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

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B/G

FILE:



Office: VERMONT SERVICE CENTER

Date:

JUN 07 2006

EAC 03 242 56406

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Other Worker pursuant to § 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, Chief
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 jeweler. It seeks to employ the beneficiary permanently in the United States as a rhodium jewelry worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$11.82 per hour, which equals \$24,585.60 per year.

The petitioner submitted the Form I-140 petition in this matter on August 30, 2003. On the petition, the petitioner stated that it was established on November 12, 1997. The petitioner did not state the number of workers it employs in the space provided for that purpose. The petition states that the petitioner's gross annual income is \$793,062, but does not state its net annual income in the space provided for that purpose.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

The petition in this matter was submitted on July 20, 2003. In support of the petition, counsel submitted a copy of its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on November 12, 1997, and that it reports taxes pursuant to the calendar year and accrual convention accounting.

During 2001 the petitioner declared ordinary income of \$23,449. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$9,508 and current liabilities of \$1,598, which yields net current assets of \$7,910.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date,¹ the Vermont Service Center, on June 23, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested the petitioner's 2002 and 2003 tax returns or annual reports and, if it employed the beneficiary during 2001, 2002, or 2003, the Form W-2 Wage and Tax Statements showing wage payments to the beneficiary.

In response, counsel submitted (1) a copy of the petitioner's 2000 tax return, (2) an additional copy of the petitioner's 2001 tax return, (3) a copy of the petitioner's 2003 tax return, (4) 2000, 2001, 2002, and 2003 W-2 forms showing payments to the beneficiary, (5) a 2003 W-2 form showing wages paid to the beneficiary by JDM Gems Incorporated, (6) W-2 forms showing wages paid to the beneficiary's husband during various years, (7) photocopies of checks drawn by the petitioner to the beneficiary's order, (8) photocopies of monthly statements pertinent to the petitioner's bank account, (9) photocopies of monthly statements of the bank accounts of Forte Jewelry Incorporated and JDS Gems Incorporated, (10) photocopies of checks paid by the petitioner to the beneficiary, and (11) the 2001, 2002, and 2003 joint Form 1040 U.S. Individual Income Tax Returns of the beneficiary and the beneficiary's husband.

The priority date of the petition is April 23, 2001. Evidence pertinent to the petitioner's finances prior to that year is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner's 2000 tax return will be disregarded.

The petitioner's 2003 tax return covers only the period from January 1, 2003 to July 31, 2003 and indicates that it is the petitioner's final return. The tax return covering the balance of that year was not provided. During the portion of 2003 covered by the return the petitioner declared ordinary income of \$2,677. The corresponding Schedule L shows that at the end of that period the petitioner's current liabilities exceeded its current assets.

The 2000, 2001, 2002, and 2003 W-2 forms showing wages paid to the beneficiary show that the petitioner paid her \$7,356, \$7,842.50, \$12,126, and \$4,621.50 during those years, respectively. Again, however, evidence pertinent to payments the petitioner made to the beneficiary during 2000 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The W-2 form from JDM Gems Incorporated shows an amount it paid to the beneficiary during 2003. Although that W-2 form shows that JDM Gems Incorporated is at the same address as the petitioner nothing in the record explains the relationship between those two apparently separate corporate entities. The amount that JDM Gems Incorporated paid to the beneficiary during 2003 has not been shown to be available to the petitioner to pay the proffered wage.

¹ The petitioner failed to submit its 2002 return, which should have been available on the date the petition was submitted.

The photocopied checks are dated from January 12, 2001 to November 16, 2002. The checks were generally drawn at one week intervals on Friday and range in amount from \$171.04 to \$316.35, although most are drawn in the amount of \$217.20. The 2001 checks total \$7,315.10 and the 2002 checks total \$9,970.55.²

The proposition counsel intended to support by submitting the W-2 forms showing wages paid to the beneficiary's husband is unknown to this office, as is the proposition he wished to support by submitting the joint personal returns of the beneficiary and her husband.

Counsel did not submit the requested copy of the petitioner's 2002 tax return, nor did he explain that omission.

The acting 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 22, 2004, denied the petition. In that decision the acting director noted that the end-of-year amounts in the petitioner's bank account were less than the annual amount of the proffered wage and the petitioner's balance did not incrementally increase in an amount sufficient to pay the proffered wage. The acting director further noted that the petitioner's 2003 bank return indicated that it was the petitioner's final return, and noted that the petitioner may have gone out of business. Finally, the acting director noted that some of the bank statements submitted do not appear to pertain to the petitioner.

On appeal, the petitioner submits a statement on a Form I-290B appeal and a letter dated December 3, 2004.

The December 3, 2004 letter states that the petitioner has not gone out of business but changed its name to Forte Jewelry Incorporated for business and insurance purposes, without further explaining that necessity or how the change was accomplished. The petitioner adds that the newly formed company is in the same location as the original petitioner, employs the same personnel, and retains its original employer identification number. That statement explains the proposition that the bank statements of Forte Jewelry Incorporated were intended to support. Although the purpose for which the bank statements of JDS Gems Incorporated were submitted is not explicitly stated, counsel does state that the petitioner's owner owns this additional jewelry company, apparently implying that the funds of JDS are also available to the petitioner to pay the proffered wage.

The statement on appeal asserts that the evidence submitted is sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner argues that the bank statements need not show an end-of-year balance equal to the annual amount of the proffered wage but that each monthly statement must show an amount sufficient to pay the monthly amount of the proffered wage. The statement indicated that a brief would follow.

In the subsequently submitted brief, received February 1, 2005, counsel reiterates the arguments urged by the petitioner. Counsel also stated that the petitioner's annual cost of labor also represents an amount available to

² Because the amounts shown on the checks represent net income and the amounts shown on the W-2 forms represent gross income the check totals for 2001 and 2002 need not equal the amounts shown on the W-2 forms.

pay the proffered wage, as the petitioner would be free, if it was able to hire the beneficiary, to assign to her work previously covered by outside contractors. Counsel further states that the tax return of Forte Jewelry Incorporated for the last five months of 2003 is incomplete, but provides no evidence in support of that assertion. Finally, counsel asserts that the petitioner's gross receipts show its ability to pay the proffered wage.

Counsel submitted bank statements pertinent to a corporation other than the petitioner, also allegedly owned by the petitioner's owner, implying that the funds of that other corporation are available to the petitioner to pay additional wages as necessary.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.³ As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel's reliance on the bank statements of the petitioner in this case is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁴ 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 reported on its tax returns.

The petitioner asserts that the Cost of Labor shown on Line 3, Schedule A of its tax returns are funds available to pay the proffered wage. The evidence does not demonstrate, however, what portion, if any, of those amounts were paid to contractors for performing the duties of the proffered position. If those payments were for the performance of other essential duties, then they were not available to pay the proffered wage. The petitioner has not demonstrated that any portion of those funds was available to pay the proffered wage and they will not be further considered.

³ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

⁴ As the decision on appeal implies, a possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The petitioner's reliance on the amount of its gross receipts during the salient years is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

In the instant case counsel asserts, but provides no evidence to demonstrate, that hiring the beneficiary will increase the petitioner's revenue. Absent any indication of the amount of additional revenue, if any, that will result from hiring the beneficiary, no additional funds have been shown to be available from that source.

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 \$7,842.50, \$12,126, and \$4,621.50 during 2001, 2002, and 2003, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). See also 8 C.F.R. § 204.5(g)(2). 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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed

⁵ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

or 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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 16(d) through 18(d). 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.

The proffered wage is \$24,585.60 per year. The priority date is April 23, 2001.

During 2001 the petitioner paid the beneficiary \$7,842.50. The petitioner is obliged, therefore, to show the ability to pay the \$16,743.10 balance of the proffered wage. The petitioner declared ordinary income of \$23,449 during that year. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary \$12,126. The petitioner is obliged, therefore, to show the ability to pay the \$12,459.60 balance of the proffered wage. The petitioner did not submit its 2002 tax returns, nor any other reliable evidence of additional funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary \$4,621.50. The petitioner is obliged, therefore, to show the ability to pay the \$19,964.10 balance of the proffered wage. Because that amount is shown on a W-2 form from the petitioner, Forte Incorporated, rather than from Forte Jewelry Incorporated, this office believes that it was paid during the period from January 1, 2003 to July 31, 2003. The entire amount of the proffered wage that would have been due during that period is \$14,341.60.⁸ The petitioner must show the ability to pay the \$9,720.10 balance of that amount remaining after subtracting the \$4,621.50 actually paid.

The petitioner's tax return for the period from January 1, 2003 through July 31, 2003 shows that it declared ordinary income of \$2,677. That amount is insufficient to pay the balance of the proffered wage during that period. At the end of that period the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no evidence of any other funds available to it during that portion of 2003 with which it could have paid any portion of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during the period from January 1, 2003 through July 31, 2003.

The petitioner did not demonstrate that it paid any wages to the beneficiary during the last five months of 2003. When the petition was submitted, on August 30, 2003, the petitioner's tax return for the last five

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁸ \$24,585.60 x 7/12.

months was unavailable. However, when the request for evidence was issued in this matter on June 23, 2004, requesting evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the return for the end of 2003 should have been available. The petitioner did not then submit that form and did not explain the reason for that omission.

The appeal brief in this matter was submitted on February 1, 2005. On that date the petitioner's tax return for the last five months of 2003 should, again, have been available. In the brief counsel asserted that the return remained incomplete, but provided no evidence in support of that assertion. Under these circumstances the petitioner is not excused from demonstrating its ability to pay the proffered wage during the last five months of 2003. Because the petitioner submitted no evidence pertinent to that period it has failed to demonstrate its ability to pay the proffered wage during that period.

The record contains additional issues not addressed in the decision of denial. In the June 23, 2004 request for evidence the service center requested, *inter alia*, the petitioner's 2002 tax return. That return has never been provided. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further, on August 1, 2003 the petitioner's original name, Forte Incorporated, was apparently abandoned in favor of a new name, Forte Jewelry Incorporated. Counsel and the petitioner aver that this was merely a name change and that the petitioner retains the original premises, staff, and employer identification number.⁹

The petitioner, however, filed a final return. Presumably Forte Jewelry Incorporated has, or will, file its own return. This is an indication that the original petitioner no longer exists, but that Forte Jewelry Incorporated, a substituted petitioner, has acquired its interests.

A substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It 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.

The substituted petitioner is further obliged to 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-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

⁹ The record contains no evidence that Forte Jewelry Incorporated retains Forte Incorporated's Employer Identification Number.

No evidence has been submitted to demonstrate that Forte Jewelry Incorporated is the true successor of Forte Incorporated within the meaning of *Dial Auto Repair Shop, supra*. Further, no evidence has been submitted to demonstrate that Forte Jewelry Incorporated is able to pay the proffered wage. Again, the petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 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 as required by 8 C.F.R. § 204.5(g)(2).

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.