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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



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FILE: [REDACTED]  
SRC 06 005 51290

Office: TEXAS SERVICE CENTER

Date:

MAY 03 2007

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

*Robert P. Wiemann*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 dry cleaning business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000 per year.

The Form I-140 petition in this matter was submitted on October 7, 2005. The petitioner stated that it was established on March 8, 1996 and that it employs 11 workers. That petition also states that the beneficiary is in the United States pursuant to an entry without inspection.

On the Form ETA 750, Part B, signed by the beneficiary on April 25, 2001, she 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 Plano, Texas. The Form ETA 750B also states that the beneficiary is in the United States on a B-2 visa.

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 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 discrepancy between the Form I-140 and the Form ETA 750B pertinent to how the beneficiary entered the United States raises the level of scrutiny to which the instant appeal is subject.

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.<sup>1</sup>

In the instant case the record contains (1) the petitioner's 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Return, (2) the petitioner's 2001, 2002, 2003, and 2004 Form W-3 transmittals, (3) the petitioner's 2001, 2002, 2003, and 2004 Form W-2 Wage and Tax Statements, and (4) a letter dated December 14, 2005 from the petitioner's accountant. 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 it is a corporation and that it reports taxes pursuant to cash convention accounting and the calendar year. Those returns do not state the date the petitioner incorporated in the space provided for that purpose.

The petitioner's 2001 return shows that it reported taxable income before net operating loss deductions and special deductions of \$24,295. The corresponding Schedule A shows no Line 3 Cost of Labor, but an addendum to that return lists Other Deductions including \$4,177 in "Misc. Outside Se." The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 return shows that it reported taxable income before net operating loss deductions and special deductions of \$31,250. The corresponding Schedule A shows Line 3 Cost of Labor of \$130 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 return shows that it reported taxable income before net operating loss deductions and special deductions of \$20,194. The corresponding Schedule A shows no Line 3 Cost of Labor. An addendum to that return lists Other Deductions including \$2,821 in "Misc. Outside Services." The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2004 return shows that it reported taxable income before net operating loss deductions and special deductions of \$15,819 during that year. The corresponding Schedule A shows no Line 3 Cost of

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<sup>1</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).

Labor. An addendum to that return lists Other Deductions including \$7,466 in "Misc. Outside Services." The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The W-3 transmittals show that the petitioner paid \$177,539.29, \$180,491.98, 170,057.86, and 197,913.42 during 2001, 2002, 2003, and 2004, respectively.

The 2001 W-2 forms show that the petitioner paid wages to 24 employees during that year, but paid no wages to the beneficiary. Although some of the names on the 2002 W-2 forms are illegible the petitioner appears to have employed 24 employees during that year but not to have employed the beneficiary. The 2003 W-2 forms show that the petitioner paid wages to 25 employees during that year, but paid no wages to the beneficiary. The 2004 W-2 forms show that the petitioner paid wages to 18 employees during that year, but paid no wages to the beneficiary.

The petitioner's accountant's December 14, 2005 letter notes that the petitioner has declared a profit during each of the salient years, and that the petitioner's profit during each of those years was reduced by a depreciation deduction which, if added to the petitioner's annual profit, would yield a sum greater than the proffered wage. The accountant observed that the petitioner's salary and wage expense equaled 40% of its gross profit after cost of goods sold (CGS) during 2002 and 2003 and 50% of its gross profit after CGS during 2004. From this the accountant gathered that the petitioner had paid out its profits as salaries.

The accountant also stated that the petitioner informed him that it paid outside contractors \$7,112, \$9,043, \$5,642, and \$9,762 during 2001, 2002, 2003, and 2004, respectively, and that hiring the beneficiary would obviate that expense.

In a request for evidence issued October 28, 2005 the director asked whether the beneficiary was related to any of the petitioner's officers, at least some of whom share her family name. In response counsel submitted a letter from the petitioner's vice-president, dated November 9, 2005, in which he stated that the beneficiary is his sister. Counsel also submitted a notarized statement from the petitioner's vice-president dated September 25, 2003 and addressed to the Texas Workforce Commission. In that letter the petitioner's vice-president also stated that the beneficiary is his sister.

The director denied the petition on December 2, 2005.

On appeal, counsel asserted that the beneficiary entered the United States without inspection and the statement on the Form ETA 750B that she entered pursuant to a B-2 visa was the result of a typing error. Counsel provided no evidence in support of the assertion that the beneficiary entered without inspection or that the incorrect information was the result of a mistake. Counsel stated that the beneficiary's immigration status is irrelevant to the adjudication of the Form I-140.

Counsel is incorrect that the discrepancy between the information on the Form ETA 750 and that on the Form I-140 is irrelevant to the adjudication of the Form I-140. That discrepancy demonstrates that incorrect information was entered on the forms pertinent to the instant visa petition whether intentionally or, as counsel

asserts, accidentally. It heightens the level of scrutiny to which the assertions and the evidence in this case are subject. *See Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Counsel reiterated the assertion of the accountant that the petitioner's salary and wage expense equaled 40% of its gross profit after CGS during 2001, 2002 and 2003 and 50% of its gross profit after CGS during 2004. Counsel reiterated the accountant's assertion that this ratio demonstrates that the petitioner paid out its profits as salaries. Finally, counsel reiterated the accountant's assertion that the petitioner's depreciation deduction should be included in the calculation of the funds available to the petitioner to pay additional salaries.

The record does not support the assertion that a total salary expense that is 40% or 50% of a petitioner's CGS demonstrates that it was paying out its profits in the form of salaries and neither counsel nor the accountant explained further.

Further the assertion that the petitioner paid out its profits as wages is only germane to the determination of its ability to pay additional wages if the petitioner is able to demonstrate that it was not obliged to pay those wages. In the instant case the wage and salary expense has not been shown to be anything other than what it purports to be, the payment of wages and salaries to employees for performing duties necessary<sup>2</sup> to the petitioner's continued operation. No portion of the salaries and wages the petitioner paid to its employees during the salient years has been shown to be a surplus available to pay the wages of the proffered position.

The accountant asserts that the petitioner told him that it incurred contract worker expense for alterations in the following amounts: \$7,112 during 2001, \$9,043 during 2002, \$5,642 during 2003 and \$9,762 during 2004. If the petitioner were able to demonstrate that it paid those amounts during those years for performance of the duties of the proffered position, and that hiring the beneficiary would have obviated those expenses during those years, then those amounts would be considered in determining whether the petitioner had shown the ability to pay the proffered wage during those years.

The petitioner's 2001 tax return shows no Schedule A Cost of Labor. An addendum to that return lists Other Deductions including \$4,177 in "Misc. Outside Se." That amount is less than the amount the accountant claims was paid for contract alteration work. Further, it has not been demonstrated that any portion of those outside services consisted of alterations. No other line item on that return appears to support the accountant's assertion. The petitioner has not demonstrated that it paid any amount for contract alterations services during 2001.

The petitioner's 2002 tax return shows \$130 at Schedule A Cost of Labor. An addendum to that return lists that same amount as Contract Labor. That amount is insufficient to support the accountant's assertion that the petitioner paid \$9,043 for contract alterations during that year. Further, it has not been demonstrated that any

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<sup>2</sup> 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. – Trade or business expenses

(a) In general

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .

portion of even that small amount was paid for alterations. No other line item on that return appears to support the accountant's assertion. The petitioner has not demonstrated that it paid any amount for contract alterations services during 2002.

The petitioner's 2003 tax return shows no Schedule A Cost of Labor. An addendum to that return lists Other Deductions including \$2,821 in "Misc. Outside Services." That amount is less than the amount the accountant claims the petitioner paid for contract alteration work. Further, it has not been demonstrated that any portion of those outside services consisted of alterations. No other line item on that return appears to support the accountant's assertion. The petitioner has not demonstrated that it paid any amount for contract alterations services during 2003.

The petitioner's 2004 tax return shows no Schedule A Cost of Labor. An addendum to that return lists Other Deductions including \$7,466 in "Misc. Outside Services." That amount is less than the amount the accountant claims was paid for contract alteration work. Further, it has not been demonstrated that any portion of those outside services consisted of alterations. No other line item on that return appears to support the accountant's assertion. The petitioner has not demonstrated that it paid any amount for contract alterations services during 2004.

Although the proposition counsel intended to support with the petitioner's W-2 and W-3 forms is unclear,<sup>3</sup> this office suspects that counsel meant to imply that, having paid those amounts in wages, the petitioner must have been able to pay the proffered wage.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>4</sup> or otherwise increased its net income,<sup>5</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

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<sup>3</sup> Counsel was directly requested to provide the W-2 forms and may not have provided them for any other reason.

<sup>4</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>5</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The argument of the accountant and counsel that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>6</sup> Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

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. 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, the petitioner did not establish that it employed and paid 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

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<sup>6</sup> Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

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).

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>7</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 \$25,000 per year. The priority date is April 26, 2001.

During 2001 the petitioner reported taxable income before net operating loss deductions and special deductions of \$24,295. That amount is insufficient to pay the proffered wage. At the end of that 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 not demonstrated that any other funds were available to it 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.

During 2002 the petitioner reported taxable income before net operating loss deductions and special deductions of \$31,250. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner reported taxable income before net operating loss deductions and special deductions of \$20,194. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay

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<sup>7</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available to it 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 2003.

During 2004 the petitioner reported taxable income before net operating loss deductions and special deductions of \$15,819. That amount is insufficient to pay the proffered wage. At the end of that 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 not demonstrated that any other funds were available to it 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 2004.

The petition in this matter was submitted on October 7, 2005. On that date the petitioner's 2005 tax return was unavailable. On October 28, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial. The beneficiary is the petitioner's vice-president's sister. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood, by marriage, through friendship, or where the two have a financial relationship. See *Matter of Summart*, 374, 2000-INA-93 (May 15, 2000). The petition might have been denied for this additional reason.<sup>8</sup>

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.

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<sup>8</sup> The record contains a letter dated September 25, 2003 from the petitioner's vice-president and addressed to the Texas Workforce Commission. In that letter the petitioner's vice-president also stated that the beneficiary is his sister. The fact that the petitioner's vice-president disclosed the family relationship to the state workforce agency may have mitigated the implication that the job offer was not *bona fide*.