U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 16 2006

EAC 03 090 53280

IN RE: Petitioner:
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:

[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 preference visa petition was denied by the Director, Vermont Service Center. The subsequent motion to reopen was granted by the Administrative Appeals Office (AAO) and the previous decision of the director was affirmed. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a drycleaner and laundromat. It seeks to employ the beneficiary permanently in the United States as a dry cleaning supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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.

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

As set forth in the director's October 12, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 DOL. *See* 8 C.F.R. § 204.5(d). 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 DOL 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 March 29, 2001. The proffered wage as stated on the Form ETA 750 is $13.74 per hour ($28,579.20 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience as a store manager.

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] Counsel submits a brief and no new evidence on appeal. Relevant evidence in the record includes the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2001, the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2002, the petitioner's unaudited financial statements for 2001 and 2002, a letter dated April 19, 2004 from the petitioner's accountant regarding the petitioner's retained earnings, IRS Form W-2 issued by the petitioner to in 2001, and the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2001 and the first quarter of 2002.[2] The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation until January 1, 2002, when it elected to be treated as an S corporation. On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of $356,879.00, and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 23, 2001, the beneficiary claimed to have worked for the petitioner as a shirt machine operator from February 1998 to February 1999, and as a laundromat assistant manager from February 1999 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the director should have considered the petitioner's retained earnings in its determination of the petitioner's ability to pay the proffered wage. He states the petitioner could have used its retained earnings to pay the proffered wage. Counsel also states that the petitioner paid another employee $25,000.00 in 2001 in the proffered job.

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 determining the 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 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 established that it employed and paid the beneficiary the full proffered wage from the priority date.[3]

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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).

[2] The record contains copies of the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 1998, 1999 and 2000. Evidence preceding the priority date in is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

[3] The record lacks copies of IRS Forms W-2 showing wages paid to the beneficiary, and the record contains no other evidence of the wages paid to the beneficiary by the petitioner. The record therefore lacks evidence that the petitioner was paying the proffered wage during the relevant time period. Thus, the AAO must evaluate the petitioner's ability to pay the entire proffered wage as of the priority date and continuing to the

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 record before the director closed on January 2, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2002 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net income[4] of -$21.00.
- In 2002, the Form 1120S stated net income[5] of $0.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage of $28,579.20.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -$9,349.00.

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present.

[4] Taxable income before net operating loss deduction and special deductions as reported on Line 28.

[5] 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. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional deductions shown on its Schedule K for 2002, the petitioner's net income is found on line 23 of Schedule K of its tax return.

[6] 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.

- In 2002, the Form 1120S stated net current assets of -$8,673.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage of $28,579.20.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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 recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Counsel asserts that the services of the beneficiary are intended to replace those of another employee. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In support of counsel's assertions, counsel submits copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2001 and the first quarter of 2002 and a copy of IRS Form W-2, Wage and Tax Statement, for the employee in question showing compensation received from the petitioner in the amount of $25,000.00 for 2001 and $6,000.00 for 2002. These amounts are less than the proffered wage of $28,579.20 per year. The petitioner has not documented the position and the duties of the employee who performed the duties of the proffered position. In general, 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 other employee involves the same duties as those set forth in the Form ETA 750. If that employee performed other kinds of work, then the beneficiary could not have replaced that employee. Moreover, counsel states that the employee in question is still employed by the petitioner.

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 the DOL.

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.