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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JAN 16 2007  
EAC 04 242 50377

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

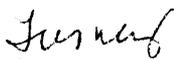
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

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

  
Robert P. Wiemann, 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 petitioner is a jewelry store. 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 (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.

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 March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$18.48 per hour, which equals \$38,438.40 per year.

The Form I-140 petition in this matter was submitted on August 18, 2004.<sup>1</sup> On the petition, the petitioner stated that it was established on August 1, 1999. The petitioner did not state the number of workers it

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<sup>1</sup> The record shows that the petitioner previously filed another petition for the instant beneficiary. That previous petition was filed on November 21, 2001 and denied on November 13, 2003. A subsequent appeal was rejected on July 7, 2004. Today's decision is concerned only with the petition filed on August 18, 2004, although evidence filed with the previous petition has been considered in this adjudication.

employs in the space provided for that purpose. The petition states that the petitioner's gross annual income is \$624,192 and that its net annual income is \$1,534.

On the Form ETA 750, Part B, signed by the beneficiary on September 1, 2000, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Brooklyn, New York.

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.<sup>2</sup>

In the instant case the record contains (1) the petitioner's 2000, 2001, 2002, and 2003 Form 1120, U.S. Corporation Income Tax Returns, (2) letters dated July 20, 2004 and January 24, 2005 from [REDACTED] and (3) 2001, 2002, and 2003 Form W-2 Wage and Tax Statements issued to [REDACTED] the petitioner. 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 August 1, 1999, and that it reports taxes pursuant to accrual convention accounting and a fiscal year that runs from August 1 of the nominal year to July 31 of the following year. Those returns identify [REDACTED] as the petitioner's owner.

During its 2000 fiscal year, which ran from August 1, 2000 to July 31, 2001, the petitioner declared a loss of \$1,534 as its taxable income before net operating loss deductions and special deductions. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

During its 2001 fiscal year, which ran from August 1, 2001 to July 31, 2002, the petitioner reported taxable income before net operating loss deductions and special deductions of \$2,898. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

During its 2002 fiscal year, which ran from August 1, 2002 to July 31, 2003, the petitioner reported taxable income before net operating loss deductions and special deductions of \$2,197. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

During its 2003 fiscal year, which ran from August 1, 2003 to July 31, 2004, the petitioner declared a loss of \$2,035 as its taxable income before net operating loss deductions and special deductions. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

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<sup>2</sup> 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).

In her July 20, 2004 letter [REDACTED] identified herself as the petitioner's owner<sup>3</sup> and stated that the petitioner can afford to pay the proffered wage because the beneficiary will replace [REDACTED] whom she identifies as a jeweler then in the petitioner's employ.

In her January 24, 2005 letter [REDACTED] reiterated that the beneficiary would replace [REDACTED], whom she stated she would then employ in South America, and that the petitioner therefore has additional funds available to pay the proffered wage.

The W-2 forms provided show that the petitioner paid [REDACTED] gross wages of \$40,400, \$52,104, and \$80,000 during 2001, 2002, and 2003, respectively.

The director denied the petition on December 8, 2004. On appeal, counsel asserted that the evidence of record as supplemented on appeal demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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).

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 did not establish that it employed and paid the beneficiary.

In her letters to this office [REDACTED] asserted that the beneficiary would replace [REDACTED] who "will be doing managerial works [sic] in my perspective business [sic] in South America."

The fact that Mr. [REDACTED] duties in Ms. [REDACTED] prospective business will be managerial considered together with the fact that Mr. [REDACTED] is listed as the owner/officer of the petitioner on its tax returns raises the issue of what portion of his duties for the petitioner were managerial and what portion were in the capacity of jeweler, the proffered position in the instant case. The petitioner did not submit any evidence, other than Ms. [REDACTED] letters, such as notarized affidavits from Mr. and Ms. [REDACTED] which attest that the wages paid to Mr. [REDACTED] were, either in part or in full, for performance of the duties of the proffered

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<sup>3</sup> The indication on the petitioner's tax returns that Mr. [REDACTED] owns the petitioner and the assertion in Ms. [REDACTED] letters that she owns it are reconcilable if the ownership of the petitioning corporation changed hands during the pendency of this petition. In any event, because the record contains an apparent discrepancy regarding who owns the petitioner, this office will make no finding regarding who owns the petitioning corporation.

position and that Mr. [REDACTED] will be replaced by the beneficiary and will forego salary in the future. Without additional reliable evidence, those amounts have not been shown to be available to pay the proffered wage.

Further, although Ms. [REDACTED] now states that she will replace Mr. [REDACTED] with the beneficiary as soon as the beneficiary becomes available, she does not indicate that she was ready to make that change since the priority date of the instant petition. Unless the petitioner was ready to replace Mr. [REDACTED] with the beneficiary during any given year since the priority date, the wages the petitioner paid to Mr. [REDACTED] during that year cannot be said to have been available to pay the wages of the proffered position.

For both reasons, the amounts paid to Mr. [REDACTED] will not be considered in the assessment of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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

typically<sup>4</sup> 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 \$38,438.40. The priority date is March 15, 2001, which fell during the petitioner's 2000 fiscal year.

During its 2000 fiscal year 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 year. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has provided no reliable evidence of any other funds available to it during its 2000 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

During its 2001 fiscal year the petitioner reported taxable income before net operating loss deductions and special deductions of \$2,898. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has provided no reliable evidence of any other funds available to it during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year the petitioner reported taxable income before net operating loss deductions and special deductions of \$2,197. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has provided no reliable evidence of any other funds available to it during its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

During its 2003 fiscal year 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 year. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has provided no reliable evidence of any other funds available to it during its 2003 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2000, 2001, 2002, and 2003 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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<sup>4</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The record suggests an additional issue that was not addressed in the decision of denial.

Ms. [REDACTED] stated in her letters that the beneficiary would replace another worker, Mr. [REDACTED] apparently a legal U.S. worker. The fundamental purpose of the visa category pursuant to which the petition in this case was filed is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. The position is currently filled. If the petitioner were seeking to replace the incumbent with the beneficiary out of preference for the foreign worker, rather than necessity, that would be inconsistent with the purpose of the instant visa category.

That the petitioner intends to discharge or relocate a current employee to South America in favor of the beneficiary calls into question the legitimacy of the petitioner's claim that it is unable to find a U.S. worker to fill the proffered position. Because this consideration formed no part of the basis for the decision of denial, however, and the petitioner has not been accorded an opportunity to reconcile its claim of inability to fill the proffered position with a U.S. worker with its willingness to discharge a current worker, that issue plays no part in today's decision. This office notes, however, that even if the petitioner had satisfied CIS on the issue of its ability to pay the proffered wage, the petition could not be approved until the petitioner had addressed this issue.

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.