



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: NOV 01 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a "mechanic and repairer." 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 ability to pay the beneficiary the proffered wage from the priority date of the visa petition in 2001 through 2007. 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 April 15, 2013 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.

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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$21.87 per hour (\$45,489.60 per year based on 40 hours per week). The Form ETA 750

states that the position requires four years of experience in the job offered as a mechanic of heavy equipment.

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.<sup>1</sup>

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 1980 and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 6, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000.

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).

As stated above, at issue in this matter is whether the petitioner had the ability to pay the beneficiary's proffered wage for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. 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 W-2 Forms in the record (and an Earnings Statement for 2007) demonstrate that the petitioner paid the beneficiary the following wages for 2001 through 2007:

- 2001 - \$37,039.50
- 2002 - \$39,904.00
- 2003 - \$41,324.50

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<sup>1</sup> 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).

- 2004 - \$44,712.00
- 2005 - \$47,177.13
- 2006 - \$48,120.78
- 2007 - \$38,568.00 (stated on the beneficiary's Earnings Statement as of October 19, 2007)

The petitioner has established that it paid the beneficiary wages in excess of the \$45,489.60 proffered wage for 2005 and 2006. Thus, the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary for 2001, 2002, 2003, 2004, and 2007. Those amounts are:

- 2001 - \$8,450.10
- 2002 - \$5,585.60
- 2003 - \$4,165.10
- 2004 - \$777.60
- 2007 - \$7,921.60 (as of October 19, 2007)

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 whether the petitioner had sufficient net income or net current assets<sup>2</sup> to pay the difference between the wage paid, if any, and the proffered wage. 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).

The record contains the petitioner's tax return for 2007, which states sufficient net income (\$973,298.00) to pay the difference between the beneficiary's proffered wage and the wages actually paid for this year as shown in the record. Therefore, due to the wages paid to the beneficiary for 2005 and 2006 and the petitioner's tax return for 2007, the director's decision regarding the petitioner's ability to pay the proffered wage for 2005, 2006, and 2007 is withdrawn.

However, the record does not contain the petitioner's tax returns for 2001 through 2004. On appeal, counsel for the petitioner states in a cover letter, dated March 3, 2013, that these tax returns have been requested from the IRS and that they will be forwarded to the AAO. The AAO has not received any of these documents nearly eight months later. Accordingly, for the years 2001, 2002,

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<sup>2</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

2003, and 2004, the petitioner has not established that it had sufficient net income or net current assets to pay the difference between the beneficiary's proffered wage and the wages paid.

Therefore, for 2001, 2002, 2003, and 2004 the petitioner has not established that it had the continuing ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner's income statements demonstrate that it had paid significant amounts for payroll from 2001 through 2007 that should be considered toward the petitioner's ability to pay the proffered wage. However, these income statements have not been audited and there is no indication as to who prepared them. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the difference between the proffered wage and the wages paid to the beneficiary in all relevant years.

On appeal, counsel states that the regulations at 20 C.F.R. § 656.20(c) and 20 C.F.R. § 656.40, in effect at the time of the labor certification, only require that the prospective employer pay 95% of the prevailing wage. Pursuant to 20 C.F.R. § 656.40(a)(2)(i) [2001], "the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within five percent of the average rate of wages." The wage rate listed on the application is \$21.87 per hour. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding. The proffered wage listed on the Form ETA 750 already accounts for the adjustment of 5% of the prevailing wage. Therefore, the petitioner must demonstrate its ability to pay the full proffered wage as listed on the Form ETA 750. Further, counsel's assertion that the petitioner paid the beneficiary at least 95% of the proffered wage in 2004 does not explain the deficiencies in 2001, 2002, and 2003.

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 (Reg'l Comm'r 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 states on the Form I-140 that it has been in business since 1980 and that it employs 15 workers. As stated above the record does not contain the petitioner's tax returns for 2001 through 2004 to demonstrate whether the petitioner had the ability to pay the difference between the proffered wage and the wages paid to the beneficiary for these years. The petitioner has also not provided any evidence of uncharacteristic expenses or losses during these years for the AAO to consider in the totality of the circumstances. The record does not contain any evidence of the petitioner's reputation in the industry. 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 difference between the proffered wage and the wages paid for 2001, 2002, 2003, and 2004. The petitioner did establish its ability to pay the difference between the proffered wage and the wages paid for 2005, 2006, and 2007, and as the director determined, the proffered wage for 2008, 2009, 2010, 2011, and 2012.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.