

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



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

B6

[Redacted]

FILE:

[Redacted]
EAC 03 263 51282

Office: VERMONT SERVICE CENTER

Date: JUL 25 2007

IN RE:

Petitioner:
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 Acting 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 manufactures casework and millwork. It seeks to employ the beneficiary permanently in the United States as a cabinet designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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 acting 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour, which equals \$30,160 per year.

The Form I-140 petition in this matter was submitted on September 26, 2003. On the petition, the petitioner stated that it was established during 1999 and that it employs seven workers. The petition states that the petitioner's gross annual income is \$335,220 and that its net annual income is \$17,059. On the Form ETA 750, Part B, signed by the beneficiary on April 28, 2001, the beneficiary claimed to have worked for the petitioner since October 2000. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Gloucester, Massachusetts.

The AAO reviews *de novo* issues raised 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.¹

In the instant case the record contains (1) a copy of a portion of the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return, (2) a copy of one page of a 2003 Massachusetts Schedule C Profit or Loss from Business, (3) a copy of a portion of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (4) a letter dated September 23, 2003 from counsel, and (5) a letter dated July 29, 2004 from the petitioner's president. 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 submitted portion of the 2001 tax return shows that the petitioner's owner held it as a sole proprietorship during 2001. The submitted portion of the 2003 tax return shows that the petitioner incorporated on June 18, 2003. During 2003 the petitioner declared ordinary income of \$4,368. Because the corresponding Schedule L was not provided this office is unable to calculate the petitioner's net current assets.

Because the petitioner incorporated on June 18, 2003 the 2003 Massachusetts Schedule C apparently pertains to the portion of the year before it incorporated. That document shows that the petitioner's cost of goods sold exceeded its gross receipts from January 1, 2003 until June 18, 2003. The petitioner's gross profit, before the subtraction of operating expenses, was -\$5,753. That form shows some, but apparently not all, of the petitioner's operating expenses during that portion of 2003. The operating expenses shown total \$14,760. The petitioner appears to have suffered a loss of more than \$18,495 during the period from January 1, 2003 to June 18, 2003.

The submitted portion of the petitioner's owner's 2001 tax return includes a Schedule C Profit or Loss from Business. During 2001 the petitioner returned a net profit of \$17,059. Because the first page of that return was not provided the petitioner's owner's 2001 adjusted gross income is unknown to this office.

Counsel's September 23, 2003 letter states that the proffered position is not a new position, but was previously filled by another employee.

The petitioner's president's July 29, 2004 letter states that the petitioner incorporated during July 2003. That letter also names six employees whom the beneficiary has ostensibly replaced and states that the amounts the petitioner allegedly paid to them during various years represent funds available to pay the proffered wage. No Form W-2 Wage and Tax Statements or other contemporaneous documentation of those wages was submitted.

The petitioner's president stated that during 2001 the petitioner paid \$23,132 to [REDACTED], \$2,958 to [REDACTED], and \$1,218 to [REDACTED]. The petitioner's president stated that the petitioner paid \$17,987 to [REDACTED], \$13,462 to [REDACTED], and \$19,647 to [REDACTED] during 2002.

¹ 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 acting director denied the petition on July 12, 2004. On appeal, counsel stated that the service center should have issued a notice of intent to deny seeking additional evidence rather than denying the petition. Counsel also cited the petitioner's president's July 29, 2004 letter as evidence of its continuing ability to pay the proffered wage beginning on the priority date.

This office agrees that the evidence submitted with the visa petition, rather than demonstrating ineligibility, was merely insufficient to demonstrate eligibility. In such a situation the service center should, consistent with 8 C.F.R. § 103.2(a)(8), issue a request for evidence, rather than simply denying the visa petition.

However, the petitioner has been accorded an opportunity to submit additional information, argument, or documentation on appeal. The failure to provide that opportunity earlier in the petition process, although a procedural shortcoming, is of no substantive effect. The error of the service center in failing to request additional evidence was, therefore, harmless.

To demonstrate that wages paid to another employee during a given year were available to pay the proffered wage during that year, a petitioner must demonstrate, first, that those wages were paid for performance of the duties of the proffered position. Wages paid to truck drivers, mechanics, or custodial personnel, for instance, could not necessarily have been used to employ and pay an additional carpenter.

Further, to show that wages paid to other employees during a given year were available to pay the proffered wage a petitioner must show that, had it been able to employ the beneficiary during that year, it would have replaced those other employees with the beneficiary. Unless it could and would have replaced those other employees with the beneficiary,² their wages were not a source of funds that could have been paid to the beneficiary for performance of the duties of the proffered position.

In the instant case, the record does not demonstrate that the petitioner could and would have replaced the named workers with the beneficiary had the beneficiary been available and the petitioner able to employ him. In fact, the record appears to contradict any such assertion, as the beneficiary stated on the Form ETA 750 that he began working for the petitioner in October 2000. The wages the petitioner paid to other workers have not been shown to have been available to pay to the beneficiary for performance of the duties of the proffered position and will not be included in the analysis of the funds available to the petitioner to pay the proffered wage during various years.

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.

² Further, the purpose of the instant visa category is to provide workers for positions for which U.S. workers are unavailable. If the petitioner is arguing that it could and would have replaced a U.S. worker with the beneficiary, this might be contrary to the underlying purpose of the visa category and cast doubt on the petitioner's assertion that it is unable to fill the proffered position with a U.S. worker. The petitioner would be obliged to demonstrate that it is not replacing a U.S. worker with a foreign worker out of preference.

§ 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 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, although the beneficiary claims to have worked for the petitioner since October 2000, the petitioner submitted no evidence that it ever paid any 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 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 proffered wage is \$30,160 per year. The priority date is April 30, 2001.

During 2001, 2002, and a portion of 2003 the petitioner was a sole proprietorship. Because the petitioner's owner was then obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid the proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

During 2001 the petitioner returned a net profit of \$17,059. That amount is insufficient to pay the proffered wage. In any event, this office is unable to determine what the sole proprietor's adjusted gross income was during that year or how many dependents the proprietor had. The record contains no evidence of the petitioner's owner's personal assets or any other funds available to the petitioner with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

No portion of the petitioner's owner's 2002 tax return was presented. No other reliable evidence of any funds available to the petitioner during 2002 with which it could have paid the proffered wage is in the record. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The record appears to indicate that the petitioner continued as a sole proprietorship from January 1, 2003 to June 18, 2003. The portion of a Massachusetts tax return appears to indicate that the petitioner suffered a loss of at least \$18,495 during that period. In any event, the record contains no reliable evidence of any funds available to the petitioner during that period with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during the period from January 1, 2003 to June 18, 2003.

The petitioner incorporated on January 18, 2003. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

However, net income is not the only statistic that may be used to show the corporate 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 typically³ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the

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's 2003 corporate tax return covers the period from June 18, 2003 to December 31, 2003. During that period the petitioner had ordinary income of \$4,368. That amount is insufficient to pay the portion of the proffered wage that would have been due during the period covered by that tax return.⁴ Because the petitioner did not provide its 2003 Schedule L this office is unable to calculate its end-of-year net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets during 2003. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on September 26, 2003. On that date the petitioner's 2004 tax return was unavailable. No evidence pertinent to the petitioner's ability to pay the proffered wage during 2004 was subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2004 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, the portion of 2003 during which it was a sole proprietorship, and the portion of 2003 during which it was a corporation. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests additional issues that were not addressed in the decision of denial.

The Form ETA 750 indicates that the proffered position requires two years of experience as a carpenter or in a similar trade. That experience must have been accumulated before the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 8 CFR § 204.5(1)(3)(ii) states, in pertinent part:

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Schedule L to another.

⁴ The annual amount of the proffered wage is \$30,160. The period from June 18, 2003 to December 31, 2003 is 196 days or slightly more than one-half of that year. One-half of the annual amount of the proffered wage is \$15,080.

The beneficiary only began working for the petitioner during October of 2000, approximately six months before the April 30, 2001 priority date. Only those six months may be included in the inquiry into the beneficiary eligibility for the proffered position. The experience gained after the priority date does not count toward the requisite two years.

In evaluating the beneficiary's qualifications, CIS must look to the portion of the labor certification, Form ETA 750 part 14, which defines the minimum education, training and experience needed for a worker to perform the job duties described at part 13 to determine the qualifications required for the position. CIS may not ignore a term of the labor certification, Form ETA 750 part 14, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The only other employment the beneficiary claimed on the Form ETA 750B consisted of two months of housekeeping duties at a hotel and three months of bussing tables and washing dishes at a restaurant. The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification" The beneficiary listed no qualifying experience on that form.

Notwithstanding that the beneficiary indicated on the Form ETA 750B that he had no experience in carpentry other than that with the petitioner, the record contains two employment verification letters from other alleged employers. One letter, dated February 7, 2001, states that the beneficiary worked full-time as a finish carpenter and cabinet designer from December 1995 to April 1998.⁵ That letter is written in English and purports to have been signed by [REDACTED]. The name of the employing company is not identified in that letter.

The other letter, dated April 27, 2001, is in Portuguese and is accompanied by an English translation. It states that the beneficiary worked as a carpenter/furniture maker from October 1, 1994 to December 10, 1999. This office notes that those two employment claims overlap, but are not identical. The second employment letter does not state whether the beneficiary worked full-time or how many hours the beneficiary worked per week. It identifies the employer as F.J. Furniture and Décor Company and is also apparently signed by [REDACTED], whom it identifies as the company's proprietor.

That the letters are mutually contradictory renders them both poor evidence of the beneficiary's claim of qualifying employment. That the beneficiary did not list that employment on the Form ETA 750B, where he was required to list all relevant experience, renders them even less credible.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent

⁵ That letter, rather than referring to the beneficiary as [REDACTED] and [REDACTED], which leads this office to question whether the writer was actually acquainted with the beneficiary.

competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The beneficiary's employment verification letters are insufficient to demonstrate that the beneficiary worked as a full-time carpenter for two years, or that he worked the equivalent of two full-time years as a carpenter. The petitioner has not demonstrated that the beneficiary is qualified for the proffered position. The petition should have been denied on this additional basis.

Because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further still, the record makes clear that the petitioner was a sole proprietorship when it filed the Form ETA 750 labor certification application on April 30, 2001 and that it incorporated on June 18, 2003.

Clearly, a new company, a corporation, was formed with the name previously used by the sole proprietorship, notwithstanding that they might have owners in common. When an existing, approved Form ETA 750 is to be used by a company other than the company to which it was issued, the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case the evidence does not demonstrate that the corporation assumed all of the rights, duties, obligations, and assets of the sole proprietorship. The petition should also have been denied on this basis.

This issue was not raised in the decision of denial and the petitioner has not been accorded the opportunity to address it. Today's decision, therefore, will not rely on that additional basis for denial, even in part. If the petitioner attempts to overcome today's decision with a motion, however, it should address 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.