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U.S. Department of Homeland Security  
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Washington, DC 20529



**U.S. Citizenship  
and Immigration  
Services**

*Handwritten initials*

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: SEP 03 2004

IN RE:

Petitioner:

[Redacted]

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:

[Redacted]

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.

*Handwritten signature of Robert P. Wiemann*

for Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a cosmetics company. It seeks to employ the beneficiary permanently in the United States as a quality control technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a statement.

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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. 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 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$19.65 per hour, which equals \$40,872 per year. The Form ETA 750 states that the position requires two years of experience in a quality control position.

With the petition, the petitioner submitted a copies of its 1997 and 1998 Forms 1120S, U.S. Income Tax Return for an S Corporation. Because the priority date is January 14, 1998, information pertinent to the petitioner's finances during 1997 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Information from the 1997 return will not be further addressed.

The 1998 return shows that the petitioner declared a loss of \$304,043 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The beneficiary stated, on the Form ETA 750, Part B, that she had worked as a quality control inspector for Muebles Contessa, in San Pedro Sula, Honduras, from January 1979 through October 1982. The petitioner, however, submitted no evidence in support of that employment claim.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and did not show that the beneficiary has the requisite two years experience in quality control, the Vermont Service Center, on November 16, 2002, requested evidence pertinent to both of those issues.

The Service Center requested evidence that the beneficiary had the requisite two years of quality control experience as of the priority date. Consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii), the Service Center requested that the evidence be in the form of letters from employers and include the name, address, and title of the writer, a specific description of the beneficiary's duties, but stated that if such evidence were unavailable, other evidence would be considered.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's 1999, 2000, and 2001 Federal tax returns, with all schedules and attachments. Further, noting that the Form ETA 750, Part B states that the petitioner has employed the beneficiary since August 1997, the Service Center requested copies of the Form W-2 Wage and Tax Statements showing the amounts paid to the beneficiary during 1998, 1999, 2000, and 2001.

The Service Center also asked (1) whether the beneficiary would fill a newly created position, (2) if not, how long the position has existed, (3) how much the petitioner has been paying the incumbent in the position, and (3) the name of the incumbent. The Service Center requested evidence of the wages paid to the incumbent, evidence the position was vacated, and copies of the petitioner's Form 941 for the previous four quarters.

In response, counsel submitted (1) a printout of web content purporting to show that Outsourcing Services Group (OSG), acquired the petitioner in September of 2001, (2) a printout of web content showing unaudited financial information for OSG at the end of 2001 and at the end of the first, second, and third quarters of 2002, (3) a 2000 W-2 form showing that the petitioner paid the beneficiary \$13,388.84 during that year, and (4) pay stubs for the pay periods ending November 30, December 3, December 8, and December 21, 2000<sup>1</sup> showing that the petitioner employed the beneficiary during those pay periods at \$6.75 per hour. The total shown on those pay stubs as paid to the beneficiary is \$1,027.87.

The petitioner did not provide the requested evidence of the beneficiary's employment experience, the requested 1999, 2000, and 2001 tax returns, or the requested 1998, 1999, and 2001 W-2 forms. Further, the petitioner did not answer the questions pertinent to the proffered position and the incumbent in that position.

The director denied the petition on May 2, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel asserts, "Petitioner's evidence submitted with the petition established it's [sic] ability to pay the prevailing wage throughout the pendency of the petition." Counsel did not address the director's finding that the petitioner had failed to demonstrate that the beneficiary has the requisite experience. No further information, argument, or documentation has been submitted to supplement the appeal.

The petitioner has not presented any evidence that the beneficiary has the requisite two years of experience. The petitioner has not, therefore, demonstrated that the beneficiary is eligible for the proffered position.

As to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, this office notes that an issue exists in this matter not raised by the decision of the director. Whether OSG is a successor-in-interest to the original petitioner within the meaning of *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981) is unclear. That case provides that the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. The successor-in-interest petitioner must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. It must further show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business.

A print out of web content of OSG's website provided by counsel states that OSG acquired the petitioner during September of 2001. Counsel submitted no evidence pertinent to any of the other requirements of *Matter of Dial Repair Shop*, 19 I&N Dec. at 482-483. This office will not assume that OSG is a successor-in-

<sup>1</sup> The pay stubs submitted also included a fifth stub, for a pay period ending December 22, 2000, showing no hours worked but earnings of \$50. The significance of that additional pay stub is unknown to CIS, though it may represent a Christmas bonus.

interest within the meaning of *Dial Repair Shop*. Evidence pertinent to the finances of OSG have not been shown to be relevant to this case and will not be further addressed.

The priority date is January 14, 1998. The proffered wage \$40,872 per year.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed and paid the beneficiary. Because counsel did not provide all of the requested W-2 forms, or sufficient other evidence pertinent to some years, the amount the petitioner paid the beneficiary during some years is unknown. The beneficiary did not establish that it paid any wages to the beneficiary during 1998, 1999, 2001 or 2002.

The petitioner established, through submission of a 2000 W-2 form and pay stubs, that it paid the beneficiary \$13,388.84 during that year. That amount is also 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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The three types of evidence that the petitioner, Dermal Science, might have submitted to show its ability to pay the proffered wage are copies of annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2). The petitioner submitted none of those three types of evidence pertinent to 1999, 2000, 2001, or 2002.

The petitioner submitted its 1998 Form 1120S, U.S. Income Tax Return for an S Corporation showing that it declared a loss of \$304,043 during that year. The petitioner was unable to pay any portion of the proffered

wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner was unable, therefore, to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during 1998. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

The petitioner has submitted no evidence of any funds available to pay the proffered wage during 1999. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

The petitioner has demonstrated that it paid the beneficiary \$13,388.84 during 2000, but has not demonstrated that any funds were available to pay the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner has submitted no evidence of any funds available to pay the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has submitted no evidence of any funds available to pay the proffered wage during 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience.

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.