

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent unauthorized disclosure
invasion of personal privacy

[Handwritten signature]
APR 27 2009

[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN-03-120-53398

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:
[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]
Robert P. Wiemann, Director
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 The director's decision will be withdrawn in part and affirmed in part.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail manager. 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 denied the petition accordingly. The director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel submits a brief and additional evidence.

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 first issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date. 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$34,611 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in January 1990, to have a gross annual income of \$669,000, and to currently employ four workers. In support of the petition, the petitioner submitted a notarized declaration from the petitioner's owner, [REDACTED] and an unnotarized letter from its bookkeeper, [REDACTED] Book-Keeping Service, signed by [REDACTED]. The [REDACTED] declaration stated that he wholly owns and operates S corporations as of 2001; that he is a 50% owner and operates another corporation, [REDACTED] Inc.; and that he has purchased "and/or initiated" two other businesses. He also stated that he could have reduced the amount of compensation he received from the petitioner, "dba Courtright Market," in 2001 and used that towards funds for paying the proffered wage. [REDACTED] letter restated much of [REDACTED] letter, and also stated that the petitioner would have had ample funds if the proffered wage were pro-rated to the priority date and had excess cash assets because it bought more inventory than it needed in 2001.

The petitioner provided a copy of a W-2 form issued to [REDACTED] from [REDACTED] Market, with the same address as the petitioner and employer identification number (EIN) of [REDACTED], which is also indicated as the petitioner's EIN on the first page of the petitioner's visa petition. The petitioner also submitted a copy of its Form 1120, U.S. Income Tax Return for an S Corporation, for 2001 reflecting net income¹ of \$16,068 and net current assets of \$65,864. The petitioner also submitted a copy of [REDACTED]'s corporate tax return, as well as copies of [REDACTED] Market's bank account statements in 2001 and 2002.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 24, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested clarification about representations made on the visa petition, and evidence of the petitioner's continuing ability to pay the proffered wage in 2002 or any wage payments made to the beneficiary.

In response, counsel stated that her law firm made clerical errors on the visa petition and submitted documentation to corroborate that Courtright Market is the trade name of the petitioner. The petitioner also submitted its corporate tax returns for 2002 reflecting net income² of \$21,341 and net current assets of \$80,371. The petitioner also submitted more bank account statements and an additional declaration from [REDACTED] about his other business ventures and willingness to forego past compensations in order to pay the proffered wage. Counsel stated that the beneficiary did not work for the petitioner and thus the petitioner could not submit W-2 forms evidencing payment of wages to the beneficiary.

The director determined 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, on October 1, 2003, denied the petition, stating that the petitioner's net income was less than the proffered wage and the assets of [REDACTED] could not be considered.

On appeal, counsel asserts that the evidence was sufficient and if Citizenship and Immigration Services (CIS) denies the petition, she would request that CIS obtain another original Form ETA 750 from the Department of Labor (DOL) so the petitioner can re-file the petition.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's reliance on the assets of [REDACTED] is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958);

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

² See note 1, *supra*.

A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Additionally, funds already paid to [REDACTED] are not funds available to pay the proffered wage as they have already been used regardless of [REDACTED] retrospective assertion about what he might do if circumstances were different. Such speculation has little weight in these proceedings.

Additionally, the petitioner's bookkeeper requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

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 reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net incomes in 2001 and 2002 were \$16,068 and \$21,341, respectively, which are both less than the proffered wage of \$34,611. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income in 2001 or 2002.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be

considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 2001 and 2002, were \$65,864 and \$80,371. Both amounts are greater than the proffered wage of \$34,611. Thus, the petitioner has demonstrated its continuing ability to pay the proffered wage out of its net current assets in 2001 and 2002.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In both years, the petitioner's net current assets are greater than the proffered wage. The petitioner has, therefore, shown the ability to pay the proffered wage during 2001 and 2002.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date. Thus, the portion of the director's decision pertaining to the petitioner's continuing ability to pay the proffered wage beginning on the priority date is withdrawn.

The second issue to be discussed in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which, as noted above, is April 17, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of jeweler. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Y
	High School	Y
	College	Blank

³ 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.

College Degree Required Blank
Major Field of Study Blank

The applicant must also have two years of experience in the job offered in order to perform the job duties listed in Item 13, which states "Manage [s]tore. Oversee operations and maintenance. Supervise cashiers. Balance and accounting for income. Keep records of sales, food and merchandise prices, inventory, and total sales volume. Prepare sales activity reports to managements [sic]." Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he listed the following:

- a. Sales Manager for [REDACTED] Inc., in Amman, Jordan, from March 1997 to August 1999, for which he managed sales activities; directed staffing and training; performed evaluations to develop and control sales programs; reviewed market analyses to determine customer needs, volume, price, and discount rates; placed orders; oversaw operations and maintenance; and supervised day shift sales, food, merchandise prices, inventory, and sales volume.
- b. Client did not have a valid work authorization, therefore there is no work experience in the United States.

With the initial petition, the petitioner submitted a letter in Arabic with an English translation lacking certification, stating that the beneficiary worked full-time as a sales manager for [REDACTED] Tourist Restaurant from March 1997 to August 1999. Many of the duties listed on the ETA 750B were included in this letter. The letter does not provide any contact information about the restaurant or information about the author of the letter, [REDACTED]

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on June 24, 2003. The director requested clarification concerning the discrepant information about the beneficiary's prior employer's name since it was listed as [REDACTED] on his ETA 750B and [REDACTED] in the letter provided.

In response to the director's request for evidence, the petitioner submitted two letters. One letter is written by [REDACTED] and states that the beneficiary worked as a full-time sales manager from January 1995 to February 1997. Aside from [REDACTED] name and phone number, no other contact information is provided and the identity of the employing entity is unclear. Additionally, no information is provided concerning [REDACTED] identity and his role within an employment organization. The letter states that the beneficiary's job duties while employed were those similar to the duties of the proffered position.

The other letter submitted into the record of proceeding in response to the director's request for evidence is written by [REDACTED] and states that the beneficiary worked as a full-time sales manager from March 1997 to August 1999. The letter contains an [REDACTED] Restaurants stamp with a phone number. No information is provided concerning [REDACTED] identity or role at [REDACTED] Restaurant. The letter states that the beneficiary's job duties while employed by [REDACTED] Restaurant were those similar to the duties of the proffered position.

Neither letter provides a certified English translation. Counsel's accompanying letter provided no additional clarification about discrepant information concerning the different names used for the beneficiary's prior employer.

The director denied the petition on October 1, 2003 stating the petitioner failed to comply with his request to clarify the discrepant information about the beneficiary's prior employer's name. The director also noted that the two English versions of the two letters submitted in response to the request for evidence were very similar and contained the same typographical errors. Finally, the director noted that the letters' contents failed to include the name, address, and title of the employer, or the specific dates of employment.

On appeal, counsel asserts that the letters were similar because the same translator translated both of them. Additionally, counsel, on appeal, states that her office made the typographical error on the Form ETA 750B misspelling the name of the beneficiary's prior employer. Counsel also states on appeal that "[b]oth employment letters contain the name of the person writing, the date the letter was written, and the specific dates of [the] beneficiary's employment. Moreover, the letters contain the evidence of authenticity, namely, official company stamps, letterheads, and post office stamps, evidencing the letters were originally mailed from Jordan."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(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 AAO concurs with the director's decision pertaining to the beneficiary's qualifications for the proffered position. The letters provided do not identify the authors of those letters as "trainers or employers" and fails to provide the "address, and title of the trainer or employer."

The AAO also notes that beyond the decision of the director, the letters were not translated with a proper certification concerning the translation provided⁴. The translation of the letters failed to comply with the terms of 8 C.F.R. § 103.2(b)(3): “*Translations*. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.”

To summarize, the letters do not establish that the beneficiary has two years of experience as a sales manager because they do not provide details required by 8 C.F.R. § 204.5(1)(3) nor a proper translation certificate as required by 8 C.F.R. § 204.5(1)(3). Therefore, the petitioner has failed to establish that the beneficiary is qualified for the proffered position as delineated on the ETA 750A. Thus, the AAO affirms this portion of the director’s decision.

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 dismissed. The director’s decision is withdrawn in part and affirmed in part.

⁴ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff’d*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).