

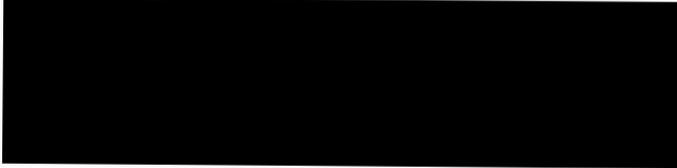
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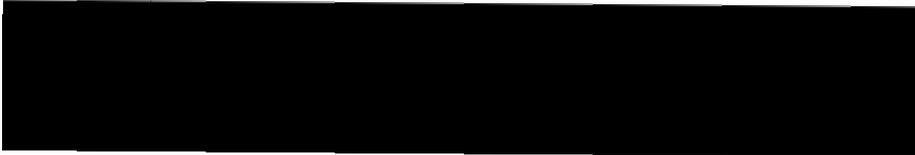
Date: **JAN 11 2007**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

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

The above-captioned attorney submitted the appeal in this matter and previously submitted a Form G-28 Entry of Appearance executed by the petitioner acknowledging her as its counsel. Subsequently another attorney submitted a letter, dated August 29, 2006, in which he stated that he now represents the beneficiary in this matter. A Form G-28 Notice of Entry of Appearance indicates that the second attorney does, in fact, represent the beneficiary.

The beneficiary of a visa petition is not an affected party according to 8 C.F.R. § 103.3(a)(1)(iii)(B) and is not recognized party in this proceeding. 8 C.F.R. § 103.2(a)(3). The beneficiary has no standing in this appeal. *See* 8 C.F.R. § 103.3(a)(2)(i). All representations will be considered,¹ but today's decision will be provided only to the petitioner and the petitioner's counsel of record.

The petitioner is an automotive service station. It seeks to employ the beneficiary permanently in the United States as a night manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

¹ In fact, this second attorney submitted no evidence or argument either contemporaneously with that entry of appearance or subsequently.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$825.65 per week, which equals \$42,933.80 per year.

The Form I-140 petition in this matter was submitted on August 27, 2004. On the petition, the petitioner did not state the date upon which it was established, the number of workers it employs, or its gross or net annual income in the spaces provided for reporting that information.

The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Levittown, New York. The intending employer's name originally shown on the Form ETA 750 was J.J. Service Station. On December 5, 2003 that name was amended to Ultimate Auto Care Incorporated. The Form ETA 750 was approved on February 24, 2004. Ultimate Auto Care Incorporated is the petitioner listed on the Form I-140 visa petition and the entity for whom the Form ETA 750 was approved.

On the Form ETA 750, Part B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for J&J Sunoco Service Station since December 1990. The address given for J&J is the same as the petitioner's address. This office gathers that J&J Sunoco Service Station owned the business at that location when the Form ETA 750 was filed, but that Ultimate Auto Care Incorporated now owns it.²

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³

In the instant case the record contains (1) the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, (2) the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and (3) the petitioner's New York Form NYS-45 Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for the first quarter of 2005. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on October 23, 2001, and that it reports taxes pursuant to cash convention accounting. The 2002 return shows that the petitioner elected subchapter S corporate status on October 1, 2002.

² If this assumption is incorrect and prejudices the petitioner's case this may be addressed on motion.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The 2001 tax return provided purports to cover the period from October 23, 2001 to September 30, 2002. The 2002 tax return originally stated that it covered the period from October 1, 2002 to December 31, 2002. That return was subsequently altered to indicate that it covers the entire 2002 calendar year. Who altered the tax return, when it was altered, and for what purpose it was altered are all unclear.

On the 2001 Form 1120, U.S. Corporation Income Tax Return submitted the petitioner reported that it suffered a loss of \$790 as its ordinary income during the period from October 23, 2001 to September 30, 2002. That return further indicates that at the end of that period the petitioner had current assets of \$29,743 and current liabilities of \$6,014, which yields net current assets of \$23,729.

On the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation submitted the petitioner reported that it suffered a loss of \$9,207.⁴ That return further indicates that at the end of that year the petitioner had current assets of \$28,858 and current liabilities of \$8,196, which yields net current assets of \$20,662.

The petitioner's first quarter 2005 NYS-45 shows that it then employed five workers to whom it paid total gross wages of \$20,631 during that quarter, including \$10,725 to the beneficiary.

The director denied the petition on January 18, 2005. On appeal, counsel asserted that the evidence of record as amended on appeal demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In an undated letter subsequently submitted the beneficiary's attorney stated that the petitioner incorporated during October 2001 and that the 2001 tax return covers the period from October 1, 2001⁵ to September 30, 2002. That attorney further stated that the petitioner changed to S corporation status on October 1, 2002 and the 2002 tax return therefore covers the period from October 1, 2002 to December 31, 2002. That attorney further observed that start-up companies frequently require cash infusions from their owners, and that the evidence of record should therefore be reevaluated.

Although the evidence is far from clear on this point, this office finds, on the balance, that counsel's assertions pertinent to the petitioner's business history appear to be correct. This office finds that the petitioner incorporated on October 23, 2001 and began to operate the subject automotive service station on or about that date, then became a subchapter S corporation on October 1, 2002. This office further finds that the subject service station was owned and operated by another company prior to October 23, 2001, presumably J.J. Sunoco or J&J Sunoco. Finally, this office finds that, as asserted by counsel, the 2001 return covers the

⁴ This is the amount shown as the petitioner's ordinary income at Line 21 on Page 1 of the 2002 return. Curiously, that amount was carried over to Line 1 of Schedule K as a loss of \$8,585. The reason for that discrepancy is unknown to this office. In any event, however, the difference between those figures for the petitioner's 2002 net loss is not determinative of any material issue in this case.

⁵ This office believes that counsel meant to state that the first day covered by the 2001 return is October 23, 2001, which is the date the petitioner incorporated and is the first day that return purports, on its face, to cover.

period from October 23, 2001 to September 30, 2002, and its 2002 return covers the period from October 1, 2002 to December 31, 2002.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered 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. (Reg. Comm. 1967).

The assertion of counsel, that start-up businesses often suffer losses and must be supported by their owners, while true, is inapposite. It neither demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date nor releases it of the obligation to demonstrate that ability, which obligation is imposed by 8 C.F.R. § 204.5(g)(2).

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 beneficiary claims to have been employed at the petitioner's address since December 1990. The only evidence pertinent to wages the petitioner paid him, however, is the quarterly report showing that the petitioner paid him \$10,725 during the first quarter of 2005. The petitioner has not demonstrated that it or its predecessor paid any other wages to the beneficiary.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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. 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 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 minus 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 typically⁶ 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 petitioner seeking to rely upon the approved labor certification in this case is not the same entity that originally applied for it. In fact, as was noted above, the petitioning corporation was not in existence on the priority date. This raises the issue of whether the job offer was realistic within the meaning of *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Because the decision of denial did not discuss this issue, and the petitioner has not been accorded an opportunity to respond to it, today's decision is not based on this issue, even in part. If the petitioner attempts to overcome today's decision on motion it should address this issue.

The proffered wage is \$42,933.80 per year. The priority date is April 30, 2001.

The petitioner's predecessor appears to have owned and operated the service station from some unknown date until the petitioner incorporated on October 23, 2001. The petitioner has submitted no evidence to demonstrate that its predecessor was able to pay the proffered wage from April 30, 2001 to October 23, 2001, and has not shown the ability to pay the proffered wage during that period as required by 8 C.F.R. § 204.5(g)(2) as that obligation was interpreted in *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).⁷

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁷ One might distinguish the facts of *Dial Auto Repair Shop* from the facts of the instant case. The Form ETA 750 in that case was approved for use by the predecessor and the Form I-140 filed by the successor, whereas in the instant case the Form ETA 750 was approved for use by the successor and the Form I-140 filed by the predecessor. Even if the reasoning in *Dial Repair Shop* is not controlling here, however, the petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to show its ability to pay the proffered wage from the priority date until October 23, 2001, a period during which it was not in existence. It appears to this office that the petitioner is

The petitioner's 2001 tax return covers the period from October 23, 2001 to September 30, 2002, a period of almost a year. During that period the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that period. At the end of that period the petitioner had net current assets of \$23,729. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during that period with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during the period from October 23, 2001 to September 30, 2002.

The petitioner's 2002 return covers the period from October 1, 2002 to December 31, 2002. The petitioner declared that it suffered a loss during that period. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$20,662. That amount is insufficient to pay the proffered wage. The petitioner has provided no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not shown that it was able to pay the proffered wage during the period from October 1, 2002 to December 31, 2002.

That the period covered by the petitioner's 2002 return terminated on December 31 appears to indicate that the petitioner contemplated filing future returns based on the calendar year. When the petition in this matter was filed on August 23, 2004 the petitioner's tax return for the 2003 calendar year should have been available. That return has never been provided nor has the petitioner volunteered any reason for that omission. The petitioner submitted no other reliable evidence pertinent to its ability to pay the proffered wage during 2003. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner's 2004 tax return was unavailable when the petition was filed and was never subsequently requested. The petitioner is excused, therefore, from demonstrating its ability to pay the proffered wage during 2004 and subsequent years.⁸

The petitioner failed to demonstrate that it or its predecessor was able to pay the proffered wage from April 30, 2001 to October 23, 2001. The petitioner failed to demonstrate that it had the ability to pay the proffered

only able to show ability to pay the proffered wage during that period, if at all, by showing that its predecessor could have paid the proffered wage.

If the petitioner attempts to overcome today's decision on appeal it should address this issue, demonstrating either that it is not obliged to show its ability to pay the proffered wage during that period or that its predecessor was able to pay it. It should also address another requirement of *Dial Repair Shop*. The petitioner should either demonstrate that it is the true successor of its predecessor within the meaning of *Dial Repair Shop* or show that it is not bound to make that showing. In order to show that it is the true successor within the meaning of *Dial* the petitioner 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 its predecessor and continues to operate the same type of business as its predecessor did.

⁸ This office notes that the petitioner demonstrated that it paid the beneficiary \$10,725 during the first quarter of 2005. It is excused from demonstrating the ability to pay the remaining \$32,208.80 balance of the proffered wage during that year.

wage during the period from October 23, 2001 to September 30, 2002, during the period from October 1, 2002 to December 31, 2002, and during the 2003 calendar year. 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.