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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

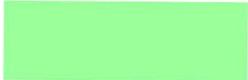


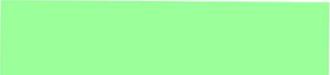
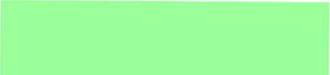
U.S. Citizenship
and Immigration
Services



DATE: JUN 17 2013

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 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 "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, 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 determined that the petitioner failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. Specifically, he found that the petitioner had not demonstrated its ability to pay the proffered wage in 2002, 2005 and 2007. He denied the petition accordingly.

The AAO found that the petitioner established its ability to pay the proffered wage in all years from 2001 through 2007, except 2005, and dismissed the petitioner's appeal on that basis. In its motion to reopen, the petitioner submits additional evidence and argues that it possessed the ability to pay the proffered wage in 2005.

The motion to reopen complies with the regulation at 8 C.F.R. § 103.5(a)(2) because it states new facts and supports them by documentary evidence. Specifically, the petitioner states that it paid its sole shareholder compensation that he could have foregone to pay the beneficiary's proffered wage in 2005. The petitioner also submits a copy of an Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement as evidence of its compensation to the shareholder in 2005.

The record shows that the motion is properly filed and timely. 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 with the motion.¹

The petitioner must establish its ability to pay the proffered wage as of the petition's priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Here, the petition's priority date is April 2, 2001, which is the date an office in the DOL's employment service system accepted the Form ETA 750 for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states the proffered wage as \$14.00 per hour for regular time and \$21.00 per hour for

¹ The submission of additional evidence on appeal and motion 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 motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

overtime. The labor certification states a 45-hour work week for the position, including 40 regular hours and five overtime hours. The annual proffered wage is therefore \$34,580.

In its November 29, 2012 decision, the AAO determined the petitioner's ability to pay the proffered wage by examining the wages that the petitioner paid the beneficiary and its annual net income and net current asset amounts, as reported on its federal income tax returns for the years 2001 through 2007.² The AAO also considered the totality of the circumstances in this case, assessing the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

The record shows that, in 2005, the petitioner paid the beneficiary wages of \$19,189.64, which is \$15,390.36 less than the annual proffered wage of \$34,580. The petitioner's 2005 tax return reports insufficient annual amounts of net income (\$0) and net current assets (-\$43,026) from which to pay the difference between the wages the beneficiary received and the annual proffered wage. For 2001 and 2002, the AAO found that the petitioner's tax returns showed that it paid its sole shareholder sufficient amounts of officer compensation that he could have foregone and allocated to pay the beneficiary's annual proffered wages in those years. Because the petitioner's tax return shows that it did not pay the shareholder any officer compensation in 2005, however, the AAO determined that the petitioner failed to establish its ability to pay the proffered wage in 2005.

In the instant motion, counsel asserts that the AAO erred in finding that the petitioner did not compensate its shareholder in 2005. The petitioner submits a copy of an IRS W-2 form showing that it paid its shareholder \$115,000 that year. Because the shareholder has stated his willingness and ability to forego his compensation, counsel argues that the petitioner has demonstrated its ability to pay the beneficiary's proffered wage in 2005.

Despite the evidence that the petitioner paid its sole shareholder \$115,000 in 2005, it has not established its ability to pay the beneficiary's proffered wage that year. In finding that the shareholder could have foregone and allocated compensation from the petitioner in 2001 and 2002 to pay the beneficiary's proffered wage in those years, the AAO stressed that the petitioner had reported the shareholder's compensation as "officer compensation" on lines 12 of its 2001 and 2002 IRS Forms 1120 U.S. Corporation Income Tax Returns. The AAO found that the officer compensation reflected additional company funds, the annual amounts of which varied depending on the company's profitability, and that the shareholder had authority to allocate the funds as he saw fit.

For 2005, the petitioner has not demonstrated that it compensated its shareholder from company

² Reliance on federal income tax returns to determine a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See 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).

funds that he could have allocated at his discretion. The copy of the petitioner's 2005 federal tax return, line 12, "Compensation of officers," is blank, which shows that the petitioner did not pay any officer compensation that year.³ Because the petitioner did not report any officer compensation in its 2005 tax return, the W-2 form appears to reflect the petitioner's payment of a \$115,000 salary to its shareholder in 2005.⁴

If the shareholder's 2005 compensation constituted salary, then the petitioner has not compensated the shareholder from company funds that he could have allocated at his discretion. Rather, the shareholder's compensation would reflect funds allocated specifically and only to compensate the shareholder for services rendered. The shareholder's \$115,000 salary would therefore not reflect additional company funds that he could have allocated at his discretion to pay the beneficiary's proffered wage in 2005.

While the shareholder may claim that he would have foregone part of his \$115,000 salary to pay the beneficiary's proffered wage in 2005, the AAO cannot consider the personal assets of a company officer when determining a corporate petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) (a corporation is a legal entity separate from its officers and other companies); *see also Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) ("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"). The petitioner has not demonstrated that the shareholder's 2005 compensation constituted officer compensation or payment from other company funds that he could have allocated at his discretion.

Moreover, even if the petitioner paid the shareholder's 2005 compensation from funds over which he had discretionary authority to allocate, the petitioner has not established that the shareholder had the financial ability to forego the compensation. The petitioner has not submitted copies of the shareholder's personal income tax returns and/or other evidence of the shareholder's financial status in 2005 to show that he could have paid the living expenses of himself and any dependents without the compensation. If the shareholder could not have afforded to forego enough of his compensation

³ The petitioner's Schedule E of its 2005 tax return indicates that there is only a single shareholder of the corporation, and that no compensation was paid in 2005, as all "Amount of compensation" lines in that schedule are blank.

⁴ In his brief in support of the motion, counsel refers to the payment as a "salary," stating that the shareholder "received \$115,000 in salary" in 2005. The statements of counsel, however, do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not indicate whether the petitioner regularly paid its shareholder a salary in addition to annual shareholder compensation. In any further filings, the petitioner must establish whether the amounts reported are officer compensation or a salary, by providing independent, objective evidence, such as the officer's W-2 forms, personal tax returns, or other evidence documenting the type of compensation received from the entities for all years from the petition's priority date onward.

to pay the beneficiary's proffered wage in 2005, then the petitioner could not demonstrate its ability to pay the proffered wage that year.

In addition, a review of the tax returns of the petitioner and another construction company in which its shareholder owns stock casts doubt on the annual officer compensation amounts that the entities purportedly paid the shareholder. The tax returns show that the shareholder received annual officer compensation from both companies in every year from 2001 through 2007, except 2005 when the petitioner did not pay any officer compensation. In reporting the officer compensation amounts on Schedules E of their tax returns, however, each company states that the shareholder devoted "100" percent of his time to its business during the years in which the shareholder received officer compensation from both companies.

The shareholder could not have devoted all of his time to both companies in the same years. Therefore, the companies' tax returns appear to reflect inaccurate information regarding the annual officer compensation amounts they paid to the shareholder. The inaccuracies cast doubt on the reliability of the information in the companies' tax returns and the purported officer compensation amounts that the shareholder received. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition. *See Matter of Ho*, 19 I&N Dec. 481, at 591-92 (BIA 1988) (the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

For the foregoing reasons, the AAO finds that the petitioner's 2005 compensation to its sole shareholder and his willingness to forego it fails to establish the petitioner's ability to pay the beneficiary's proffered wage that year.

Counsel also argues that, in rejecting the petitioner's \$150,000 line of credit as evidence of its ability to pay the proffered wage, the AAO failed to consider that the credit line reflects "a long-term, solid relationship" between the petitioner and its creditor. Counsel argues that the petitioner's sole shareholder has authority to use the credit line for any purpose, including paying the beneficiary's proffered wage.

The petitioner has established that it has had a line of credit since before the petition's priority date. But the petitioner has failed to establish that the credit line enables it to pay the beneficiary's proffered wage. The record contains copies of two letters, both dated August 12, 2010, from the president of a company that sells concrete and masonry products.⁵ One letter states that the petitioner has been the company's customer since April 1999. The other letter indicates that, as of August 10, 2010, the balance on the petitioner's \$150,000 credit line was \$32,000 and that the petitioner was "[c]urrent" on its payments, which are due within 30 days of its receipt of supplies. In an August 24, 2010 letter, the petitioner's sole shareholder states that the petitioner has always kept its credit level

⁵ One of the two letters is unsigned, reducing the reliability of its contents. *See Matter of H-L-H & Z-Y-Z*, 25 I&N Dec. 209, 214, n. 5 (BIA 2010) (holding that unsigned, unauthenticated documents are entitled to minimal weight as evidence).

between \$30,000 and \$40,000, well below the \$150,000 maximum.

The record shows that the petitioner's credit line is with a supplier. Thus, unlike a line of credit from a bank that allows a borrower to obtain cash to meet payroll obligations, the petitioner's credit line appears to allow it to obtain business supplies in advance of payment. The petitioner has not sufficiently explained how its ability to obtain business supplies on credit demonstrates its ability to pay the beneficiary's proffered wage.

Counsel argues that the line of credit allows the petitioner "to manage its cash flow to finance its operations." But this vague statement and the evidence in the record do not demonstrate that the credit line conserved sufficient cash flow to pay the beneficiary's proffered wage in 2005. In its previous decision, the AAO advised the petitioner that it must submit financial documentation, such as audited cash flow statements, if it wishes to rely on its credit line as evidence of its ability to pay the proffered wage. The petitioner's motion does not contain any evidence that the credit line augmented its financial ability to pay the beneficiary's proffered wage in 2005. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972) (going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings).

Moreover, as the AAO indicated in its previous decision, lines of credit do not establish the availability of funds at specific times because they are not guarantees of loans. *See Rahman v. Chertoff*, 641 F.Supp.2d 349, 351-52 (D.Del. 2009) (the AAO reasonably disregarded the petitioner's line of credit in determining its ability to pay the proffered wage because credit lines are unenforceable commitments to loan and cannot establish the ability to pay at the time of filing).

For the foregoing reasons, the AAO finds that the petitioner has failed to establish its ability to pay the beneficiary's proffered wage based on its line of credit.

Finally, counsel argues that the AAO misinterpreted one of the petitioner's arguments on appeal and failed to properly consider the petitioner's relationship to the other construction company in which its sole shareholder owns stock. Rather than suggesting consideration of the combined assets of the two companies to demonstrate the petitioner's ability to pay the proffered wage, counsel states that the petitioner urges the AAO to consider "the special and unique relationship" between the entities.

In an affidavit dated March 6, 2009 and in his letter of August 24, 2010, the petitioner's sole shareholder states that he owns all of the petitioner's stock and half of the other construction company's stock. He states that he operates the companies as two units of the same enterprise, with the companies sharing employees, administrative staff, equipment, and storage facilities. He states that he assigns employees to the projects of both companies based on "manpower needs," not on the abilities of the companies to pay the employees' wages.

The record shows that both companies issued W-2 forms to the beneficiary every year from 2001 through 2007. The sums of the annual wages that the beneficiary received from both companies, as

reflected on his W-2 forms, exceed the annual proffered wage rate in all of those years, except 2001 and 2002. The shareholder states that, had he known that the beneficiary's wages from the other company would not be considered in determining the petitioner's ability to pay the proffered wage, he would have assigned the beneficiary to work solely on the petitioner's projects and directed other employees to perform the work that the beneficiary did on the other company's projects. Had the beneficiary worked solely on the petitioner's projects, the shareholder claims that "the wage expense of each company would have remained unchanged and [the beneficiary's] annual earnings would be the same in each year, except that it would have been reported only on the W-2 issued by [the petitioner]."

The shareholder's assertions do not appear to be supported by the record. The assertions that the beneficiary could have worked solely for the petitioner without affecting his earnings and the companies' wage expenses would be true only if the petitioner had sufficient, alternate work for the beneficiary during the time periods he worked for the other company. If, however, the shareholder had assigned the beneficiary to work on the other company's projects because the petitioner then lacked projects of its own for him, the beneficiary's earnings or the companies' wage expenses would have differed. If the petitioner had no projects for the beneficiary and he could not work for the other company, the petitioner might have either stopped paying him for no work, which would have decreased his earnings, or might have paid him for performing no work, which would have increased its wage expenses.

The petitioner has not submitted any evidence that it had sufficient, alternate work for the beneficiary during the time periods he worked for the other company. It has therefore failed to corroborate the shareholder's assertions that the beneficiary could have worked solely for the petitioner without affecting the beneficiary's earnings and the companies' wage expenses. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceeds. *See Matter of Soffici*, 22 I&N Dec. at 165, *citing Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Further, the petitioner must establish its eligibility at the time of filing, and may not become eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm'r 1971). The petitioner has therefore failed to establish its ability to pay the beneficiary's proffered wage based on its relationship with the other construction company.

Thus, the petitioner's evidence and counsel's assertions in this motion do not outweigh the preponderance of the evidence in the record, which shows that the petitioner lacked the financial ability to pay the proffered wage from the petition's priority date onward.

In addition, USCIS records show that the petitioner has filed three I-140 petitions on behalf of other beneficiaries since 2004. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages of all the I-140 beneficiaries from the priority date of the instant petition until the other beneficiaries obtained lawful permanent resident status or their petitions were denied, withdrawn or revoked. 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not establish: the priority date, proffered wage or wages paid to each beneficiary; whether any of the other petitions have been withdrawn, revoked, or denied; or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the petitioner has failed to establish its continuing ability to pay not only the beneficiary's proffered wage, but also the proffered wages of its other I-140 beneficiaries.

In its previous decision, the AAO considered the magnitude of the petitioner's business activities and determined that the totality of the circumstances did not establish its ability to pay the beneficiary's proffered wage in accordance with *Sonegawa*. Because the petitioner must demonstrate its ability to pay the proffered wages of three other I-140 beneficiaries in addition to the proffered wage of the instant beneficiary, the AAO concludes that the totality of the circumstances in this case continue to weigh against the petitioner's claim that it has had the continuing ability to pay the beneficiary's proffered wage since the April 2, 2001 priority date.

The evidence submitted does not establish the petitioner's continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

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 motion to reopen is granted and the decision of the AAO, dated November 29, 2012, is affirmed. The petition remains denied.