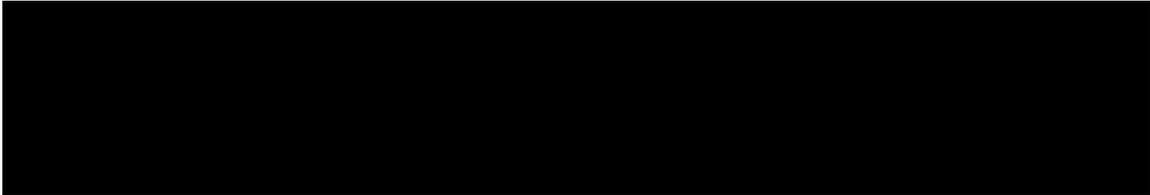


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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services



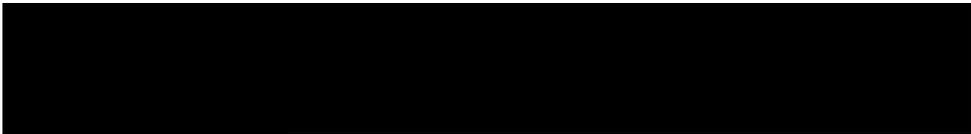
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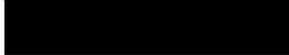
Office: VERMONT SERVICE CENTER

Date: JAN 25 2005

IN RE: Petitioner:

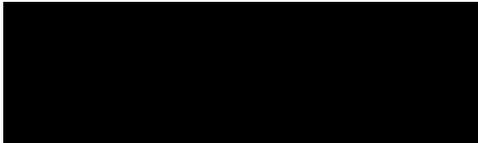


Beneficiary:



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.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning, alteration and tailoring firm. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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.

On appeal, counsel asserts that the evidence establishes the petitioner's ability to pay the certified wage.

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 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 March 7, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, which amounts to \$29,120 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to have been established in 1994, to have a gross annual income of approximately \$400,000 per year, and to currently employ four workers. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of its federal Form 941, Employer's Quarterly Federal Tax Return for the quarter ending March 31, 2002. This returns shows that the petitioner reported wages paid for six employees. The beneficiary's name is not included among the petitioner's employees.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered, on November 13, 2002, 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 ability to pay the proffered wage beginning on the priority date of March 7, 2001 and continuing until the present.

In response, the petitioner submitted a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It shows that the petitioner reported net income of -\$3,564. Schedule L of the tax return indicates that the petitioner had \$19,697 in current assets and \$34,760 in current liabilities, resulting in -\$15,063 in net current assets. Besides net income, CIS will consider a petitioner's 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.¹ A corporation's year-end current assets and liabilities are shown on Schedule L. 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. Counsel's transmittal letter submitted with the petitioner's response states that the 2001 tax return only reflects two months of the petitioner's financial data as it had purchased [REDACTED] in November 2001.

In addition, counsel submitted copies of the petitioner's checking account statements for the period from November 29, 2002 through January 31, 2003. Counsel also submitted a copy of the beneficiary's Wage and Tax Statement (W-2) issued by the petitioner for 2002. It shows that the petitioner paid the beneficiary \$2,400 in 2002. Copies of four checks dated January 4th, January 11th, January 18th, and January 25, 2003 issued by the petitioner to the beneficiary for \$442 each also accompany the beneficiary's W-2. A letter, dated January 4, 2003, from the petitioner's president, explains that the beneficiary had working full-time for the petitioner since December at a rate of \$14.00 per hour.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on April 15, 2003, denied the petition. The director noted that the petitioner's tax return did not indicate that it had the ability to pay the proffered wage in the year of filing, 2001.

On appeal, counsel resubmits copies of the documents previously provided and contends that the director's analysis of the 2001 tax return is flawed because it only represents two months of the petitioner's financial data. Counsel asserts that the director's interpretation only considered one year "rather than many years of business operation." Counsel argues that such items as salaries and wages paid and officer compensation paid in 2001 should also be reviewed. Counsel asserts that the beneficiary's 2002 W-2 and copies of paychecks show that the petitioner has had no trouble paying the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, a W-2 showing \$2,400 paid to the beneficiary beginning in December 2002 and four pay checks from January 2003 is not probative of the petitioner's ability to pay the proffered wage beginning on the priority date of March 7, 2001. To the extent that the petitioner may have paid wages to the beneficiary can be taken into consideration in some cases, but there must also be evidence consistent with the requirements of 8 C.F.R. 204.5(g)(2) submitted to balance against any wages paid to the

¹ 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.

beneficiary. As noted by the director, the petitioner's payment of wages to the beneficiary in December 2002 and January 2003 does not establish the continuing ability to pay the proffered wage beginning on the priority date of the petition.

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 officer compensation or cumulative wages to other employees in excess of the proffered wage, as suggested by counsel, is also 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.

In this case, the petitioner's 2001 tax return reflects that neither its reported net income of -\$3,564, nor its net current assets of -\$15,063 was sufficient to cover the proffered wage of \$29,120. It cannot be concluded that the petitioner's ability to pay the proffered wage is demonstrated by these figures.

Counsel maintains that the director erred in recognizing only one year of data rather than many years of business operation. It is noted that the director analyzed the information provided by the petitioner. The petitioner did not provide many years of evidence of financial ability. It provided one tax return, one quarterly tax return and three bank statements. It is further noted that the three bank statements only partially present the petitioner's information, as they do not reflect other liabilities that may affect the petitioner's financial status. Further, three bank statements showing various amounts on different dates during a two-month period do not demonstrate a sustainable ability to pay a proffered wage. The assertions of counsel in this regard do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel argues on appeal that the petitioner would incur extreme hardship if the preference petition were not approved allowing it to permanently hire the alien beneficiary. Counsel cites no statutory or regulatory provisions that allow consideration of a petitioner's hardship in determining the eligibility of an employment-based visa petition filed under section 203(b)(3) of the Act, therefore such a contention will not be considered.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner submit annual reports, audited financial statements, or federal tax returns in order to demonstrate a continuing ability to pay. The AAO cannot conclude that the evidence provided in this case is sufficient to demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, one of the fundamental reasons that this petition cannot be approved is because the petitioner failed to carry its burden to show that it is a successor-in-interest to the corporate entity, "Sun Rite Corp. d/b/a Sun Rite Cleaners & Tailors," which appears on the approved labor certification. The

record contains insufficient evidence that the petitioner qualifies as a successor-in-interest to Sun Rite Corp. d/b/a Sun Rite Cleaners & Tailors. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, as noted above, the record suggests that the petitioner only acquired the original employer in November 2001, while the priority date of the petition is March 7, 2001.

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.