

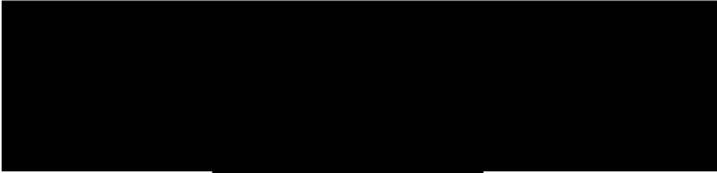
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

SRC-03-167-52288

Office: TEXAS SERVICE CENTER

Date:

SEP 28 2006

IN RE:

Petitioner:

Beneficiary:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fine jewelry sales and repairs firm. It seeks to employ the beneficiary permanently in the United States as a jeweler. 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 record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 25, 2006 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, which amounts to \$29,120.00 annually.

It may be noted that it has been approximately five years since the Application for Alien Employment Certification has been accepted and the proffered wage established. The employer certification that is part of the application states, "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." (ETA Form 750 Part A, Section 23 b).

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Evidence submitted on appeal includes copies of complete bank statements for one account of the petitioner for 2001 and 2002 and for another account of the petitioner for 2002. Partial copies of those statements had been submitted previously.

Other relevant evidence in the record includes copies of Form 1120S U.S. Income Tax Returns for an S Corporation of the petitioner for 2001, 2002, 2003, 2004 and 2005, copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001, 2003 and 2004, copies of Form 941 Employer's Quarterly Federal Returns of the petitioner for 2001 and 2002, copies of both partial and complete bank statements for three accounts of the petitioner for 2001 and 2002, copies of corporate documents pertaining to the petitioner, and copies of documents pertaining to the work experience and education of the beneficiary.

The file also contains an I-140 petition filed on May 22, 2006 by a different petitioner on behalf of the same beneficiary. That petition is for a different position at a different pay rate. That petition was approved on June 24, 2006. However, the instant petition has not been withdrawn. Since the approved I-140 petition was submitted by a different petitioner, the instant petition is not moot.

On appeal in the instant petition, counsel states that evidence pertaining to the petitioner's net income, the petitioner's net current assets and the salary actually paid to the beneficiary is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. Counsel also states that depreciation expenses should be combined with the petitioner's income as shown on its tax returns to determine the petitioner's net income. Counsel moreover states that the petitioner's assets, including cash on hand, should be considered as additional financial resources of the petitioner. Counsel states that bank statements in the record show sufficient monthly balances to pay the salary for each month at issue. Based on the evidence in the record concerning the foregoing matters, counsel offers detailed calculations for 2001 and 2002, which are the years for which the director found the evidence to be insufficient. Counsel asserts that the evidence establishes the petitioner's ability to pay the proffered wage in each of those years.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 April 18, 2001, the beneficiary did not claim to have worked for the petitioner.

On a Form G-325A submitted in support of an I-485 application of the beneficiary to adjust status to permanent residence, the beneficiary states that his work experience includes work with the petitioner Roz Jewelers, Inc., as a jeweler from January 2001 until March 2001. The Form G-325A was signed by the beneficiary on May 9, 2003. The information on the G-325A about the beneficiary's employment with the Roz Jewelers, Inc., is inconsistent with the Form ETA 750B, which declares no such employment as of April 18, 2001.

On a later form ETA 750B, signed by the beneficiary on May 18, 2006 and submitted in support of the May 22, 2006 petition the beneficiary again declares no employment by the petitioner [REDACTED]. The information on the G-325A about such employment is therefore also inconsistent with the Form ETA 750B signed by the beneficiary on May 18, 2006.

The record in the instant petition contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001, 2003 and 2004. The beneficiary's Form W-2's show compensation received from the petitioner Roz Jewelers, Inc., as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$4,500.00	\$29,120.00	\$24,620.00
2002	not submitted	\$29,120.00	\$29,120.00
2003	\$10,000.00	\$29,120.00	\$19,120.00
2004	\$25,000.00	\$29,120.00	\$4,120.00
2005	not submitted	\$29,120.00	\$29,120.00

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The record also contains copies of Form 941 Employer's Quarterly Federal Returns of the petitioner for 2001 and 2002. The quarterly reports for the year 2001 raise an evidentiary inconsistency with the Form W-2 Wage and Tax Statement of the beneficiary for that year, which shows compensation from the petitioner in the amount of \$4,500.00. The petitioner's quarterly reports for 2001 show wage and salary payments to a total of six employees over the course of the year, but the beneficiary's name does not appear on any of the quarterly reports for 2001. The quarterly reports are also inconsistent with the beneficiary's claim on the Form G-325A to have worked for the petitioner from January 2001 until March 2001.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence noted above.

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 evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001, 2002, 2003, 2004 and 2005. The record before the director closed on April 18, 2006 with the receipt by the director of the petitioner's submissions in response to a request for additional evidence which had been issued on January 18, 2006. As of April 18, 2006 the petitioner's tax return for 2005 was the most recent return available.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2003)*, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; *Instructions for Form 1120S (2002)*, available at <http://www.irs.gov/pub/irs-prior/i1120s-2002.pdf>. Similarly, some deductions appear only on the Schedule K. *See Internal Revenue Service, Instructions for Form 4562 (2003)*, at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; *Internal Revenue Service, Instructions for Form 1120S (2003)*, at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s-2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax returns indicate small amounts of income from activities other than from a trade or business and small additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include portions of the petitioner's income or all of its relevant deductions. For this reason, the petitioner's net income must be considered as the amount shown on Line 23 of the Schedule K, for income, as shown in the table below.

In the table, the \$4,500.00 shown on the beneficiary's Form W-2 for 2001 is not credited to the petitioner, since that information is inconsistent with other evidence in the record, as discussed above. Also, the record contains no evidence of any wage payments may be the petitioner to the beneficiary in 2002 or 2005.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	\$26,081.00	not applicable	not applicable
2001	\$(4,241.00)	\$29,120.00*	\$(33,361.00)
2002	\$(8,690.00)	\$29,120.00*	\$(37,810.00)
2003	\$30,980.00	\$19,120.00**	\$11,860.00
2004	\$37,030.00	\$4,120.00**	\$32,910.00
2005	\$38,105.00	\$29,120.00*	\$8,985.00

* The full proffered wage.

**Crediting the petitioner with the compensation actually paid to the beneficiary in 2003 and 2004.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2003, 2004 and 2005, but it fails to establish the petitioner's ability to pay the proffered wage in the years 2001 or 2002.

Counsel asserts that depreciation deductions should be added to the petitioner's income as shown on its tax returns. While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. For this reason, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements.

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 petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

As in the income analysis above, the \$4,500.00 shown on the beneficiary's Form W-2 for 2001 is not credited to the petitioner, since that information is inconsistent with other evidence in the record. The record contains no evidence of any wage payments may be the petitioner to the beneficiary in 2002 or 2005.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	\$11,676.00	not applicable	not applicable
2001	\$4,792.00	\$29,120.00*	\$(24,328.00)
2002	\$18,244.00	\$29,120.00*	\$(10,876.00)
2003	\$(8,401.00)	\$19,120.00**	\$(27,521.00)
2004	\$1,863.00	\$4,120.00**	\$(2,257.00)
2005	\$7,787.00	\$29,120.00*	\$(21,333.00)

* The full proffered wage.

**Crediting the petitioner with the compensation actually paid to the beneficiary in 2003 and 2004.

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not cumulative. Net income in any given year is one of the factors which affect the petitioner's assets and liabilities at the end of the year. Therefore, combining the net income and net current assets could double-count certain funds, such as cash on hand or, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. For these reasons, net income and net current assets cannot be combined in order to establish the petitioner's ability to pay the proffered wage.

Counsel also states that the petitioner's assets are additional evidence of the petitioner's ability to pay the proffered wage. Counsel's assertions fail to distinguish between total assets and current assets, and they also fail to take into account either total liabilities or current liabilities. As discussed above, CIS does not rely on total assets, but on net current assets, since net current assets may be converted into cash within a reasonable time if needed to pay the proffered wage. CIS rejects the idea that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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, be considered as financial resources available to pay the proffered wage.

As noted above, the record contains copies of Form 941 Employer's Quarterly Federal Returns of the petitioner for 2001 and 2002. Those quarterly reports show total wage payments which are generally consistent with the information on the petitioner's Form 1120S tax returns for 2001 and 2002, but the quarterly reports for 2001 and 2002 may not be complete. For some quarters separate Form 941's were filed under each of the petitioner's different trade names, for some quarters a Form 941 was filed under only one trade name, and for one quarter the Form 941 is filed under all three trade names. The total of the wages shown on the Form 941's for 2001 is \$49,100.00, which is more than the amount of \$43,100.00 claimed by the petitioner as deductions for salaries and wages that year. The difference between those two figures is \$6,000.00, which does not match the amount of \$4,500.00 shown on the beneficiary's Form W-2 from the petitioner for 2001. Therefore an analysis of the Form 941's for 2001 fails to resolve the evidentiary inconsistencies noted above concerning the beneficiary's Form W-2 for 2001.

The total of the wages shown on the petitioner's Form 941's for 2002 is \$53,709.00, which matches the amount of \$53,709.00 claimed by the petitioner as deductions for salaries and wages that year.

For the foregoing reasons, the petitioner's Form 941 quarterly reports provide no significant additional information to help establish the petitioner's ability to pay the proffered wage.

The record also contains copies of bank statements for three accounts of the petitioner issued in 2001 and 2002. Each of the accounts is the petitioner's name and in one of three different trade names used by the petitioner, apparently referring to three different lines of business carried on by the petitioner. One trade name is [REDACTED], a second is [REDACTED] and the third is [REDACTED]. The petitioner initially submitted copies of only the first page of each monthly statement for those three accounts but later submitted complete copies of most of the statements, including some of which were submitted for the first time on appeal. The record now contains complete copies of the [REDACTED] statements for 2001 and 2002, complete copies of the [REDACTED] statements for 2001, copies of the first page of each of the [REDACTED] statements for 2002 and complete copies of the [REDACTED] statements for November 2001 through December 2002.

Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and do not necessarily show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	[REDACTED]			Total
2001				
January	\$19,196.55	\$28,854.87	-	\$48,051.42
February	\$31,229.91	\$12,640.15	-	\$43,870.06
March	\$11,159.63	\$28,574.61	-	\$39,734.24
April	\$5,891.38	\$18,523.31	-	\$24,414.69
May	\$11,397.19	\$24,293.17	-	\$35,690.36
June	\$8,399.47	\$16,305.66	-	\$24,705.13
July	\$10,753.81	\$25,068.92	-	\$35,822.72
August	\$11,860.22	\$30,050.00	-	\$41,910.22
September	\$12,075.88	\$21,372.37	-	\$33,448.25
October	\$16,125.64	\$8,613.89	-	\$24,739.53
November	\$14,100.65	\$14,414.43	\$12,109.81	\$40,624.89
December	\$48,100.32	\$59,670.43	\$32,828.56	\$140,599.31

2002:				
January	\$19,745.64	\$27,436.40	\$17,548.94	\$64,730.98
February	\$10,300.41	\$23,736.84	\$16,047.15	\$50,084.40
March	\$5,300.57	\$15,553.82	\$15,989.48	\$36,843.87
April	\$12,978.07	\$13,455.93	\$9,791.14	\$36,225.14
May	\$22,114.91*	\$14,226.90*	\$7,285.20*	\$43,627.01
June	\$25,413.63	\$14,523.09	\$6,148.55	\$46,085.27
July	\$24,442.81	\$27,654.69	\$5,516.26	\$57,613.76
August	\$27,812.01	\$16,952.25	\$9,912.75	\$54,677.01
September	\$26,315.34	\$25,248.43	\$14,343.71	\$65,907.48
October	\$29,327.26	\$24,207.43	\$16,710.69	\$70,245.38
November	\$7,275.91	\$10,120.72	\$4,417.34	\$21,813.97
December	\$18,080.13	\$19,422.12	\$8,340.86	\$45,843.11

* No statements were submitted for May 2002; ending balances for that month are taken from the beginning balances on the June 2002 statements.

The average of the combined ending balances over the twenty-four months shown above is \$46,971.18. That amount is greater than the annual proffered wage of \$29,120.00. The lowest combined ending balance is \$21,813.97 in November 2002, an amount equal to approximately nine months of the proffered wage.

In his brief, counsel offers a month-by-month analysis of the ending balances in the statements for the [REDACTED] for the year 2001 and asserts that the ending balances are sufficient to pay the monthly proffered wage in those months. Counsel refers to another account of the petitioner as a "second account," but offers examples of balances both from the [REDACTED] account and from the [REDACTED] account. (Brief, page 5). For the year 2002, counsel treats the [REDACTED]'s account as the petitioner's primary checking account and refers to another account as a "secondary checking account," even though the record contains statements from all three accounts for the year 2002. (Brief, page 7). Counsel apparently failed to note that the record contains copies of statements for three separate bank accounts of the petitioner.

For the above reasons, the bank statement evidence in the record is stronger than is indicated by the analysis in counsel's brief. Counsel focuses only on statements for single accounts, and asserts that the ending balances are more than sufficient to pay the monthly proffered wage each month. But in fact, the combined balances on all three accounts in each month exceed the amount of the annual proffered wage in all but four months during 2001 and 2002.

Nonetheless, no evidence was submitted indicating how to reconcile the year-end closing balances shown on the bank statements with the year-end figures for cash assets as shown on the Schedule L's of the petitioner's Form 1120S tax returns for 2001 and 2002. On the Schedule L for 2001, the year-end cash assets are stated as \$179,811.00, while the combined balances on the three bank statements dated December 31, 2001 show a total of \$140,599.51. On the schedule L for 2002, the year-end cash assets are stated as \$116,931.00, while the combined balances on the three bank statements dated December 31, 2002 show a total of \$45,843.11. The record contains no explanation for those inconsistencies. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Moreover, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets. An analysis of the petitioner's tax returns for 2001 and 2002 indicates that petitioner had substantial ongoing expenses for items other than salaries and wages.

The petitioner's Form 1120S for 2001 shows gross receipts or sales of \$663,477.00, less returns and allowances of \$3,102.00, for a balance of gross receipts or sales of \$660,375.00. The return shows the cost of goods sold as \$419,349.00, of which \$372,181.00 is for purchases. Since the petitioner is a jewelry company, its purchases presumably were mainly for jewelry intended for retail resale. The itemization of cost of goods sold shows no amounts spent for cost of labor.

In the deductions portion of the Form 1120S for 2001, the return shows no expenses for compensation of officers and only \$43,100.00 for salaries and wages. The return shows expenses for rents of \$189,604.00, an average of \$15,800.00 per month in rents.

Similarly, the petitioner's Form 1120S for 2002 show gross receipt or sales of \$586,575.00, with no adjustment for returns and allowances. The return shows cost of goods sold as \$295,140.00, all of which is for purchases. As in the 2001 return, the itemization of cost of goods sold in 2002 shows no amounts spent for cost of labor.

In the deductions portion of the Form 1120S for 2002, the return shows no expenses for compensation of officers and \$53,709.00 for salaries and wages. The return shows expenses for rents of \$210,622.00, an average of \$17,552.00 per month in rents.

Based on the deductions for salaries and wages in the above returns, the payment of the proffered wage of \$29,120.00 to the beneficiary would have represented a 68% increase in the petitioner's payroll in 2001 and a 54% increase in the petitioner's payroll in 2002.

Although the petitioner had significant cash balances in its three checking accounts throughout 2001 and 2002, the above analysis of the petitioner's Form 1120S tax returns for those years does not indicate that those cash balances would represent funds available to pay the proffered wage to the beneficiary in those years.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net losses in 2001 and 2002. The director also calculated the petitioner's net current assets for each of those years. For 2001, the director's analysis contains an apparent minor calculation error. Also, the analysis contains an apparent typographical error, apparently omitting the word "not" from one sentence pertaining to the year 2001, which produces an analysis inconsistent with the director's finding that the petitioner had not established the ability to pay the proffered wage as of the April 27, 2001 priority date.

Although the director's decision contains errors as noted above, the decision of the director to deny the petition was correct, based on the evidence in the record before the director. 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.

Beyond the decision of the director, evidence in the beneficiary's file contains inconsistent information on the beneficiary's education.

The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Jeweler. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

14. Education (number of years)
- Grade School [blank]
 - High School [blank]
 - College [blank]
 - College Degree Required [blank]
 - Major Field of Study [blank]
- Training - yrs [blank]
- Experience
- Job Offered Yrs 2
 - Related Occupation Yrs [blank]
 - Related Occupation (specify) [blank]
15. Other Special Requirements [blank]

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition was signed by the beneficiary on April 18, 2001. On that ETA 750B, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Board of secondary Education Karachi, Pakistan	Commerce	04/75	06/77	SSC
Board of Higher Education Karachi, Pakistan	Commerce	09/77	09/79	HSC

[remaining rows blank]

On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
unemployment	[blank]	07/99	present	[blank]
[redacted]	Jeweler	03/94	06/99	Gold and silver merchant and order suppliers

[remaining row blank]

In support the I-140 petition submitted on May 22, 2006, that petitioner submitted a separate ETA 750A, Application for Alien Employment Certification, approved by the Department of Labor. On that ETA 750A, blocks 14 and 15 describe the requirements of the offered position of Operation Manager as follows:

14. Education (number of years)
- | | |
|-------------------------|-------------------------|
| Grade School | [blank] |
| High School | [blank] |
| College | 4 |
| College Degree Required | Business Administration |
| Major Field of Study | or its related field |
- Training - yrs [blank]
- Experience
- | | |
|------------------------------|-------------|
| Job Offered | Yrs 2 |
| Related Occupation | Yrs [blank] |
| Related Occupation (specify) | [blank] |
15. Other Special Requirements [blank]

The ETA 750 submitted in support of the second petition was originally for a different beneficiary. That person's name also appears as one of the employees of the petitioner [redacted], in the employer's quarterly wage reports for the second, third and fourth quarters of 2001 and the first and second quarters of 2002. That fact suggests that a cooperative relationship may exist between the second petitioner and the instant petitioner.

The I-140 petition submitted on May 18, 2006 by [redacted] was on behalf of the beneficiary in the instant petition, and was supported by a new Form ETA 750B stating the qualifications of the beneficiary. That ETA 750B was signed by the beneficiary on May 18, 2006. On that ETA 750B, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Board of Secondary Education Karachi, Pakistan	Commerce	04/75	06/77	SSC
Board of Higher Education Karachi, Pakistan	Commerce	09/77	09/79	HSC
U. of Karachi Karachi, Pakistan	Commerce	06/80	06/82	Bachelor
The Institute of Cost and Management Accountants of Pakistan	Accounting and Management	06/86	06/87	Master of Commerce

[remaining row blank]

On the ETA 750B for the beneficiary submitted with the petition by [redacted], in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
[redacted]	Operation Manager	11/2004	present	Jewelry sales and repairs
[redacted]	Jeweler	09/03	10/04	Jewelry sales and repairs
unemployment	[blank]	06/02	08/03	[blank]
[redacted]	Jeweler	07/01	05/02	Jewelry sales and repairs
[redacted]	Jeweler	03/94	06/99	Jewelry sales and repairs
[redacted]	General Manager	04/88	02/94	Jewelry sales and repairs

[remaining row on attachment sheet blank]

Significant differences in the beneficiary's education appear on the two ETA 750B's signed by the beneficiary. On the ETA 750B submitted in support of the instant petition, signed by the beneficiary on April 18, 2001, the beneficiary states education only at two institutions, one a board of secondary education and the other a board of higher education. The degrees listed are "SSC" and "HSC" respectively. According to school certificates in the record, those abbreviations stand for "Secondary School Certificate" and "Higher Secondary Certificate." The Secondary School Certificate was awarded based on an examination taken in June 1977 and the Higher Secondary Certificate was awarded based on an examination taken in September 1979.

On the ETA 750B submitted in support of the second petition, signed by the beneficiary on May 18, 2006, the beneficiary states the study at the foregoing institutions, but also states education at the University of Karachi until June of 1982, with the award of a Bachelor's degree, and education at the Institute of Cost and Management Accountants until June of 1987 with the award of a Master of Commerce degree. Certificates documenting those two degrees appear in the record in the second I-140 petition. That record also contains a copy of an evaluation report dated May 19, 2006 by the Foundation for Educational Services, Inc., finding

that the beneficiary's education is the equivalent to a Bachelor's degree in business administration from a regionally accredited college or university in the United States.

The instructions on the Form ETA 750, Part B, block 11 require the beneficiary to state "Names and Addresses of Schools, College and Universities Attended (included trade or vocational training facilities." (ETA 750B, block 11). The beneficiary's failure to state his studies for his Bachelor's degree and for his Master of Commerce degree on the ETA 750B submitted in support of the instant petition was a material omission of information required on that form. Information about the beneficiary's degrees is relevant to the instant petition because it shows that the beneficiary was qualified as a professional in a field other than one relevant to the skilled worker position of jeweler, which is the job offered in the instant petition. That information, in turn, is relevant to the issue of the petitioner's intention to offer full-time permanent employment to the beneficiary.

The regulation at 8 C.F.R. § 204.5(c) states in pertinent part, "Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." The instant petition has been filed under section 203(b)(3) of the Act.

Moreover, the omission of required material information from the ETA 750B signed by the beneficiary on April 18, 2001 constituted a misrepresentation by the beneficiary. Section 212(a)(6)(C) of the Act states in pertinent part, "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." Act § 212(a)(6)(C)(i).

Of course, if the beneficiary did not obtain a Bachelor's degree and a Master of Commerce degree, the information on the ETA 750B in the instant petition could be accurate, but the ETA 750B accompanying the second petition would thereby contain misrepresentations. In any event, the record contains no explanation for the inconsistencies in the evidence noted above. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Beyond the decision of the director, the Form ETA 750B of the beneficiary submitted in support of the instant petition contains information inconsistent with that in a different Form ETA 750B of the beneficiary submitted in support of an I-140 petition by a different petitioner.

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.