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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] SRC-04-088-51524 Office: TEXAS SERVICE CENTER Date: JUL 2 8 2006

In re: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The director determined that the petitioner did not sustain the burden of proof to meet eligibility for the classification sought and denied the petition.

The petitioner is a beauty salon and seeks to employ the beneficiary permanently in the United States as a Hair Stylist. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 5, 2005, denial, the case was denied based on the petitioner's failure to establish the ability to pay the beneficiary the proffered wage.

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.[1]

The record shows that the appeal is properly filed, timely[2] 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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, here, April 13, 2001, 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).

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[1] 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). 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).

[2] The I-290B was initially filed on April 7, 2005, but rejected for failure to use the most current version of the Form I-290B. The petitioner then resubmitted the updated appropriate version of the form, which was accepted for filing.

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 13, 2001. The proffered wage as stated on Form ETA 750 for the position of a hair stylist is $14,310 per year, 40 hours per week. The labor certification was approved on February 15, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on February 3, 2004. On the I-140 petition, the petitioner listed the following information related to the petitioning entity: established 1996; gross annual income: $83,281.00; net annual income: $36,400.00; and that the petitioner had 8 employees. The I-140 Petition additionally listed the beneficiary's salary at $275.19 per week, for an annual salary of $14,309.88.

The Service Center Requested Additional Evidence ("RFE") on October 20, 2004, related to the petitioner's other employees. Specifically, the Service Center requested that the petitioner send W-2s and/or 1099 statements for the eight employees that the petitioner listed on Form I-140 (as the tax returns submitted did not demonstrate that the employer had paid any wages to the eight listed employees).

In response to the RFE, the petitioner's president provided an explanation of how the individuals were paid: "I am the owner of the hair salon and the hairdressers pay me a percentage of their earnings for use of their work stations every week. Although, I did not pay the hairdressers a salary *per se*, I nevertheless considered them my employees because I issued directives to them and exercised authority over them in determining the timeframe which they worked and their dress code . . . However, since the time of filing the petition, we are converting operations to maintaining full-time employees and stylists, instead of charging a percentage of earnings for the use of stations as we did in 2001. [redacted] will become one of our staffed full-time hair stylists. So, pursuant to our filed labor certification process, [redacted] receive the stipulated salary for her services as a stylist at our salon."

On March 5, 2005, the director denied the I-140 petition. The director's decision concluded that based on the past method of paying the other stylists, the petitioner lacked the intent at the time of filing to actually pay the beneficiary (and the other stylists) as an "employee." Further, the director concluded that based on the framework that the petitioner elaborated, the beneficiary would likely not be "employed" in the traditional sense of the word, but rather would pay "rent" for use of the work station, similar to the other stylists. The director noted that according to the petitioner's statement submitted, the petitioner's intent pay the beneficiary and other workers as "employees" was only changed after the filing of the petition (more pertinently, after the petitioner received the RFE). Additionally, based on the documentation submitted, the petitioner failed to establish its ability to pay the beneficiary the proffered wage from the priority date until the time that the beneficiary obtains permanent residence.

On appeal, counsel submitted a brief along with a notarized affidavit from the owner, which provided that: he would give up a portion of his salary to pay the beneficiary the proffered wage; that he has already begun to pay himself less; and that his intentions related to giving up his salary to pay the beneficiary "have existed since 2001 up through the present time." Counsel additionally submitted a letter from the owner wherein he

agreed to reduce his salary from $800 per week to $400 per week. Also submitted were the petitioner's tax returns for 2001, 2002, 2003, and 2004.

We will first examine the petitioner's ability to pay the proffered wage, and then address the remaining issue of intent. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 petitioner has not claimed that it employed and paid the beneficiary the full proffered wage from the priority date of April 13, 2001. On Form ETA 750B, signed by the beneficiary on May 11, 2002, the beneficiary did not claim to have worked for the petitioner, but rather listed on the form that she was employed as a Home Health Aide for S.E.B.N.C. Quality Vending, Bronx, New York from December 1997 onward. She additionally listed prior experience as a stylist [redacted] Bronx, New York, from June 1994, to December 1997.[3]

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. 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).

The evidence shows that the petitioner is an S corporation. 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. Line 21 indicates ordinary income as follows:

Year	Amount
2001	-$863
2002	-$1,668
2003	$1,207
2004	$2,897

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 shown on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. Here, petitioner's tax returns do not indicate income from other activities. Therefore, the ordinary income figure of the petitioner's Form 1120S tax returns, line 21 accurately reflects the petitioner's income. Based on the tax returns submitted, the petitioner did not have sufficient net income to pay the proffered wage in any year, and the petitioner did not demonstrate its ability, or continuing ability, to pay the proffered wage.

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[3] The labor certification job offer ETA 750A requires two prior years of experience as a hair stylist. The beneficiary has supplied a letter from the [redacted] to confirm her prior experience (although we note that the letter fails to confirm whether the beneficiary's experience was full-time, part-time, or the number of hours worked for the time period of June 1994 to December 1997.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] 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 were as follows:

Year	Amount
2001	$9,188
2002	$7,520
2003	$8,727
2004	$11,624

As demonstrated above, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage.

To address the petitioner's additional arguments, the petitioner's president[5] has agreed to reduce his salary from $800 per week to $400, a reduction, which translates to $20,800 on an annual basis, and that reduction would provide the required $14,309.88 to pay the beneficiary's salary. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's officer's compensation paid may be considered as an additional financial resource in addition to the petitioner's ordinary income to determine the petitioner's ability to pay the proffered wage.

The tax returns demonstrate that the following amounts were paid for Officer's Compensation:

Year	Amount
2001	$41,400
2002	$41,600
2003	$41,600
2004	$42,400

These amounts would allow for a reduction of the president's salary of $20,800 to pay the beneficiary's annual salary of $14,309.88. Further, the president states in his letter submitted on appeal that it has been his intent since 2001 to pay the beneficiary from his salary. To quote the letter precisely: "Final Touch Beauty Salon has had the ability to pay [redacted] offered wage since 2001, as my intentions to give up the required portion of my salary in order to [redacted] existed since 2001 up through the present time."

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[4] 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.

[5] The tax returns list that he owns 100% of the petitioning company's stock.

Other than the petitioner's own statement, nothing in the record of proceeding demonstrates that the petitioner's pledge to reduce his compensation, whether by 50% (or 33%) is credible.[6]

However, as raised in the director's denial, "a petitioner must establish eligibility at the time of filing and cannot make material changes to a deficient petition to conform to Service requirements." *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As noted further in the denial, "the ability to pay the salary was not established with the 2001 income tax return showing only $863 in ordinary income and no wages. Additionally, it cannot be established with any financial documentation available prior to this petition as it is only now that the petitioner can see if all of his stylists will agree to the changed pay arrangements, establish evidence of his income after this change takes place, etc."

We agree with the director's determination. The tax returns submitted represent income earned and revenue generated under the prior business formulation wherein his hairstylists were "renters," rather than employees. Consequently, the terms of employment, revenue generated, and owner's compensation would all be different, and we cannot conclude that prior revenue generated under the old "renter system" with no "employees" would be indicative of future income that might be paid in Officer Compensation, and, therefore, available in lieu of the president's compensation to pay the beneficiary the proffered wage.

Based on the evidence submitted, the petitioner has failed to demonstrate that it can pay the beneficiary the proffered wage. 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.

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[6] The petitioner has submitted a copy of one check for Final Touch, dated March 26, 2005, issued to [redacted] in the amount of $344.40. The petitioner asserts that this demonstrates that he has begun to pay himself less. One check alone is not convincing. Based on the one check submitted, we cannot ascertain whether this pattern of payment has been followed on a regular basis, whether this check is in fact his pay, and not issued to him for another reason, what time period the check represents, and what [redacted] was previously paid.