

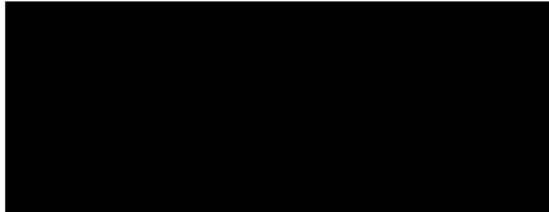
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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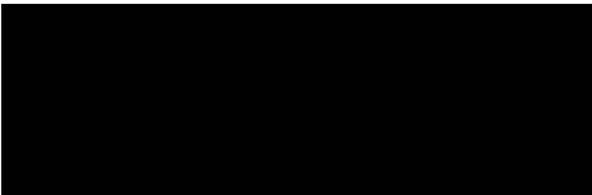
Petitioner:

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 law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner¹ is a water treatment full line supplier. It seeks to employ the beneficiary permanently in the United States as an engineer-R&D. As required by statute, the petition is accompanied by a ETA Form 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 continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting 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 the [U.S. Citizenship and Immigration Services (USCIS)].

The AAO notes that the director in his decision dated July 16, 2007, stated that the petitioner submitted an incomplete Form I-140, i.e. Part 5, that did not state the gross and net incomes of the petitioner, and the petitioner submitted no evidence of its ability to pay the proffered wage with the petition.

¹ The petitioner has submitted a corporate board of director's resolution by the directors of [REDACTED] signed on various dates in 2004 changing the name of the company to [REDACTED]

alia, to submit additional evidence of its ability to pay the proffered wage starting from the September 29, 2003 priority date, including "federal income tax returns, audited financial statements, or annual reports for 2003 through 2006." In response, counsel submitted the petitioner's audited financial statements for 2002, 2003, 2004, and 2005, as well as interim financial statements for 2006.² Additionally, the chief financial officer (CFO) of the petitioner submitted a letter dated April 13, 2007, stating that the petitioner employs "in excess" of 145 individuals and has the ability to pay the proffered wage.

The director in his decision stated that USCIS was not required to accept the CFO's letter in lieu of annual reports, federal tax returns, or audited financial statements. The AAO notes that the language of the pertinent regulation at 8 C.F.R. § 204.5(g)(2) states "In a case where the prospective United States employer employs 100 or more workers, the director *may* [emphasis added] accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage."

The director's decision found that the petitioner's CFO, along with the said letter, failed to submit "any information concerning the petitioner's finances." However, the AAO finds that the petitioner submitted its audited financial statements for 2002, 2003, 2004, and 2005 along with the letter which is evidence required by the regulation. This portion of the director's decision is withdrawn.

Therefore, as set forth in the director's denial, the single 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 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 (Act. Reg. Comm. 1977).

Here, the ETA Form 750 was accepted on September 29, 2003. The proffered wage as stated on the ETA Form 750 is \$48,200.00 per year. The ETA Form 750 states that the position requires a "bachelor's degree in environmental engineering and 2 years experience in water/wastewater/environmental applications/research."

² 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 interim financial 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.

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).³

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1974, and to currently employ 145 workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the ETA Form 750B, signed by the beneficiary on August 25, 2003, the beneficiary did not claim to have worked for the petitioner. However, evidence in the record indicates that the beneficiary is employed by the petitioner.

On appeal, counsel asserts in an explanatory letter dated August 13, 2007, submitted in support of the appeal, that the director erred in his determination that the petitioner did not have the ability to pay the proffered wage by failing to "give weight" to the statement by the CFO that the petitioner employed 100 or more workers. Further, counsel contends that the director erred in his assessment of the petitioner's financial statements and erred in the "over-all assessment" of the petitioner's ability to pay.

As stated above and as found in the record of proceeding, the petitioner has submitted the following relevant evidence: a letter from counsel dated August 13, 2007; a letter dated April 13, 2007, from the petitioner's CFO that the petitioner employs "in excess" of 145 individuals and has the ability to pay the proffered wage; the petitioner's audited financial statements for 2002, 2003, 2004, and 2005 and interim financial statements for 2006; U.S. federal income tax returns (Form 1120) for 2003, 2004 and 2005; the petitioner's Statement of Deposits and Filings quarterly wage reports for the period from April 26, 2003, to the December 31, 2006 (the statement evidences 146 employees); Wage and Tax Statements Forms (W-2) issued by the petitioner to the beneficiary in the following amounts: in 2003-\$48,479.10; in 2004-\$50,161.16; in 2005-\$51,854.95; and in 2006-\$57,459.18; and earning statements evidencing wages paid by the petitioner to the beneficiary for the period from January 1, 2007, to July 31, 2007, stating year to date earnings of \$37,469.81 (and evidencing an hourly rate of \$29.44 or \$61,235.14 yearly).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). As the case progressed, the petitioner submitted a statement from its CFO, audited financial statements, and then, its U.S. federal tax returns for 2002, 2003, 2004 and 2005 including Forms W-2 and pay statements, but the director did not find that this evidence established the petitioner's ability to pay. 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).

later based on the ETA Form 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Comm. 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 established that it employed and paid the beneficiary the full proffered wage from the priority date based upon the Forms W-2 and earning statements aforesaid submitted into the record for 2003, 2004, 2005, 2006, and 2007.

Accordingly, the evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

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