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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 25 2005

WAC-02-228-54199

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center, but the approval was later revoked. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The petitioner is a garment manufacturing firm. It seeks to employ the beneficiary permanently in the United States as a garment sample maker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 27, 2001. The proffered wage as stated on the Form ETA 750 is $2,602.00 per month, which amounts to $31,224.00 annually. On the Form ETA 750B, signed by the beneficiary on March 9, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on July 10, 2002. On the petition, the petitioner claimed to have been established on July 7, 2000, to currently have 47 employees, to have a gross annual income of $628,244.00, and to have a net annual income of $46,573.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 9, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on September 20, 2002.

The director initially approved the petition on February 6, 2003.

The beneficiary submitted an I-485 Application to Register Permanent Residence or Adjust Status on March 13, 2003. In the course of adjudicating the I-485 application, the director determined that the underlying I-140 petition had been approved in error. In a notice of intent to revoke (ITR) dated April 16, 2004, the director stated that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and stated his intention to revoke the petition. The director afforded the petitioner a period of thirty days to offer evidence in support of the petition and in opposition to the proposed revocation.

In response to the ITR, the petitioner submitted additional evidence. The petitioner's submissions in response to the ITR were received by the director on May 14, 2004.

In a decision dated June 7, 2004, the director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the present. The director also noted that the petitioner had submitted I-140 petitions for two other beneficiaries. The director therefore revoked the petition.

On appeal, counsel submits no brief and no additional evidence. Counsel states on appeal that the director was without authority to revoke the underlying visa petition since the beneficiary was already in the United States. Counsel states that the director did have authority to deny the application for adjustment of status and counsel requested certification of the denial of the adjustment application to the AAO. Counsel also states that the petitioner is now seeking to employ only one beneficiary, not three beneficiaries.

Notwithstanding counsel's statements concerning the presence of the beneficiary in the United States, the approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The United States Court of Appeals for the Second Circuit has interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition

ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127, 130 (2d Cir. 2004). That decision was for a time a binding precedent in the Second Circuit. However, the petitioner is located in California, and according to a Form G-28 submitted by counsel on behalf of the beneficiary, the beneficiary also lives in California. Therefore, the *Firstland* case has never been a binding precedent for the instant petition.

Moreover, on December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. *Firstland* is therefore no longer a binding precedent even in the Second Circuit.

For the foregoing reasons, the director did have authority to revoke the petition. *See* Act § 205; 8 C.F.R. § 205.2.

Since no new evidence is submitted on appeal, the AAO will evaluate the director's decision based on the evidence in the record prior to the director's revocation decision of June 7, 2004.

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the absence of a statement from a financial officer of the petitioner, in determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 9, 2001, the beneficiary did not claim to have worked for the petitioner. However other evidence in the record indicates that the beneficiary began working for the petitioner after the ETA 750B was signed.

The record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2003. The record before the director closed on May 14, 2004 with the receipt by the director of the petitioner's submissions in response to the ITD. As of that date, the beneficiary's Form W-2 for 2003 was the most recent Form W-2 available. That Form W-2 states compensation received from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	no W-2 submitted	$31,224.00	$31,224.00
2002	no W-2 submitted	$31,224.00	$31,224.00
2003	$13,010.00	$31,224.00	$18,214.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2003. No tax return of the petitioner was submitted for the year 2002, and the record contains no explanation for the absence of a tax return of the petitioner for that year. Although the RFE was issued prior to the end of 2002, the record before the director closed on May 14, 2004 with the receipt by the director of the petitioner's submissions in response to the ITD. As of that date the petitioner's federal tax return for 2004 was not yet available. Therefore the petitioner's tax return for 2003 was the most recent return available when the record before the director closed.

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 the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns will be considered as the petitioner's net income.

The petitioner's tax returns show the amounts for ordinary income on line 21 as shown in the table below.

Tax year	Ordinary income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	$29,799.00	$31,224.00*	-$1,425.00
2002	not submitted	$31,224.00*	no information
2003	$45,269.00	$18,214.00**	$27,055.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

** Crediting the petitioner with the $13,010.00 actually paid to the beneficiary in 2003.

The above figures fail to establish the petitioner's ability to pay the proffered wage in 2001 or in 2002.

Counsel asserts that since the priority date was established as March 27, 2001, the petitioner need only demonstrate its ability to pay the proffered wage since that date. However, if a only a pro-rata share of the proffered wage were to be considered for the year 2001, then only a pro-rata share of the petitioner's income for 2001 would also be considered. The above figures considering the petitioner's full net income for the year 2001 show that a deficit would have resulted from paying the full proffered wage to the beneficiary in 2001. An analysis using pro-rata shares of the net income and of the proffered wage for that year would also show a resulting deficit. Therefore a pro-rata analysis would not change the result of the analysis.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	

2001	$5,401.00	$16,750.00	$31,224.00*
2002	not submitted	not submitted	$31,224.00*
2003	-$2,347.00	$10,956.00	$18,214.00**

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

** Crediting the petitioner with the $13,010.00 actually paid to the beneficiary in 2003.

The above figures fail to establish the petitioner's ability to pay the proffered wage in 2001, 2002 or 2003.

The record also contains copies of the petitioner's Form DE 6 California quarterly wage reports for the four quarters of 2001 and the first two quarters of 2002. The reports show payments of wages totaling $287,209.11 in 2001 and $182,939.00 for the first two quarters of 2002. The figures for number of employees each month show that the highest number of employees in any month in 2001 was 33 and the highest number of employees in any month during the first two quarters of 2002 was 46. The figures show general increases in monthly payroll amounts and in the number of employees over the six quarters covered by the reports in the record.

The beneficiary's name is not among the petitioner's employees on any of the DE 6 reports in the record. The reports for 2001 appear to be consistent with the petitioner's Form 1120S tax return for 2001, but they add no significant information to the tax return information discussed above. The reports for the first two quarters of 2002 show that the petitioner's payroll amounts and its number of employees increased during that period. But no Form 1120 tax return of the petition was submitted for 2002, and the Form DE 6's for the first two quarters of 2002 are not an acceptable form of evidence in lieu of a federal tax return for that year.

The record also contains copies of bank statements for an account of the petitioner for the months of January through July 2002. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

On the petitioner's bank statements the ending balances are as follows:

2002:	Ending balances
January	$15,182.43
February	$18,033.31
March	$21,135.83
April	$8,681.23
May	$17,853.00
June	$11,175.85
July	$10,308.61
August	not submitted
September	not submitted
October	not submitted
November	not submitted
December	not submitted

No bank statements were submitted for 2001, nor for any months after July of 2002. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

For the above reasons, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In addition to the issue of the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, CIS electronic records indicate that the petitioner has filed two other I-140 petitions which have been pending during the time period relevant to the instant petition. The receipt numbers on those petitions are WAC-02-288-50031 and WAC-03-029-53675. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the other petitions submitted by the petitioner were each denied by CIS, one on January 21, 2003 and the other on June 2, 2004. The petition denied on January 21, 2003 was appealed to the AAO and that appeal was dismissed on June 15, 2004.

Even if a petition has been denied or has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from [redacted]sociate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 [redacted]& Company, Inc. 2004) (available at [redacted]Online). Therefore the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year. Similarly, for any petitions which have been denied, the underlying approved ETA 750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for same beneficiary, or for a substituted beneficiary.

The record in the instant case contains no evidence about the proffered wages for the beneficiaries of the other two petitions submitted by the petitioner. In his decision, the director noted the existence of other petitions filed by the same petitioner. For one of those petitions the director stated the proffered wage, information presumably taken from the record in that case. Counsel states in the instant appeal that the petitioner is now seeking to employ only one beneficiary, not three beneficiaries, and that the instant petition is the only one which the petitioner now intends to pursue. The assertions of counsel on this point are supported by a sworn declaration of the petitioner's president dated May 13, 2004 stating that the petitioner is only seeking adjudication of the instant petition. The declaration refers to two other I-140 petitions filed by the petitioner which were denied by CIS.

The language of the declaration would not prevent the petitioner from filing other I-140 petitions in the future and seeking adjudications of such petitions.

In any event, however, since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

In his decision, the director correctly stated the figures for ordinary income on the petitioner's tax returns for 2001 and 2003 and noted the absence of federal tax documents for 2002. The director correctly found that the evidence failed to establish the petitioner's ability to pay the proffered wage in any of the three years at issue in the instant petition. The director's decision to deny the petition was correct. For the reasons stated above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.

ORDER: The appeal is dismissed.