identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 10 2007

EAC 04 257 53756

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, Vermont 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 jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a 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.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is $18.48 per hour, which equals $38,438.40 per year.

The Form I-140 petition in this matter was submitted on September 13, 2004. On the petition, the petitioner stated that it was established on December 6, 1994. The space reserved for the petitioner to report the number of workers it employs was left blank. The petition states that the petitioner's gross annual income is $618,401. On the Form ETA 750, Part B, signed by the beneficiary on June 27, 2000, the beneficiary 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 New York, New York.

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.

In the instant case the record contains (1) the petitioner's 2001 and 2003 Form 1120, U.S. Corporation Income Tax Return, (2) the petitioner's 2002 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, (3) New York quarterly wage reports for the last quarters of 2001, 2002, 2003, and 2004, (4) an earnings statement the petitioner issued to the beneficiary, (5) letters dated June 30, 2004, May 17, 2005, and September 29, 2005 from the petitioner's vice president, (6) 2001, 2002, and 2003 Form W-2 Wage and Tax Statements, and (7) copies of monthly statements pertinent to the petitioner's bank accounts.

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 tax returns show that the petitioner is a corporation, that it incorporated on December 6, 1994, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner declared a loss of $102,252 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared a loss of $11,107 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of $103,501. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The New York quarterly wage reports show that the petitioner employed 27 employees during the last quarter of 2001, 19 employees during the last quarter of 2002, 14 employees during the last quarter of 2003, and 20 employees during the last quarter of 2004. Those reports do not show that the petitioner employed the beneficiary.

The earnings statement shows that the petitioner paid the beneficiary gross pay of $2,500 for the two-week pay period from September 12, 2005 to September 25, 2005. Another entry shows that the petitioner had paid the beneficiary year-to-date wages of $43,129.69 for work through September 25, 2005.

The petitioner's vice president's June 30, 2004 and May 17, 1005 letters list 21 former employees of the petitioner and amounts paid to them during 2001, 2002, and 2003. Some of the W-2 forms submitted confirm the figures provided in the letter. The vice president concludes that because the sum of those wages during various years exceeds the annual amount of the proffered wage the evidence demonstrates that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. The September 29, 2005 letter lists 20 of the recently released employees previously named. In that letter the vice president

stated that he had been employing the beneficiary since January 17, 2005 and that he dismissed the listed employees because he wished to hire the beneficiary.[1]

The other W-2 forms submitted show amounts paid to and [redacted] during 2001, 2002, 2003, and 2004. The proposition that [redacted] W-2 forms were intended to support is unknown to this office. The proposition that [redacted] W-2 forms were intended to support is unclear, although that proposition may be implied below.

The director denied the petition on September 26, 2005. On appeal, counsel asserted that [redacted] Holliday is a retired jeweler and that the evidence demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner appears to be asserting that, in addition to replacing the 20 employees previously listed, the beneficiary would also replace Mr. [redacted]

In a request for evidence dated April 20, 2005 the service center requested that the petitioner provide its 2002 and 2003 tax returns. Those returns were not provided in the petitioner's response to that request. On appeal, counsel provided those documents.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under the circumstances, this office will not consider the tardily submitted tax 2002 and 2003 returns.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[2] Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

---

[1] The wording of the letter was, "I ceased their employment because I highly needed [the beneficiary's] service to us. This is the main reason why this company filed a Labor Certification and Petition for [the beneficiary.]"

[2] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Evidence of wages the petitioner paid to various individuals and evidence of the petitioner's total wage expense has been submitted. As to the wages paid to named individuals, this office will consider those wages as funds available to pay the proffered wage if the petitioner demonstrates that they were paid for the performance of the duties of the proffered position and that the petitioner was able, if the beneficiary had become available to work, to replace those individuals.

In the instant case the petitioner lists 20 former employees, indicates that the beneficiary will replace all of them, and appears to imply that the petitioner would replace Mr. [redacted]. Absent considerable supporting evidence this office is not inclined to find that claim credible. The petitioner did not demonstrate that the wages paid to any of the named individuals were available to pay the proffered wage to the beneficiary.

The petitioner's total wage expense is also of little evidentiary value. 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[3] or otherwise increased its net income,[4] 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.

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 Sonegawa*, 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

---

[3] For instance, the petitioner might be able to demonstrate, rather than merely alleging, 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.

[4] 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.

instant case, the petitioner showed that it paid the beneficiary 2005 year-to-date wages of $42,500 by September 25 of that year.

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 the petitioner's federal income tax return, without consideration of depreciation or other expenses.[5] 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[6] 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 $38,438.40. The priority date is April 27, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. 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 submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

---

[5] 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).

[6] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner's 2002 tax return was not timely submitted and will not be considered. The petitioner submitted no reliable evidence of any funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner's 2003 tax return was not timely submitted and will not be considered. The petitioner submitted no reliable evidence of any funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on September 13, 2004. On that date the petitioner's 2004 tax return was unavailable. On April 20, 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 2004 tax return should have been available. The request for evidence, however, specifically requested the petitioner's 2002 and 2003 tax returns and did not request its 2004 return. Under these circumstances this office finds that the petitioner is excused from providing copies of its tax returns for 2004 and subsequent years.

The petitioner demonstrated, however, that it paid the beneficiary at least $42,500 during 2005. That amount is greater than the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2005, although it was not obliged to do so.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003.[7] Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests additional issues that were not addressed in the decision of denial.

In a request for evidence dated April 20, 2005 the service center requested that the petitioner provide its 2002 and 2003 tax returns. Those returns were not provided in the petitioner's response to that request.[8] 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). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further, in a September 29, 2005 letter the vice president stated that he dismissed the 20 listed employees, whom he said were jewelers, because he wished to hire the beneficiary.

---

[7] This office is aware that another Form I-140 petition was filed by the instant petitioner for the instant beneficiary. That petition was supported by many of the same representations and much of the same evidence that this office now finds unconvincing, and was approved on March 5, 2007. That other petition is not before this office and we express no opinion as to whether it should have been approved.

[8] They were subsequently provided on appeal.

The fundamental purpose of the visa category pursuant to which the petition in this case was filed is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. If the petitioner dismissed employees with the intent to replace them with the beneficiary out of preference, as he plainly admitted, that would be inconsistent with the purpose of the instant visa category.

That the petitioner discharged other jewelers in favor of the beneficiary calls into question the legitimacy of the petitioner's claim that it is unable to find U.S. workers to fill the proffered position. This consideration formed no part of the basis for the decision of denial, however, and the petitioner has not been accorded an opportunity to reconcile its claim of inability to fill the proffered position with a U.S. worker with its eagerness to discharge jewelers it employs in favor of the beneficiary. Therefore, this office will not base today's decision, even in part, on that issue. If the petitioner attempts to overcome today's decision on motion it should address this additional issue.

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.