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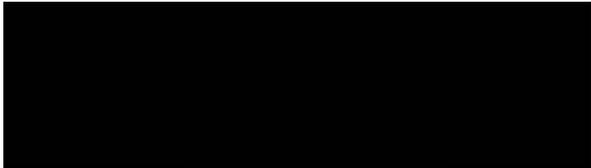
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: DEC 29 2006

EAC 03 002 52522

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
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jewelry firm. It seeks to employ the beneficiary permanently in the United States as a sample maker I jeweler. 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.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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

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

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. 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 priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 06, 2001. The proffered wage as stated on the Form ETA 750 is \$18.20 per hour, which amounts to \$37,856 per annum. The ETA 750 B, signed by the beneficiary on November 21, 2000, does not indicate that the petitioner has employed the beneficiary.

The Immigrant Petition for Alien Worker (I-140) was filed on September 25, 2002. In support of its ability to pay the beneficiary's proposed wage offer of \$37,856 per year, the petitioner initially provided a copy of a Form 1099, Miscellaneous Income, showing that it paid compensation of \$18,803.86 to the beneficiary in 2001. The petitioner also supplied a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflects that

the petitioner files its federal tax returns using a fiscal year running from November 1st to the following October 31st. Thus the 2000 return covers a period from November 1, 2000 to October 31, 2001. It contains the following information:

	2000
Taxable Income before the net	
operating loss (NOL) deduction	\$ 1,119
Current Assets (Sched. L)	- \$ 951
Current Liabilities (Sched. L)	\$ 32,588
Net current assets	- \$ 33,539

The tax return for 2001 also reflects no deductions were reported as salaries and wages or compensation of officers. As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a readily available cash or cash equivalent resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

On June 6, 2003 and November 26, 2003, the director requested additional evidence of the petitioner's continuing ability to pay the proffered wage. She specifically requested that the petitioner provide the information relating to its age and size as set forth in Part 5 of the I-140, which the petitioner had not completed. The director also requested a copy of the petitioner's 2001 federal tax return, copies of the beneficiary's Wage and Tax Statement (W-2) or Form 1099 for 2002, and copies of the monthly bank statements for the business for 2001 and 2002.

In response, the petitioner submitted a copy of its 2001 corporate tax return covering the period from November 1, 2001 to October 31, 2002. It contained the following:

	2001 ²
Taxable Income before the net	
operating loss (NOL) deduction	\$ 3,610
Current Assets (Sched. L)	- \$ 3,999
Current Liabilities (Sched. L)	\$ -0-
Net current assets	- \$ 3,999

Further provided was a copy of the beneficiary's Form 1099 for 2002 showing that he received \$19,193.19 from the petitioner as compensation. The petitioner also submitted a copy of its bank statement dated December 31,

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

² The 2001 tax return listed \$22,500 as officer compensation and no salaries or wages.

2001, showing an ending balance of \$31,459.62 and a copy of a letter, dated February 20, 2004, from the petitioner's owner, [REDACTED]. Ms. [REDACTED] states that she plans to use or transfer the amount of salary paid to sub-contractors to pay the beneficiary. She added that the petitioner employed five workers..

The director denied the petition on September 8, 2004, finding that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered salary of \$37,856. She found that the 2001 compensation paid to the beneficiary was \$19,052.14 less than the proffered wage and concluded that the petitioner's 2000 federal tax return which accounts for the period November 1, 2000-October 31, 2001 did not establish that there was sufficient net income or net current assets to cover this shortfall during the given period. The director further concluded that the shortfall of \$18,662.81 resulting in the comparison of the beneficiary's actual compensation in 2002 and the proffered wage could not be covered by either the petitioner's net income or net current assets indicated on its 2001 tax return. Although noting that the petitioner's December 31, 2001, bank statement had a balance of \$31,459.62, the director also noted that both tax returns shows a negative cash balance at the end of the tax year. Finally, the director concluded that the evidence did not show that the beneficiary was hired to replace a specific individual who was performing the same job and that the beneficiary could not be found to replace an individual in the certified position if he was simultaneously employed in the job offered.

On appeal, counsel provides a copy of the beneficiary's Form 1099, indicating that he received \$30,028.54 in compensation in 2003 from the petitioner. Counsel also provides another letter, dated October 7, 2004, from Ms. [REDACTED], who states that the beneficiary will replace Mr. [REDACTED] a previous sub-contractor and sample-maker, who left the firm on September 1, 2004 and, according to the Form 1099s submitted on appeal, earned \$19,193.19 in 2002, and \$24,941.61 in 2003. Counsel asserts that these facts establish the petitioner's ability to pay the proffered wage.

The AAO does not find this contention persuasive. It is noted that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In reviewing a petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record indicates that the petitioner has employed the beneficiary in 2001, 2002, and 2003 and paid him \$19,052.14 less than the proffered wage in 2001, \$18,662.81 less than the proffered wage in 2002, and \$7,827.46 less than the proffered wage in 2003.

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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as set forth above.

In this case, while it is noted that the fiscal year(s) covered by the corporate tax returns only correspond to the first ten months of the calendar year covered by the Form 1099s record of compensation paid to the beneficiary, as noted by the director, it is sufficient to conclude that neither the petitioner's \$1,119 in net income, nor its net current assets of -\$33,539 could meet the shortfall of \$19,052.14 resulting from a comparison of the actual compensation paid to the beneficiary and the certified salary of \$37,856 during the 2000 tax year. Similarly, in tax year 2001, neither the petitioner's \$3,610 in net income, nor the -\$3,999 in net current assets could cover the shortfall of \$18,662.81.

With regard to the petitioner's owner's willingness to pay the certified wage from the reallocation of Mr. [REDACTED]'s salary, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner establish its ability to pay the proffered salary through evidence including federal tax returns, audited financial statements, or audited reports, and that this continuing ability be demonstrated as of the visa priority date. As a general matter, wages already paid to others are not available to prove the ability to pay the wage proffered to a beneficiary at the priority date of the petition and continuing to the present. The record must clearly identify the individual to be replaced, the position held, and the wages paid before CIS may consider if this individual's wages are available to pay the proffered wage. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her and his or her funds would not be available to pay the beneficiary's wage. The record in this case indicates that the beneficiary was not hired to *replace* Mr. [REDACTED] as they were both employed simultaneously in the same position during 2002 and 2003.

Relevant to the petitioner's bank statement provided to the underlying record, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," one bank statement is not indicative of a sustainable ability to pay a certified wage. It does not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage during a given period and will not be considered as a substitution for the prescribed evidence.

Based on the foregoing, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary beginning at the priority date of April 6, 2001. 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.