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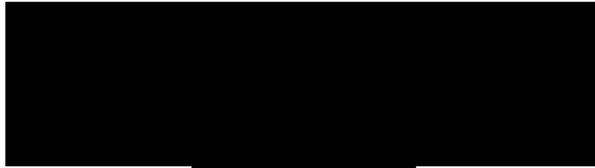
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
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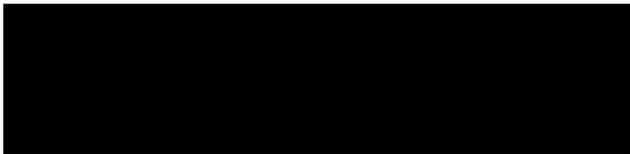


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 21 2008
LIN 06 223 52043

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment based 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 sustained. The petition will be approved.

The petitioner is an engineering/surveying firm. It seeks to employ the beneficiary permanently in the United States as a surveyor. As required by statute, a ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the

Department of Labor. See 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 9089 was accepted for processing on January 17, 2006. The proffered wage as explicitly stated on Part A of the ETA 9089 is \$63,502 per year. On Part K of the ETA Form 9089, signed by the beneficiary on March 22, 2006, the beneficiary claims to have worked for the petitioner since April 5, 2004.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on July 27, 2006, the petitioner claims that it was established in 1977, currently employs three workers, and has a gross annual income of \$282,604 and an annual net income of \$35,318.

In support of its ability to pay the proffered wage and in response to the director's request for evidence, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2005. The returns indicate that the petitioner files its taxes using a standard calendar year. The 2005 corporate tax return is the most relevant to the petitioner's priority date of January 17, 2006. It contains the following information:

	2005
Net Income ¹	\$29,318
Current Assets	\$ 9,451
Current Liabilities	\$ 3,989
Net Current Assets	\$ 5,462

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

¹ Where an S Corporation's income is exclusively from a trade or business, CIS 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 17e (2005) of Schedule K. See Instructions for Form 1120S, 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 deductions shown on its Schedule K for 2005, the petitioner's net income is found on line 17e of Schedule K.

² According 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.

The petitioner further provided, through counsel, copies of the 2004 and 2005 individual federal income tax returns of [REDACTED] a personal financial statement for the period ending 12/31/06, and a summary of personal and family household expenses for 2006. Mr. [REDACTED] is named as an owner on the petitioner's corporate tax return, Schedule K-1 and a profile of the petitioner's company that was submitted to the record identifies him as the petitioner's sole shareholder. This profile also included various projections of the petitioner's profit and loss and projected income statements for 2006 through 2010.

Following a review of the evidence submitted, the director denied the petition on March 20, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage through the financial documentation provided to the record. The director noted that neither the petitioner's net income nor net current assets as shown on its 2005 tax return was sufficient to pay the proffered wage. He also observed that the petitioner had not provided any evidence of wages paid to the beneficiary.

On appeal, the petitioner, through counsel, submits additional evidence including a copy of the petitioner's 2006 corporate income tax return. It indicates the following:

	2006
Net Income ³	\$49,519
Current Assets	\$ 7,480
Current Liabilities	\$ 168
Net Current Assets	\$ 7,312

Further provided on appeal are copies of the beneficiary's Wage and Tax Statements (W-2s) for 2005 and 2006. They reflect that the petitioner paid the beneficiary wages of \$46,963.15 in 2005 and \$46,861.94 in 2006.

Counsel asserts on appeal that the wages paid to the beneficiary should be considered in support of the petitioner's ability to pay the proffered wage of \$63,502. We note that because the petitioner has not employed the beneficiary at the full proffered wage does not mandate a denial of the immigrant visa petition. Current regulations do not actually require the obligation to pay the wage offered in the ETA Form 9089 to begin until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification.⁴

With regard to the personal holdings or individual assets belonging to principal shareholder(s) of the corporate petitioner, such as is presented here in the form of copies of the principal shareholder's personal federal tax returns, it is noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of

³Because the petitioner had additional deductions shown on its Schedule K for 2006, the petitioner's net income is found on line 18 of Schedule K.

⁴ This may not foreclose the existence of a separate legal obligation to pay at least the prevailing wage pursuant to different regulatory provisions applying to aliens with non-immigrant status.

the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period.

In this case, counsel's point relevant to the contradictions in the director's request for evidence issued on January 9, 2007, is well taken. It was clear on the petition that the petitioner is structured as a corporation, yet the request for evidence identified the petitioner as a sole proprietorship and proceeded to request financial information related to [REDACTED] individually. Additionally, the request for the beneficiary's W-2s appeared to be predicated on whether he was being paid the equivalent proffered wage, rather than requesting all evidence of compensation. For that reason, the W-2s submitted on appeal will be considered as part of the review of the petitioner's ability to pay the proffered wage. They indicate that the petitioner's payment of \$46,963.15 to the beneficiary in 2005 was \$16,538.85 less than the proffered annual salary of \$63,502. In 2006, his salary of \$46,861.94 was \$16,640.06 less than the proffered wage.

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, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In this case, the petitioner demonstrated its ability to pay the proffered wage in 2005 and in 2006. The petitioner's 2005 net income of \$29,318 was enough to cover the \$16,538.85 shortfall resulting from the comparison of actual wages paid and the proffered wage and more significantly, in the year covering the priority date, its 2006 net income of \$49,519 was sufficient to meet the \$16,640.06 difference between actual wages of \$46,861.94 paid to the beneficiary and the proffered wage of \$63,502.

Based on a review of the underlying record and the evidence and arguments submitted on appeal, it may be concluded that the petitioner established a continuing ability to pay the proffered wage.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition is approved.