

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B 6



FILE: [Redacted]
EAC 04 018 50026

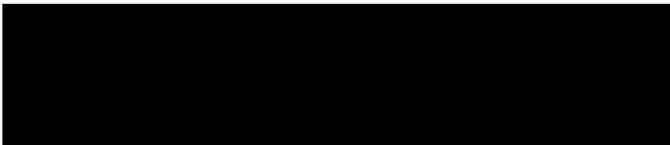
Office: VERMONT SERVICE CENTER

Date: JUN 17 2005

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

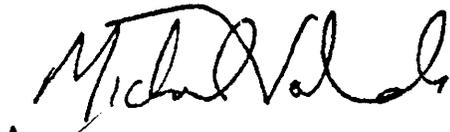
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

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

The petitioner is a jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a mold maker. 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 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 granting 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$18.48 per hour, which equals \$38,438.40 per year.

On the Form ETA 750B, signed by the beneficiary on January 23, 2001, the beneficiary did not claim to have worked for the petitioner. He did claim to have been self-employed in New York City doing janitorial work, plumbing, gardening, and repairs since March 1998. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

On the petition, the petitioner stated that it was established on October 14, 1997. The petitioner declined to state the number of workers it employs in the space provided. The petition states that the petitioner's gross annual income is \$471,187. The petitioner did not state its net annual income on the petition. In the space provided for the petitioner to state its net annual income, the petitioner entered "See attached letter. See W-2 of [REDACTED]

In support of the petition counsel submitted (1) a 2001 Form 1099 Miscellaneous Income statement showing that during that year the petitioner paid [REDACTED] non-wage compensation of \$8,785.22, (2) a 2001 Form W-2 Wage and Tax Statement showing that, during that year the petitioner paid [REDACTED] wages of \$9,117.66, (3) a 1998 Form W-2 Wage and Tax Statement showing that the petitioner paid wages of \$3,400 to the beneficiary during that year, (4) a 1999 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary wages of \$10,503.73 during that year, (5) a 2000 Form W-2 Wage and Tax Statement showing that the petitioner paid wages of \$12,163.19 to the beneficiary during that year,¹ (6) a 2001 Form W-2 Wage and Tax Statement showing that, during that year, the petitioner paid wages of \$10,198.99 to the beneficiary, (7) a 2002 Form W-2 Wage and Tax Statement showing that during that year the petitioner paid wages of 10,158.41 to the beneficiary, and (8) the petitioner's 2001 Form 1065, U.S. Return of Partnership Income.

The 2001 tax return shows that the petitioner reports taxes pursuant to the calendar year and that, during 2001, it declared ordinary income of \$14,807. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

A letter from the petitioner's president/part-owner, dated October 3, 2003, was submitted with the petition. That letter states that [REDACTED] and [REDACTED] are no longer working for the petitioner, and that the petitioner would use their salaries to pay the beneficiary. The petitioner's president noted that, during 2001 the petitioner's ordinary income shown on its tax return, plus the cash shown on its Schedule L, plus the amount paid to [REDACTED] during that year, plus the amount paid to [REDACTED] plus the amount paid to the beneficiary, added together, are greater than the amount of the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 2, 2004, requested additional evidence pertinent to that ability. The Service Center specifically requested documentary evidence of the exact date of termination of [REDACTED] a copy of the petitioner's 2002 Federal tax return, and a copy of the petitioner's 2003 tax return if available.

In response, the petitioner submitted a letter from its president, dated August 3, 2004, stating that [REDACTED] employment with the petitioner was terminated on April 4, 2002 and he was last paid on April 19, 2002, and that [REDACTED] employment was terminated on May 10, 2002 and he was last paid on May 28, 2002.

The petitioner also submitted (1) a 2002 Form 1099 showing that the petitioner paid non-wage compensation of \$2,045 [REDACTED] during that year, (2) a 2002 Form 1099 showing that the petitioner paid non-wage compensation of \$7,300.18 to [REDACTED] during that year, (3) a 2002 W-2 Form showing that the petitioner paid wages of \$10,158.41 to the beneficiary during that year, (4) a 2002 Form 1099 showing that the petitioner paid non-wage compensation of \$22,337.57 to [REDACTED] during that year, (5) a 2003 Form 1099 showing that the petitioner paid non-wage compensation of \$23,424.72 to [REDACTED] during that year, (6) a 2003 Form 1099 showing that the petitioner paid non-wage compensation of

¹ Because the priority date is April 25, 2001, evidence of amounts the petitioner paid to the beneficiary during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The 1998, 1999, and 2000 W-2 forms are relevant for another reason, however, as will appear below.

\$11,685.85 to [REDACTED] during that year, (7) a 2003 Form 1099 showing that the petitioner paid non-wage compensation of \$11,491.84 to the beneficiary during that year, (8) a 2003 W-2 form showing that the petitioner paid the beneficiary wages of \$7,485.67 during that year, (9) a 2003 W-2 form showing that the petitioner paid the beneficiary wages of \$3,428.36 during that year, (10) and an additional copy of the petitioner's 2001 Form 1065, U.S. Return of Partnership Income.

The petitioner did not provide the requested 2002 and 2003 tax returns or an explanation of that omission.

The petitioner submitted another letter from its president, dated August 23, 2004. That letter notes that during 2001, the amounts paid to the beneficiary [REDACTED] plus the petitioner's ordinary income, exceeded the annual amount of the proffered wage. That letter further notes that during 2002 the amounts paid to the beneficiary, [REDACTED], taken together, exceeded the annual amount of the proffered wage. The petitioner's president argued that the petitioner has, therefore, demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 November 10, 2004, denied the petition.

On appeal, in addition to copies of documents previously submitted, counsel submits (1) a 2001 Form 1099 showing that the petitioner paid non-wage compensation of \$26,152.53 to [REDACTED] during that year, (2) a 2002 Form 1099 showing that the petitioner paid non-wage compensation of \$5,257.62 to the beneficiary during that year, (3) a letter, dated November 24, 2004, from the petitioner's president, and (4) a pay stub for the pay period ending November 6, 2004, and purporting to show that the petitioner paid the beneficiary \$18.75 per hour during that pay period and had, during 2004 to that date, paid the beneficiary a total of \$24,006.02.

Counsel did not submit the petitioner's 2002 and 2003 tax returns, as previously requested, or offer any explanation for that omission.

In his letter the petitioner's president adds the petitioner's 2001 ordinary income to the amounts paid to the beneficiary [REDACTED] and [REDACTED] as before. To that amount, the petitioner's president adds the amount paid to [REDACTED] during that year, and states that this sum shows the petitioner's ability to pay the proffered wage during 2001. The petitioner's president did not explain why he had added the wages of [REDACTED] to the funds available to pay additional wages during that year.

As to 2002, the petitioner's president adds the amounts paid to the [REDACTED] the beneficiary's Form 1099, and the W-2 form showing wage payments to the beneficiary. To that amount, the petitioner's president adds the amount on the 2002 Form 1099 issued to the beneficiary. The petitioner's president states that the sum of those amounts shows the petitioner's ability to pay the proffered wage during 2002. The petitioner's president did not explain why the amount on the beneficiary's 2002 Form 1099 was not included in the calculation pertinent to the petitioner's ability to pay the proffered wage as shown on the petitioner's president's letter of August 23, 2004.

As to 2003 counsel asserts that the same calculation shown on the August 23, 2004 letter shows the petitioner's ability to pay the proffered wage during that year.²

Further, in his letter, the petitioner's president states that the beneficiary worked for the petitioner part-time until April 2003, when he began to work full-time for the petitioner.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient to show that the petitioner is able, in addition, to pay the proffered wage. Wages the petitioner paid to its other workers are not necessarily available to pay wages to the beneficiary. If the petitioner wishes to use wages paid to other workers as an index of its ability to pay wages to the beneficiary, the petitioner must show, (1) that the other employee was performing the duties of the proffered position, (2) that, if it were permitted to hire the beneficiary, the beneficiary would replace those other workers,³ and (3) that in working full-time the beneficiary would replace the hours of those other workers. That is, that the hours those other employees worked per week did not, in the aggregate, exceed 40 hours.

Neither counsel nor the petitioner has ever demonstrated, nor even alleged, however, that the various workers whose earnings are cited as demonstrating the petitioner's ability to pay additional wages to the beneficiary worked for the petitioner as mold makers. Even had they made such a statement, the record contains no evidence of the hour or duties of the other workers. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The W-2 forms and Forms 1099 in the instant case, however, show that the beneficiary worked for the petitioner beginning, at the latest, sometime during 1998. That the beneficiary worked as a mold maker for the petitioner is directly contradicted by the beneficiary's version of his employment history as stated on the Form ETA 750, Part B. On that form, the beneficiary was instructed to list all jobs he had held during the last three years and all jobs he had ever held related to the proffered position. On that form, which the beneficiary signed on January 23, 2001, the beneficiary stated that he had been self-employed doing janitorial, plumbing, gardening, and repair work in Queens, New York since March 1998. The beneficiary listed no other employment in the United States.

That the petitioner's version of the beneficiary's employment history, as evidenced by the W-2 forms and Form 1099, is inconsistent with the beneficiary's own version of his employment history, as stated on the Form ETA 750, Part B, casts doubt on the reliability of the evidence in this case. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective

² Although counsel makes a minor arithmetic error in the 2003 calculation submitted on appeal, it is otherwise unchanged from the 2003 calculation shown on the petitioner's August 23, 2004 letter.

³ This office further notes that the fundamental purpose of the visa category pursuant to which the petition in this case was filed is to aid U.S. business owners in filling jobs for which workers are otherwise unavailable. If the petitioner sought to replace one or more of his workers with the beneficiary out of preference, rather than necessity, that would be inconsistent with the purpose of the instant visa category. Under some circumstances this office might, in addition, require the petitioner to demonstrate the reason his previous employees left, were dismissed, or, if they are still working for the petitioner, why they wish to leave or why the petitioner wishes to replace them with the beneficiary.

evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

That the beneficiary received Form 1099 from the petitioner since 1998 is consistent with his claim of having done janitorial work and odd jobs since March of that year. If the petitioner is now claiming that all of the payments to the beneficiary were for performing the duties of the proffered position, however, that is inconsistent with the beneficiary's statement, on the Form ETA 750, Part B, indicating that he had done no such work in the United States as of January 23, 2001. This inconsistency raises the issue of what portion of the wages and non-wage compensation paid to the beneficiary since the priority date was for performing the duties of the proffered position.

The petitioner's president states that the beneficiary began to work full-time during April of 2004. How many hours the beneficiary worked during the various years since the priority date is not stated, nor does the record contain information from which it can be computed. How many of the hours of the petitioner's former employees the beneficiary could have replaced without exceeding 40 hours per week, is therefore unknown. For this additional reason, what amount of the previous employees compensation could have been used to pay the wages of the proffered position is unknown.

For both reasons, the amounts paid to the petitioner's other employees will not be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

As to amounts paid to the beneficiary, counsel and the petitioner have submitted (1) 2002 W-2 Form showing that the petitioner paid wages of \$10,158.41 to the beneficiary during that year, (2) a 2002 Form 1099 showing that the petitioner paid non-wage compensation of \$5,257.62 to the beneficiary during that year (3) a 2003 W-2 form showing that the petitioner paid the beneficiary wages of \$7,485.67 during that year, (4) another 2003 W-2 form showing that the petitioner paid the beneficiary wages of \$3,428.36 during that year, (5) a 2003 Form 1099 showing that the petitioner paid non-wage compensation of \$11,491.84 to the beneficiary during that year, and (4) a pay stub showing that the petitioner had paid the beneficiary \$24,006.02 during 2004 as of November 6 of that year, and was then paying him at the rate of \$18.75.

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 in the proffered wage 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.

The petitioner issued the beneficiary two W-2 forms during 2003. Whether one of those W-2 forms is a correction and replaced the other is unknown. Whether the petitioner chose to show the beneficiary's 2003 wages in unequal amounts on two W-2 forms is unclear, and this office is unable to discern any reason why it might. Whether the amount shown on one or the other of those W-2 forms, or the amounts on both, added together, equals the wages paid to the beneficiary during 2003 is unknown. Neither counsel nor the petitioner explained the anomaly of issuing two W-2 forms to the same employee during the same year. In the absence of clear and convincing evidence that the petitioner paid those amounts to the petitioner during 2003, those amounts will not be included in the calculation of funds available to pay the proffered wage during that year.

Further, why the petitioner issued the beneficiary both a W-2 form and a Form 1099 during the various years since the priority date is unexplained and unknown to this office. That the petitioner was issued both forms purports to indicate that the beneficiary performed two different jobs for the petitioner during those years, one as an employee and one as a contractor. If either the W-2 forms or the Forms 1099 were issued for services the beneficiary provided other than those of the proffered position, then the amount shown on those forms do not show the ability to pay any portion of the proffered wage for the performance of the proffered position. Because the petitioner has not demonstrated what amount of the compensation paid to the beneficiary during the various years was for performing the duties of the proffered position, the compensation shown on the various W-2 forms and Forms 1099 in this case shall not be included in the calculation of the funds available to pay the proffered wage during those years.

Given that the evidence does not demonstrate what portion of the funds the petitioner paid the beneficiary were for performing the duties of the proffered position, the amount shown on the 2004 pay stub will also be omitted from the calculation of funds available to pay the proffered wage. The petitioner has not submitted clear and convincing evidence of any amounts that it paid the beneficiary for performing the duties of the proffered position.

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 what portion of other employees' wages the petitioner has demonstrated were available to pay the wages of the proffered position. In the instant case, the petitioner has implied, but neither alleged nor demonstrated, that some of its employees were working as mold makers. Further, the petitioner has stated, as to some of its workers, and implied, as to others, that they have left its employ, leaving additional funds to pay the proffered wage to the beneficiary. In order to rely upon the wages it paid to those workers as indices of its ability to pay the proffered wage, the petitioner must demonstrate that those employees were performing the duties of the proffered position and either have left its employ or will leave when the beneficiary is able to hire the beneficiary. Allegations and implications are insufficient to sustain the petitioner's burden. None of the amounts shown on the various W-2 forms and Forms 1099 in this case will be counted in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

If the amount paid to the beneficiary during a given year is less than the proffered wage, CIS will 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have

considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income 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 proffered wage is \$38,438.40 per year. The priority date is April 25, 2001.

During 2001 the petitioner declared ordinary income of \$14,807. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner is obliged to demonstrate the ability to pay the proffered wage during each year since the priority date with copies of annual reports, federal tax returns, or audited financial statements. Counsel has submitted none of those documents for any year after 2001, notwithstanding that the Service Center, in the July 2, 2004 Request for Evidence, requested the petitioner's 2002 and 2003 tax returns. The petitioner has submitted no clear and convincing evidence of its ability to pay the proffered wage during 2002 and 2003.

The appeal in this matter was submitted on December 9, 2004. On that date, the petitioner's 2004 tax return was clearly unavailable. The petitioner is excused, therefore, from providing any evidence of its ability to pay the proffered wage during 2004.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.