, if available, the petitioner chose not to provide this evidence in response to the RFE. Rather, the petitioner provided in its response its federal income tax returns (Forms 1120) for 2001 to 2007. The purpose of an 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

<sup>2</sup> The petitioner offered Form 1099s to show that it paid the beneficiary the proffered wage in tax years 2005, 2006, and 2007. These forms show nonemployee compensation payments made in those years to the beneficiary and to [REDACTED]. It is unclear what services the beneficiary and [REDACTED] rendered in exchange for these payments. Payments made by the petitioner to [REDACTED] cannot be considered as wages paid to the beneficiary. Even if an individual is the sole proprietor of a business, the Forms 1099 do not account for the costs of operating that business and cannot be assumed to be payment of wages to the business owner. Such an inconsistency in the record must be explained by the petitioner in future filing if it wishes to use this evidence to establish the petitioner's ability to pay the proffered wage. See *Matter of Ho, supra*.

<sup>3</sup> 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 time frame, including the period from the priority date onward.

<sup>4</sup> 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a

Year	W-2 Wages	Net Income	Net Current Assets
2001	\$33,642.32	(\$779)	\$25,674
2002	\$19,021.75	(\$37,769)	\$591
2003	\$39,938.72	(\$121,924)	(\$124,161)
2004	\$34,231.39	(\$139,089)	(\$256,599)
2005	\$35,296.34	\$91,481	
2006	\$35,296.34	\$10,807	(\$121,901)
2007	\$792	(\$11,616)	(39,311)

Thus, the petitioner has not established its continued ability to pay the proffered wage with either wages paid to the beneficiary, net income, or net current assets for 2002, 2003, 2004, 2006, or 2007.

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.

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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).

<sup>5</sup> 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. 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.