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FILE:



WAC-03-174-53363

Office: CALIFORNIA SERVICE CENTER

Date:

DEC 14 2005

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, Director  
Administrative Appeals Office

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

The petitioner is engaged in the business of fine jewelry and gems. It seeks to employ the beneficiary permanently in the United States as an import/export manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 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 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, 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).

Here, the Form ETA 750 was accepted on August 3, 2001. The proffered wage as stated on the Form ETA 750 is \$36.15 per hour (\$75,192 per year). The Form ETA 750 states that the position requires 2 years experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation<sup>1</sup>. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$350,872,

<sup>1</sup> Form I-140 uses Hubert as the petitioning entity with IRS Tax [REDACTED] Form 1120S filed by Hubert Inc with the same employer identification number indicates that it was incorporated on May 29, 1998 and

and to currently employ 8 workers. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year.

With the petition, the petitioner submitted Form 1120S U.S. Income Tax Return for an S Corporation filed by the petitioner for 2001 with all schedules and attachments as evidence of its ability to pay the proffered wage.

On December 23, 2003, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence of the petitioner's ability to pay the beneficiary's wage for 2001 and 2002, the petitioner's W-3 forms for 2001 and 2002, Form DE-6 for all employees for the last four quarters, the beneficiary's W-2 forms for 2001 and 2002, and proof of the beneficiary's foreign employment history.

In response, the petitioner submitted first two pages of Form 1040 for the owner of the petitioner for 2001, first page of the petitioner's Form 1120S for 2001 and 2002, Form W-3 issued by Hubert Gesser/Hubert Gem Des. for 2001, Form W-3 issued by the petitioner for 2001 and 2002, Form DE-6 filed by Hubert Gesser/Hubert Gem Des. for all quarters of 2000 and 2001, Form DE-6 filed by Hubert Inc for the fourth quarter of 2001 through the fourth quarter of 2003, the beneficiary's W-2 form issued by Hubert Gesser/Hubert Gem Des. for 2001.

The director denied the petition on July 21, 2004, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the continuing ability to pay the proffered wage annualized at \$75,192 from the priority date of August 3, 2001 to the present with a negative ordinary income of \$(64,516) and insufficient assets.

On appeal, counsel asserts that the petitioner has ability to pay the proffered wage with the fact that the petitioner has employed the beneficiary for the past three years and five months and with the average monthly bank account balances and average total gross sales for the period from October 2000 through 2004.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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,

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elected as an S corporation effective on June 1, 1998. The record contains Form W-3, Form W-2 and Form DE-6 under name of [REDACTED] but with a different employer identification number:

[REDACTED] The petitioner did not document the relationship between Hubert Inc and [REDACTED] Gem Des., nor did it submit evidence to prove it is a successor in interest to Hubert [REDACTED] except that in the brief statement counsel uses Hubert Inc. dba Hubert Gem Designs as the petitioner.

In addition, the CIS record shows that Hubert Gem Designs with its own employer identification number filed an I-140 immigrant petition on March 12, 2002 (Receipt number: WAC-02-133-52334) and the beneficiary of that petition obtained the permanent status on April 29, 2005. If the petitioner proves with evidence that Hubert Inc and Hubert Gem Designs are the same entity, then in the instant case, the petitioner must demonstrate its ability to pay all wages from 2001 through 2005. The AAO finds that the petitioner in the instant case is [REDACTED] with employer identification number [REDACTED] structured as an S corporation and will consider evidence and documents pertinent the petitioner only.

the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. The instant case provided inconsistent information on the beneficiary's employment with the petitioner. The beneficiary claimed to have worked for the petitioner for one year from March 2001 to March 2002<sup>2</sup> while counsel claims on appeal that the petitioner has employed the beneficiary for the past three years and five months. The record contains Form W-3 issued by Hubert Gesser/Hubert Gem Des. for 2001, Form W-3 issued by the petitioner for 2001 and 2002, Form DE-6 filed by Hubert Gesser/Hubert Gem Des. for all quarters of 2000 and 2001, Form DE-6 filed by Hubert Inc for the fourth quarter of 2001 through the fourth quarter of 2003, the beneficiary's W-2 form issued by Hubert Gesser/Hubert Gem Des. for 2001. No documents established that the beneficiary was ever employed and paid by the petitioner, Hubert Inc. The Hubert Gesser/Hubert Gem Des. DE-6 forms for 2001 and the beneficiary's W-2 form issued by Hubert Gesser/Hubert Gem Des. for 2001 show that the beneficiary was paid by Hubert Gesser/Hubert Gem Des. in the amount of \$1,307 in the first quarter, \$3,605 in the second quarter, and \$1,400 in the third quarter, equally \$6,312 in the year 2001. However, the beneficiary's compensation of \$6,312 in 2001 cannot be considered as the compensation paid by the petitioner to the beneficiary in the instant case because the record does not contain evidence showing that the petitioner is the same entity with or the successor in interest to Hubert Gesser/Hubert Gem Des. See Footnote 1 above. Therefore, contrary to counsel's assertion, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2002.

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. 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). Counsel's reliance on the petitioner's average total gross sales for each three-month period of about \$550,000 in the brief accompanying with appeal is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net*

<sup>2</sup> On the Form ETA 750B, signed by the beneficiary on August 1, 2001, the beneficiary claimed to have worked for the petitioner since March 2001; on the Form G-325A, signed by the beneficiary on March 7, 2003, the beneficiary claimed employment with the petitioner from March 2001 to March 2002.

*income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record of proceeding contains copies of Form 1040 tax return filed by the owner of the petitioner for 2001 and Form 1120S for the petitioner for 2001 and 2002. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In the instant case, the owner's individual tax return is only dispositive when it provides information on the owner's income from an S corporation on Line 17 and Schedule E of Form 1040. The director incorrectly considered the owner's adjusted gross income in determining the petitioner's ability to pay the proffered wage.

The petitioner's tax returns in the record demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$75,192 per year from the priority date.

In 2001, the Form 1120S stated net income<sup>3</sup> of \$(64,516).

In 2002, the Form 1120S stated net income of \$81,649.

Therefore, for the year 2002, the petitioner had sufficient net income to pay the proffered wage while the petitioner is still obligated to demonstrate that it could pay the proffered wage for the year 2001.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> 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 tax return for 2001 indicates that the petitioner had current assets of \$19,292 (Cash \$8,547 and inventories \$10,745), and current liabilities of \$31,283 (accounts payable \$21,960 and other current liabilities \$9,332), therefore, net

<sup>3</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

current assets were \$(11,991). The information shows that the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage for the year 2001.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that: "The average monthly balances in the Petitioner's bank statements show the company's ability to pay most if not all of the Beneficiary's annual salary in just one month!" Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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," 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.