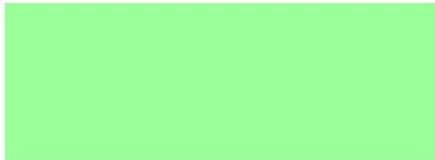


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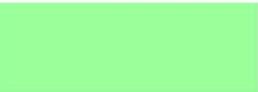
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

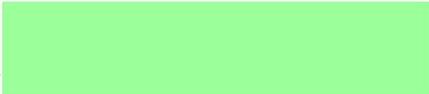
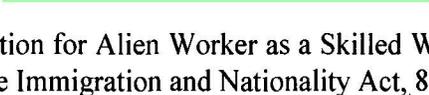


U.S. Citizenship
and Immigration
Services



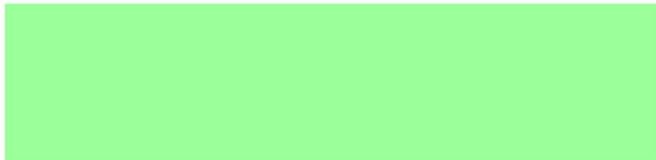
DATE: **SEP 28 2012** OFFICE: VERMONT SERVICE CENTER

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 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 in accordance with the instructions on 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.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a construction roofing contractor. It seeks to employ the beneficiary permanently in the United States as a roofer. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

The director approved the petition on October 15, 2003. On September 12, 2007, the agent who filed the labor certification and the petition on behalf of the petitioner, was found guilty of immigration fraud in the U.S. District Court for the The court found that “prepared and filed a variety of forms, including but not limited to forms ETA 750, forms I-140.” The decision also states that the “defendant and his co-conspirators produced false letters on false letterhead stating that an alien had specific employment experience so the alien would appear to be qualified for a certain position.” The court decision also states that created false tax documents, including IRS Forms 1099s.

On September 25, 2008, the director notified the petitioner of his intent to revoke the approval of the petition. The director informed the petitioner that pleaded guilty to conspiracy to commit immigration fraud in violation of Title 18, U.S.C. § 371 and 1546(a). The director instructed the petitioner to submit a statement attesting that the petitioner had knowledge that the labor certification was filed and that it represented a bona fide job offer. The petitioner was further instructed to submit specific evidence of its ability to pay the proffered wage from the priority date and independent, objective evidence that the beneficiary had two years of experience as a roofer prior to the priority date.

The petitioner failed to provide all of the evidence requested by the director in the notice of intent to revoke. The director revoked the approval of the petition, determining that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, that the petitioner had not established that the beneficiary met the conditions of the labor certification, and that the petitioner had failed to provide requested evidence that precludes a material line of inquiry pursuant to 8 C.F.R. § 103.2(b)(14).

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The record shows that the appeal is properly filed 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.

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.²

As set forth in the director's January 20, 2009 revocation, at issue in this case is whether or not the petitioner has established the ability to pay the proffered wage as of the priority date with independent, objective evidence. The petitioner must demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. The beneficiary has not yet obtained lawful permanent residence. Also at issue is whether the beneficiary has met the terms of the labor certification as of the priority date of the petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.43 per hour (\$39,174.40 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, the petitioner claimed to have been established in 1992, and to currently employ 60 workers, however the petitioner did not complete the portion of Form I-140 Part 5 for annual income, gross annual income or net annual income. The petitioner did not submit its federal tax

² 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).

returns, therefore a determination of its fiscal year cannot be made.³ On the Form ETA 750B, signed by the beneficiary on March 30, 2001, the beneficiary claimed to have worked for the petitioner since April 1997.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 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'l Comm'r 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 stated that it has employed the beneficiary since 1997. The record contains Forms W-2 listing the petitioner as the employer and the beneficiary as the recipient, however the record also contains copies of the beneficiary's income tax returns from 2001, 2002, 2003, 2004, 2005 and 2006 all listing [REDACTED] as the preparer. As [REDACTED] has admitted to submitting false tax documents to the United States Government in a United States District Court, this cannot be considered credible evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner failed to provide additional independent, objective evidence of the wages it claims to have paid the beneficiary. Therefore, the AAO cannot conclude that the petitioner has paid the beneficiary any wages since the priority date.

In determining the petitioner's ability to pay USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

³ The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii).

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, a showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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).

In a statement from the petitioner dated October 13, 2008 and submitted with the petitioner's response to the director's intent to revoke, the owner of the petitioner stated, "We do not release our Corporate Tax Returns in regards to evidence of ability to pay the proffered wage." Instead, the petitioner provided a copy of a [REDACTED] report. This is not among the evidence listed at 8 C.F.R. § 204.5(g)(2) required to establish ability to pay. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

On appeal, the petitioner provided Internal Revenue Service (IRS) tax return transcripts for tax years 2005, 2006 and 2007; however the IRS will provide these records for only the current year and three prior processing years, therefore information for 2004 and earlier was not available.

- For 2005, the tax transcript stated net income of (\$304.00).
- For 2006, the tax transcript stated net income of (\$12,417.00).
- For 2007, the tax transcript stated net income of \$46,196.00.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. However, the IRS tax transcripts do not provide sufficient information to make a net current assets determination.

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.

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's*

⁴According 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.

Tea House, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The labor certification states that the beneficiary qualifies for the offered position based on experience as a roofing installer with [REDACTED] in Frederiskburg [sp], Virginia from August 1994 until February 1997. The labor certification also states the beneficiary has been employed as a roofing installer with the petitioner since April 1997. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter from [REDACTED] stating that the company employed the beneficiary as a roofing installer from August 1994 until February 1997. However, the letter does not appear on professional letterhead, does not give specific dates of employment and does not detail the specific duties of the position. More importantly, the top of the letter contains the name and address of [REDACTED] the city is spelled "Frederisburk," while under the signature the city is spelled "Frederisburg," both different than the spelling on the labor certification. An internet search reveals a reference to [REDACTED] in Fredericksburg, Virginia, this creates an inconsistency which was not resolved by the petitioner.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

In response to the director's intent to revoke the approval of the petition, the petitioner submitted a second experience letter signed by [REDACTED] of [REDACTED]. This letter states that the company employed the beneficiary as a roofing installer from August 8, 1994 to February 1997. The letter further states that the beneficiary was trained to use the tools and equipment required to be a roofer. Finally, the letter states that the company keeps the records of its employees for only five

years and as such they no longer have any additional documentation in support of the claim that they employed the beneficiary. Again, this letter does not appear on letterhead and does not specify the duties of the position.

On appeal, counsel states that the petitioner submitted a notarized letter from the beneficiary's previous employer attesting to his experience. Although the record contains two different letters attesting to this employment, neither is notarized. Finally, counsel asserts that there is no fraud in this case, and that the beneficiary was employed by the petitioner before, during and after the approval of both the labor certification and the I-140, thereby confirming the petitioner's desire to employ the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In summary, the agent who prepared and filed the instant petition and underlying labor certification for the petitioner was found guilty of immigration fraud. The court found that the agent created fraudulent employment letters and tax documents. The conviction of the petitioner's agent raises doubts concerning the employment letters and tax documents in the record of proceeding. When these issues were raised, the petitioner failed to provide additional independent, objective evidence to establish its ability to pay the proffered wage and the beneficiary's qualifying experience for the offered position.

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.