

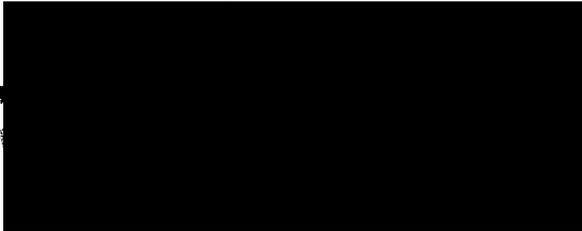
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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: LIN 02 240 50924 Office: NEBRASKA SERVICE CENTER Date: DEC 29 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

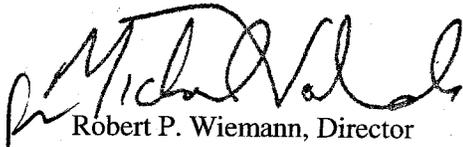
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a Muslim slaughterhouse/Halal meat producer. It seeks to employ the beneficiary permanently in the United States as a butcher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor 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 that it had not established that the beneficiary has the requisite education as stated on the labor certification 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.

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.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 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 February 1, 2002. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year. The Form ETA 750 states that the position requires eight years of grade school and four years of high school.

On the petition, the petitioner stated that it was established on October 9, 1997. The petitioner did not state the number of workers it employed at that time. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Forreston, Illinois.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage and no evidence that the beneficiary has the prerequisite education listed on the Form ETA 750. Therefore, on December 2, 2002, Director, Nebraska Service Center, requested, *inter alia*, evidence pertinent to both of those issues. The director also specifically asked the number of workers the petitioner employs.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and that it demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter, dated December 27, 2002, from Abdel Nouredin. In that letter, Mr. Nouredin states that he is the owner of the petitioner, Halal Farms USA Incorporated. He states that the business is not currently operating because he has no Halal butcher. Referring to financial statements contemporaneously provided, he continues that he anticipates a profit as soon as he is able to hire a butcher and that until the corporation makes a profit he is willing to pay the proffered wage out of his own income and assets.

With that letter, counsel submitted (1) the petitioner's checking account statements from January 2002 through February 2002, (2) its 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation, (3) wage summaries showing the amount the petitioner paid to its employees during 1998, 1999, 2000, and 2001, (4) 2000 and 2001 Form W-2 Wage and Tax Statements showing the amount the petitioner's owner's employers paid to him during those years, (5) a pay stub dated November 20, 2002 showing the amount the petitioner's owner's employer paid him during the preceding pay period as well as a year-to-date total, (6) the unaudited profit and loss statements of an unidentified company for the calendar years from 1997 through 2002 and (7) another profit and loss statement incorporating the profit and loss of all of those years into one statement.

The response to the request for evidence contains no evidence pertinent to the beneficiary's education.

The 2000 tax return shows that the petitioner declared a loss of \$118,983 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$699 and current liabilities of \$184, which yields net current assets of \$515.

The 2001 return shows the petitioner declared a loss of \$126,838 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director denied the petition on March 20, 2003, 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 and that the evidence submitted did not demonstrate that the beneficiary has the requisite twelve years of formal education.

On appeal, counsel submits (1) the joint 2002 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and the owner's spouse, (2) the petitioner's unaudited Register Report for the first quarter of 2003, (3) an Affidavit of Title purporting to show that the petitioner's owner has an interest in real property described by lot, block, and subdivision, (4) the second page of a Uniform Residential Appraisal Report estimating the value of a property described by street address<sup>1</sup>, (5) a diploma, in Arabic, and an English translation stating that Hesham Mohamed Abd Elhamid Aly graduated from a three-year program at the Don Bosco Institute, in Alexandria, Egypt, in 1980, and (6) an Evaluation Report, dated May 1, 2003, from an educational evaluator, stating that the beneficiary's education is the equivalent of graduation from a vocational high school in the United States.

Counsel states that the petitioner's individual income tax return shows adjusted gross income of \$264,203. Counsel asserts that the petitioner owns five properties valued at a total of \$2,375,000. Counsel states that this demonstrates the petitioner's ability to pay the proffered wage.

As to the beneficiary's education, counsel asserts that the beneficiary meets the requirements stated on the Form ETA 750. Counsel observes that the Evaluation Report stated that the petitioner's education is equivalent to graduation from a U.S. vocational high school.

Initially, this office notes that counsel has confused the petitioner with the petitioner's owner. He has also confused the income and assets of the petitioner with those of the petitioner's owner. The petitioner in this matter is Halal Farms USA Incorporated.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.<sup>2</sup> As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others, including real estate, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

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<sup>1</sup> That page of the URAR does not state who owns the property or whether it is encumbered. Further, the limiting conditions page that must accompany that appraisal when it is to be relied upon by anyone for any purpose was not submitted with that portion of that appraisal.

<sup>2</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

Counsel's reliance on the unaudited financial statements is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case is similarly 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. 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 returns.

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 instant case, the petitioner did not establish that it employed and paid the beneficiary.

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, 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. 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).

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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, 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 the 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, those expected to be 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 net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,960 per year. The priority date is February 1, 2002. Evidence submitted pertinent to years prior to 2002 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner, however, has submitted no reliable evidence of its ability to pay the proffered wage during 2002 and subsequent years. Therefore, the petitioner has failed to demonstrate its ability to pay the proffered wage during those years.

Counsel argues that the petitioner is not currently in business because it needs the services of a butcher. Counsel implies that, therefore, the petitioner's inability to demonstrate its continuing ability to pay the proffered wage beginning on the priority date should be overlooked. The regulation at 8 C.F.R. § 204.5(g)(2), however, makes clear that the petitioner must demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. That burden is not lifted by virtue of needing an employee or not currently being in business. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, the Form ETA 750 states that the proffered position requires eight years of grade school and four years of high school. Initially, counsel submitted no evidence pertinent to the beneficiary's education. The December 2, 2002 request for evidence noted that deficiency, described the evidence that must be submitted, and accorded the petitioner an opportunity to submit that evidence and establish that the beneficiary has the requisite education.

Now, on appeal, counsel submitted evidence that Hesham Mohamed Abd Elhamid Aly graduated from three years of vocational training. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, this Board will not accept evidence offered for the first time on appeal. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); see also Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988).

Further, the evidence submitted, even if it were acceptable on appeal, is deficient. On the petition and the Form ETA 750 labor certification, the beneficiary is called Hesham Sakr. The evidence is insufficient to show that the person who graduated from that three-year program is the beneficiary. Even if that person is the beneficiary, the evidence is insufficient to show that he has the required 12 years of education. The petitioner has not established that the beneficiary is eligible for the proffered position.

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.