



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
EAC-05-096-50376

Office: VERMONT SERVICE CENTER

Date: JUN 21 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:



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

On the Form ETA 750, the petitioner claims to be in the jewelry business. It seeks to employ the beneficiary permanently in the United States as a jeweler (goldsmith). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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 that the petitioner failed to demonstrate that the beneficiary possessed the two years required experience as a jeweler as of the priority date. 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. 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 October 12, 2005 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether or not the beneficiary possessed the two years required experience as a jeweler as of 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 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 instant petition is for a substituted beneficiary.<sup>1</sup> The original Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$15.06 per hour (\$31,324.80 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered. The I-140 petition was submitted on February 14, 2005. On the Form I-140, the petitioner claimed to have been established in 1993, to have a gross annual income of \$2,113,650, and to have a net annual income of \$29,965. The petitioner did not provide information on the current number of employees on the form. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on January 3, 2005, the beneficiary did not claim to have worked for the petitioner.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>. On appeal counsel

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<sup>1</sup> An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<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 by the regulation at 8 C.F.R. § 103.2(a)(1) and the record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal, *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988)

submits the petitioner's 2005 corporate tax return and an experience letter from Fancy Jewelers verifying the beneficiary's employment from January 1995 to May 1999. Other relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage and the beneficiary's qualifications for the proffered position.

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).

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. In the instant case, the beneficiary did not claim to have worked for the petitioner on the Form ETA 750B. In response to the director's request for evidence (RFE) dated May 16, 2005, counsel confirmed that the beneficiary has never been employed by the petitioner. The record does not contain any evidence showing the petitioner hired and paid the beneficiary during the years from 2001 to the present. The petitioner failed to establish its continuing ability to pay the proffered wage in 2001 through the present through an examination of wages paid to the beneficiary. Therefore, the petitioner is obligated to demonstrate that it could pay the full proffered wage of \$31,324.80 in 2001 through the present with its net income or its net current assets.

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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2005. The tax returns show that the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$31,324.80 per year from the priority date:

- In 2001, the Form 1120S stated a net income<sup>3</sup> of \$14,087.
- In 2002, the Form 1120S stated a net income of \$15,119.

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<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, *Shareholders' Shares of Income, Credits, Deductions, etc.* See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

- In 2003, the Form 1120S stated a net income of \$152,911.
- In 2004, the Form 1120S stated a net income of \$93,366.
- In 2005, the Form 1120S stated a net income of \$74,580.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$31,324.80 while its net income for 2003 through 2005 was sufficient to pay the beneficiary the proffered wage.

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>4</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 2001 were \$175,055.
- The petitioner's net current assets during 2002 were \$141,956.

Therefore, for the years 2001 and 2002, the petitioner had sufficient net current assets to pay the proffered wage of \$31,324.80.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets. The ground of the director's denial that the petitioner did not establish its continuing ability to pay the proffered wage is withdrawn.

The second issue in the instant case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience prior to the priority date. The petitioner must 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). Here, the Form ETA 750 was accepted on April 20, 2001.

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<sup>4</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.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of jeweler. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                    |         |
|-----|--------------------|---------|
| 14. | Experience         |         |
|     | Job Offered        | 2 years |
|     | Related Occupation | Blank   |

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on January 3, 2005 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working as a "Barber" for Metropool Barber Shop in Brooklyn, New York since April 2001. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The initial filing was submitted without any evidence to demonstrate the beneficiary's qualifications for the proffered position. In the RFE dated May 16, 2005, the director expressly requested the petitioner "submit evidence to establish that the substituted alien possessed the required two years of experience as a goldsmith as of April 20, 2001, the date of filing." Despite of the director's express request, the petitioner did not submit any evidence to establish that the beneficiary possessed the required two years of experience as a goldsmith prior to the priority date. On appeal counsel submits a faxed copy of an experience letter from Fancy Jewelers dated October 20, 2005 confirming the beneficiary's employment with them from January 1995 to May 1999 as a jeweler. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted

the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

In addition, the AAO finds that the experience letter submitted on appeal would not be acceptable even if the AAO considers the sufficiency of the evidence submitted on appeal. The letter is on letterhead of Fancy Jewelers, however, the employer's address is unreadable. Therefore, CIS cannot verify whether or not the business existed or exists. The letter includes the title of the writer as Chief Executive, but does not include the printed name of the writer, and thus, it is not clear whether the letter is from the beneficiary's former employer. The contents of the letter are not supported by the information provided by the beneficiary on the Form ETA 750B and Form G-325A. While the letter states that the beneficiary worked as a jeweler for Fancy Jewelers from January 1995 to May 1999, the beneficiary did not represent this employment at Item 15 of the Form ETA 750B despite Item 15 expressly requires to "list all jobs held during the last three (3) years and also list any other jobs related to the occupation for which the alien is seeking certification as indicated in Item 9." On the Form G-325A the beneficiary listed his employment as a barber in Brooklyn, New York as his employment last five years but he left the space for last occupation abroad blank and signed his name above a warning that severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact. Moreover, the beneficiary's passport issued by his home country indicates that the beneficiary's profession is barber. The beneficiary's Form I-485 indicates that the beneficiary entered into the United States on March 23, 2000. Counsel did not explain how the beneficiary worked as a jeweler until May 1999 in his home country but his passport used to enter the United States 10 months later indicates a barber as his profession. Counsel also failed to explain why the beneficiary worked as a jeweler before entrance of the United States, but has been working as a barber since not long after arrival in the United States. The petitioner did not submit any independent objective evidence to resolve these inconsistencies. *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." "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Therefore, the petitioner failed to establish that the beneficiary possessed the requisite two years of experience as a jeweler with the experience letter from Fancy Jewelers. The portion of the director's decision pertinent to the beneficiary's qualifications is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified another potential ground of ineligibility and will discuss whether or not the petitioner established that its job offer to the beneficiary is a realistic one. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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. To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese*

*Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on April 20, 2001 and the job offer consists of nature of employer's business activity: "Jewelry," name of job title: "Goldsmith," name of employer: [REDACTED] and the location of the employment: [REDACTED] Virginia 22031."

The record contains the petitioner's corporation income tax returns for 2001 through 2005. The petitioner filed Form 1120S U.S. Income Tax Return for an S Corporation for all these years under the name of [REDACTED]. Schedule B's of the tax returns and a close review of the tax returns attachments indicate that the petitioner's business is a gas and service station. The schedule K for some years contains incomes in addition to the ordinary business income from the gas and service station operation, such as rental real estate income, interest income, section 1231 gain and property distributions, however, no single year has income from the operation of a jewelry business. All of the tax returns show that the petitioner has operated a gas and service station from 2001 to the present. The record of proceeding does not contain any evidence showing that the petitioner ran a jewelry business in any single year from 2001 to 2005. The record with Virginia State Corporation Commission does not contain any documents showing that the petitioner ever ran a jewelry business at the location of [REDACTED]. If the matter is pursued, the petitioner must establish that the jewelry business existed from the time when the Form ETA 750 was filed in 2001, and demonstrate that the job offer is a *bona fide* one and was open to American workers.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The decision of the director dated October 12, 2005 is partially withdrawn, but the petition remains denied.

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<sup>5</sup> See <http://www.scc.virginia.gov/division/clk/diracc.htm> (accessed May 1, 2007).