

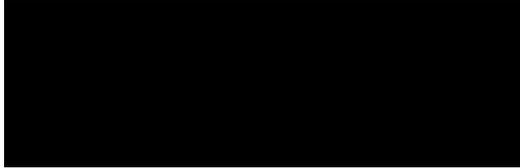
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC-02-194-50245

Office: VERMONT SERVICE CENTER

Date: MAY 18 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

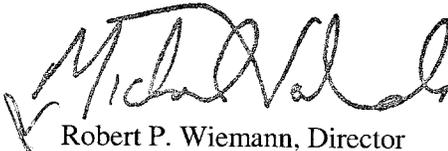
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 recycling company. It seeks to employ the beneficiary permanently in the United States as a shift supervisor. 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 was a successor in interest and 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 accordingly denied the petition.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 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 priority date in the instant petition is December 29, 1997. The proffered wage as stated on the Form ETA 750 is \$29.73 per hour, which amounts to \$61,838.40 annually. On the Form ETA 750B, signed by the beneficiary on December 26, 1997, the beneficiary claimed to have worked for the petitioner beginning in August 1995 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on May 17, 2002. On the petition, the petitioner claimed to have been established on June 4, 1998, to have a gross annual income of \$1,157,845.86, to have a net annual income of \$10,000.00, and to currently have ten employees.

In support of the petition, the petitioner submitted supporting evidence. The only financial evidence submitted consisted of a copy of the Form 1120 U.S. Corporation Income Tax Return of Jams Corporation for 2000 and a copy of the Form CBT-100 New Jersey Corporation Business Tax Return of Jams Corporation for 2000.

In a request for evidence (RFE) dated October 15, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested copies of the petitioner's federal income tax returns for 1997, 1998, 1999 and 2001. The director stated that if the beneficiary was employed by the petitioner in 1997 to 2001, the petitioner was requested to submit copies of the beneficiary's Form W-2 Wage and Tax Statements.

In response to the RFE, the petitioner submitted a letter dated January 2, 2003 signed on behalf of the petitioner by [REDACTED] whose title is not stated; copies of the Form 1120 U.S. Corporation Income Tax Returns of Jams Corporation for 1999, 2000 and 2001; copies of Form CBT-100 New Jersey Corporation Business Tax Return of Jams Corporation for 2000; and copies of Form 1099-MISC Miscellaneous Income statements of the beneficiary showing compensation received from Jams Corporation for 1999, 2000 and 2001.

In a decision dated June 24, 2003, the director determined that the petitioner had not established that it was the successor in interest to the company which filed the labor certification and 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 accordingly denied the petition.

On appeal, counsel submits a brief in the form of a statement of counsel and additional evidence consisting of a letter from the petitioner's accountant; a copy of a corporate resolution dated June 18, 1998 of Jams Corporation; a list of the petitioner's accounts receivable dated August 8, 2003; and a copy of Internal Revenue Service Form 4562, Depreciation and Amortization, of Jams Corporation for 1999.

On appeal, counsel states that a full examination of the petitioner's tax returns and of its evidence of a credit line with a bank establishes the petitioner's ability to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The ETA 750 was filed on December 29, 1997 by the employer "Jams, Inc., t/a Accurate Converters." The I-140 petition was filed on May 17, 2002 by the petitioner "Accurate Converters." On the I-140 petition, as noted above, the petitioner claimed to have been established on June 4, 1998.

On the I-140 petition, the petitioner's IRS tax number shown is a number ending with the three digits 663. The tax returns submitted in evidence are in the name of "Jams Corp." and show an employer identification number ending with the three digits 724. In a letter dated January 2, 2003, signed on behalf of the petitioner by [REDACTED] whose title is not stated, Mr. [REDACTED] states, "This letter is enclosing our corporations [sic] tax returns for the years 1999-2000 and 2001. The corporation was formed in June of 1998, taking over the assets of Paper Cutters Inc.." [sic]. The record also contains a copy of a Corporate Resolution to Borrow dated June 18, 1998 of Jams Corporation, with a taxpayer identification number ending with the three digits 724. That resolution authorizes Michael Desiderio, the president of the corporation, to borrow money on behalf of the corporation from the Hudson United Bank.

Other than the similarity in names, the record contains no evidence firmly establishing that the petitioner is the same company as the company which filed the ETA 750 labor certification application, nor evidence establishing that the tax returns in evidence are those of the petitioner. Notably, the IRS tax identification number of the petitioner differs from that shown on the tax returns in the record.

The record contains no evidence that the petitioner qualifies as a successor in interest to Jams Corporation. Moreover, the record fails to establish that the employer which submitted the ETA 750, "Jams, Inc. t/a Accurate Converters," is the same entity as "Jams Corp." or "Jams Corporation," the names which appear on the tax documents in the record.

The status of successor in interest 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. In addition, in order to maintain the original priority date, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The letter signed on behalf of the petitioner by Darren Desiderio refers to the petitioner taking over the assets of Paper Cutters, Inc., but no further information on that company is given.

Even assuming that the financial evidence in the record pertains to the petitioner, that evidence fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on December 26, 1997, the beneficiary claimed to have worked for the petitioner beginning in August 1995 and continuing through the date of the ETA 750B.

The RFE had requested copies of the beneficiary's Form W-2 Wage and Tax Statements. In a letter dated January 9, 2003 which was submitted with the petitioner's response to the RFE, counsel states that since the beneficiary does not have a valid Social Security number, he has been paid to date with 1099 forms. The record contains copies of Form 1099-MISC of the beneficiary. Those forms show the following amounts of compensation received by the beneficiary from the petitioner: \$20,085.54 for 1999; \$31,218.56 for 2000; and \$53,070.42 for 2001. Each of those amounts is lower than the proffered wage of \$61,838.40. Therefore they fail to establish the petitioner's ability to pay the proffered wage in those years. Moreover, no Forms 1099-MISC were submitted for 1997 and 1998.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The tax returns in evidence are of a corporation, Jams Corporation. After crediting Jams Corporation with compensation paid to the beneficiary, as discussed above, the amounts needed to raise the beneficiary's compensation to the proffered wage are \$41,752.86 for 1999, \$29,619.84 for 2000, and \$8,767.98 for 2001.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The tax returns of Jams Corporation show the following amounts for taxable income on line 28: \$351.00 for 1999; -\$3,351.00 for 2000; and \$2,610.00 for 2001. Since the figure for 2000 is negative and since each of the figures for 1999 and 2001 is less than the amount needed to raise the beneficiary's compensation to the proffered wage in the corresponding year, those figures fail to establish the ability of Jams Corporation to pay the proffered wage during the years 1999 through 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the tax returns of Jams Corporation yield the following amounts for net current assets: zero for the beginning of 1999; -\$59,058.00 for the end of 1999; \$167,209.00 for the end of 2000; and \$190,810.00 for the end of 2001. Since the figure for the beginning of 1999 is zero and since the figure for the end of 1999 is negative, those figures fail to establish the ability of Jams Corporation to pay the proffered wage in 1999. For 2000 and 2001 the figures for year-end net current assets are each greater than amounts needed to raise the beneficiary's compensation to the proffered wage in the corresponding year. Those figures would therefore be sufficient to establish the ability of Jams Corporation to pay the proffered wage during 2000 and 2001. The record contains no financial evidence for the year 1997, which is the year of the priority date, nor for 1998.

The corporate resolution in the record dated June 18, 1998 of Jams Corporation is sufficient to establish that Jams Corporation had applied for credit line with Hudson United Bank, Mahwah, New Jersey. The amount of principal stated on that resolution is \$75,000.00. But the record contains no documents from the Hudson United Bank. Moreover, even if a line of credit had been approved, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

If a petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that

the line of credit will augment and not weaken its overall financial position. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not necessarily improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The record also contains a list of accounts receivable of the petitioner dated August 8, 2003. The list bears no indication that it is part of an audited financial report. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

For the foregoing reasons, even if it is assumed that Jams Corporation is the petitioner, the financial evidence in the record fails to establish the ability of Jams Corporation to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly found that the record lacked evidence that the petitioner was a successor in interest to the employer which had filed the ETA 750. The director also correctly analyzed the net income as shown on the tax returns in the record and found that those figures failed to establish the petitioner's ability to pay the proffered wage during the years covered by the tax returns. The director failed to calculate the net current assets from the information shown on the tax returns. But that error did not affect the director's decision, since, as shown above, the figures for net current assets established the ability of Jams Corporation to pay the proffered wage only in 2000 and 2001, but not in 1999. Moreover, no financial evidence was submitted for 1997 or 1998. The decision of the director to deny the petition was correct, based on the evidence then in the record.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.