



U.S. Citizenship  
and Immigration  
Services

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BG

[REDACTED]

FILE: [REDACTED]  
EAC 03 140 51786

Office: VERMONT SERVICE CENTER

Date: JUL 16 2007

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:

[REDACTED]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and tailoring business. It seeks to employ the beneficiary permanently in the United States as a garment fitter. As required by statute and by regulation at 8 C.F.R. 204.5(l)(3), the petition was not accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).<sup>1</sup> The director determined that the petitioner has not submitted an original Form ETA 750 to the record, and that the record contained no evidence of labor certification by the Secretary of Labor or designated representative. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.<sup>2</sup> The procedural history in this case is documented by 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 August 8, 2005 decision, the single issue in this case is whether or not the petitioner submitted the original certified ETA Form 750 to the record, and whether the record contains any evidence of the labor certification by the Secretary of Labor or his designated representative.

As stated previously, 8 C.F.R. § 204.5(l)(3) states, in pertinent part, that every petition under the employment-based classification outlined in sections 203 (b)(3)(A)(i) and Section 203 (b)(3)(A)(ii) must be accompanied by an individual labor certification from the Department of Labor; an application for Schedule A designation; or documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

Upon review of the record, the record contains a copy of a letter dated July 9, 2002 submitted to DOL by counsel. In this letter, counsel references a letter sent to the State of New Jersey, Department of Labor dated June 10, 2002, and also notes that the petitioner's Form ETA 750 was forwarded to DOL for review on September 8, 2000. This letter contains a handwritten note from [REDACTED] Certifying Officer dated November 4, 2002, that DOL records show that the application was certified on September 22, 2000 and mailed to counsel's office. [REDACTED] also wrote on counsel's letter that if counsel needed a duplicate labor certification, to request CIS to submit a written request to the DOL to her attention. The record contains a copy of another letter from counsel to [REDACTED] dated May 5, 2004 that requests a duplicate of the certified labor certification, Form ETA 750, and submitted a copy of the Form I-797 sent by CIS to the petitioner requesting the original certified Form ETA 750. In a handwritten response on the second letter, [REDACTED] stated that counsel's letter was unacceptable and that Citizenship and Immigration Services (CIS) had to send a letter requesting a duplicate labor certification directly to DOL. [REDACTED] also stated that

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<sup>1</sup> The petitioner also did not submit a copy of the certified Form ETA 750 with the initial petition.

<sup>2</sup> On the Form I-290B submitted on appeal and received by the Vermont Service Center on August 29, 2005, counsel indicated that he was submitting additional evidence or a brief to the AAO within 30 days; however, the AAO has received no further evidence or materials. On June 15, 2007, the AAO sent counsel a FAX informing him that no separate brief and/or evidence was received, to confirm whether or not he would send anything else in this matter, and, as a courtesy, asking whether counsel had a copy of the mailed original uncertified ETA 750 application, and giving him five days to respond. On June 15, 2007, counsel responded that he did not file a brief or evidence as he indicated on Form I-290B and also submitted a copy of the uncertified Form ETA 750, Parts A & B, that indicates DOL received the form on November 17, 1997.

upon receipt of a CIS letter, DOL would retrieve the case file from their archives and issue a duplicate document directly to CIS. Finally the record contains CIS correspondence dated August 20, 2004 to the DOL in New York, New York. This letter states that the date of certification of the Form ETA 750 is September 22, 2000, that the ETA case number is 92451737, and that CIS has not established that the original labor certification is lost. The record also contains a FAX transmission from DOL dated May 6, 2005 that states the DOL could not locate the folder that contained the petitioner's labor certification from its archives.

On appeal, counsel states that the I-140 petition was supported by an approved labor certification that was certified by the U.S. Department of Labor (DOL) on September 22, 2000 and that this certification was confirmed by the certifying officer, [REDACTED]. Counsel further states that DOL instructed the petitioner to request that CIS submit a written request for a duplicate labor certification. Counsel finally states that he never received the original or a duplicate copy of the approved labor certification from DOL, despite repeated requests for the approved labor certification.

Upon review of the record, the AAO notes that the handwritten comments by the DOL certifying officer as to when the petitioner's labor certification application was certified constitutes sufficient evidence that the petitioner submitted a Form ETA 750 to DOL that was subsequently certified. The AAO notes that while the director is correct in his statement that no appeal can be made when the original of the Form ETA 705 is not submitted to the record, the AAO also notes that the record contains correspondence that indicates the original Form ETA was both received and certified by DOL and that the original Form ETA 750 and the file containing it could not be located by DOL. It appears that the petitioner made sufficient efforts to obtain a duplicate labor certification and that the Form ETA 750 is lost.

Further, on the Form I-290B submitted on appeal and received by the Vermont Service Center on August 29, 2005, counsel indicated that he was submitting additional evidence or a brief to the AAO within 30 days; however, the AAO has received no further evidence or materials. On June 15, 2007, the AAO sent counsel a FAX informing him that no separate brief and/or evidence was received, to confirm whether or not he would send anything else in this matter, and, as a courtesy, asking whether counsel had a copy of the mailed original uncertified Form ETA 750 application, and giving him five days to respond. On June 15, 2007, counsel responded that he did not file a brief or evidence as he indicated on Form I-290B. Counsel also submitted a copy of the uncertified Form ETA 750, Parts A & B, that indicates a date of initial receipt by the state office of DOL of November 17, 1997. The AAO notes that based on the correspondence in the record, the priority date for the instant petition appears to be November 17, 1997. Therefore the director's decision dated August 8, 2005 is withdrawn. The AAO will accept this date as recorded on the copy of the original Form ETA 750 as the priority date and will address the merits of the petition.

Section 203 (B)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As stated previously, the actual priority date of the petition appears to be November 17, 1997. The proffered wage as stated on the copy of the Form ETA 750 submitted by counsel is \$12.50 an hour or \$26,000 per year. The petition also contains the petitioner's Form 1120 for tax year 1995 that covers the **fiscal year of** November 1, 1995 to October 31, 1996, and a copy of a 1997 W-2 form from the petitioner to [REDACTED] that has the beneficiary's name handwritten on it.<sup>3</sup> The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1976; however, the petitioner did not provide any further information on its gross or net annual income, or the current number of employees. Based on the copy of the original submitted Form ETA 750, Part B, as of November 10, 1997, the date he signed the Form ETA 750, the beneficiary had worked for the petitioner since June 1989.

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). 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. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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. As stated previously, the priority date of the instant petition is November 17, 1997. The AAO notes that the petitioner submitted a W-2 Form for [REDACTED] for tax year 1997, whose address is the same as the beneficiary's address identified on the I-140 petition. The W-2 form indicates that the petitioner paid [REDACTED]

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<sup>3</sup> The G-325 submitted by the beneficiary with his I-485 Adjustment of Status application, indicates that the beneficiary used this name as an alias. The G-325 also indicates that the beneficiary worked for the petitioner as a garment fitter as of June 1989, and that the beneficiary entered the United States on April 19, 1986.

§22,312 during tax year 1997. Nevertheless neither the petitioner nor counsel provides any further explanation or documentation of the beneficiary's apparent use of an alias name, beyond a handwritten note on the W-2 Form that indicates the beneficiary's name. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Thus, the AAO gives no weight to the W-2 Form submitted to the record. The petitioner therefore cannot establish that it paid the beneficiary the entire proffered wage as of the 1997 priority date noted on the Form ETA 750, or in any subsequent tax years. Thus the petitioner has to establish its ability to pay the entire proffered wage in any of the relevant tax years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

In the instant petition, as stated previously, the priority date based on counsel's copy of the submitted Form ETA 705 is November 17, 1997. Nevertheless, for unexplained reasons, the petitioner submitted its tax return for fiscal year 1995. Thus, the petitioner could not establish its ability to pay the proffered wage (if it were identified in the record) for either the claimed priority year of 1995 and any subsequent tax years. For illustrative purpose, the AAO will examine the petitioner's 1995 tax return.

In 1995, the Form 1120 stated a net income<sup>4</sup> of \$9,953.

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<sup>4</sup>The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported

Therefore, for the year 1995, the petitioner did not have sufficient net income to pay the proffered wage of \$26,000.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. 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, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 1995 were -\$30,723.

Therefore, for the year 1995, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, as of the 1997 priority date, established from counsel's copy of the submitted Form ETA 750, and continuing until the beneficiary obtained lawful permanent residence, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets.

The AAO notes that the petitioner's tax return submitted to the record indicates significant officer compensation of \$148,462, cost of labor of \$757,794, and outside contract work paid in the amount of approximately \$68,000. However, to date the petitioner has not submitted sufficient evidence to establish its ability to pay the proffered wage as of the 1997 priority date and onward. The AAO notes that its dismissal of the petitioner's appeal is without prejudice to the filing of a new petition, with certified labor certification application, and with sufficient evidentiary documentation as to the beneficiary's wages, and/or the petitioner's net income or net current assets as of the actual priority date and to the time the beneficiary would obtain lawful permanent residence.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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.

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on Line 28 of the Form 1120.

<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.



**ORDER:** The appeal is dismissed.