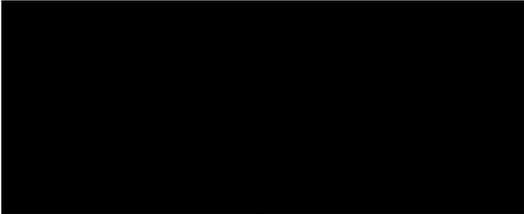




U.S. Citizenship
and Immigration
Services

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prevent clear and warranted
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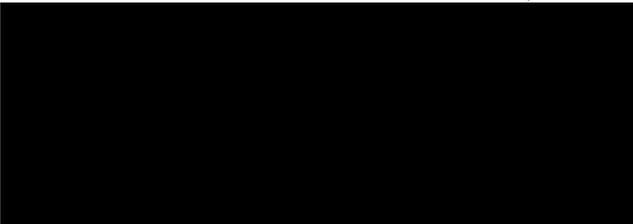
Office: VERMONT SERVICE CENTER

Date: NOV 10 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

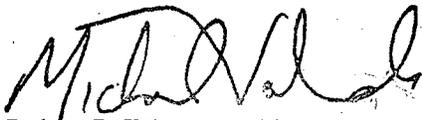
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a jewelry manufacture. It seeks to employ the beneficiary permanently in the United States as a sample maker. 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, the counsel submits 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$18.20 per hour (\$37,856.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax return 2001; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested on October 16, 2003 pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested copies of the petitioner's 2002

U.S. federal tax return; the beneficiary's 2001 and 2002 W-2 Wage and Tax Statements; and, annual reports for 2001 and 2002 with audited or reviewed financial statements,

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted copies of the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for year 2001; a letter from an accountant; a bank statement; and, freight and shipping invoice checks.¹

The director denied the petition on April 26, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the beneficiary will remain an employee of the petitioner because it is a financially viable business. Also, counsel contends that the beneficiary will have benefit of the wage of a departed employee who was employed on 2000 but not in 2001. Counsel discloses that the beneficiary has been employed since August 2003, and she submits the beneficiary's 2003 W-2 Wage and Tax Statement (W-2) and salary checks payable to the beneficiary.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Evidence was submitted to show that the petitioner employed the beneficiary from August 2003. The beneficiary's 2003 W-2 Wage and Tax Statement stated wages paid of \$13,097.00.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax return² demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,856.00 per year from the priority date of April 16, 2001:

- In 2001, the Form 1120S stated taxable income of \$27,669.00.

¹Although the introduction of these checks is not explained by counsel, presumably they were introduced to show business receipts.

²A tax return submitted before the priority date does not have probative value to show the ability to pay from that date but it will be discussed later in another context.

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. There is no information on the Schedule "L" of the 2001 tax return submitted.

Counsel asserts on the Form I-1290B appeal form that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel cites no legal precedent for the contention, and, according to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

As already mentioned, counsel contends that the beneficiary will have benefit of the wage of a departed employee who was employed on 2000 but not in 2001. The petitioner has submitted its 2000 U.S. federal tax return that states a taxable income loss of <\$7,025.00> on gross receipts or sales of \$265,000.00. A review of that tax return states "salaries and wages" on line 8 of \$59,960.00. According to counsel, the previous employee received \$50,960.00 in 2000, and a W-2 statement was submitted to support this assertion. In 2001, without any salaries or wages expenses stated on line 8, on gross receipts of \$266,000.00, the petitioner reported taxable income of \$27,669.00. The petitioner has submitted a letter from its accountant stating that there was sufficient money available in 2001 to pay the proffered wage. One bank statement was submitted stating an end-of-year cash balance of \$34,525.90, but there is no corresponding cash amount stated on Schedule "L" of the petitioner's return.

Also, counsel is asserting by implication that by employing the beneficiary and replacing existing or former workers it had the ability to pay from the priority date. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the workers indicated by name involved the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, and duties of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a sample maker will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax return as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.

³ 8 C.F.R. § 204.5(g)(2).