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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 05 2005

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

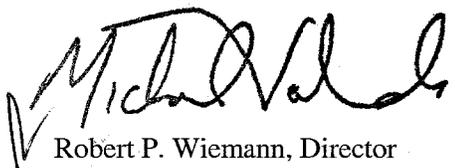
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Islamic Halal meat shop. It seeks to employ the beneficiary permanently in the United States as an Islamic Halal meat butcher and cutter. 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 denied the petition accordingly. The director also determined that the petitioned failed to establish that the beneficiary is qualified for the proffered position.

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 first issue to be discussed in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date. 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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$2,350 per month, which amounts to \$28,200 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner failed to complete information pertaining to its date of establishment, gross annual income, or number of currently employed workers. The petition also lacked information about the petitioner's IRS tax number in Part 1 and whether the position was new or not in Part 6. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

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, on August 9, 2004, the director requested additional evidence 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 pertaining to 2002 and 2003; completion of omitted items on the petition; and state quarterly wage reports for the last two quarters.

In response, the petitioner submitted a completed petition form indicating that it was established in December 1986, currently employed two employees, and has a gross annual income of \$440,139.

The petitioner also submitted its Forms 1120 Corporate tax returns for the years 2001 and 2003¹. The petitioner did not submit its corporate tax return or any other regulatory-proscribed evidence pertaining to 2002. The tax returns reflect the following information for the following years:

| | <u>2001</u> | <u>2003</u> |
|-------------------------|-------------|-------------|
| Net income ² | -\$1,555 | \$3,223 |
| Current Assets | \$21,355 | \$42,425 |
| Current Liabilities | \$30,011 | \$27,892 |
| Net current assets | -\$8,656 | -\$14,533 |

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the first two quarters in 2004. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

Finally, the petitioner also submitted a document that provided descriptive information about the petitioner and its staff. For Mr. [REDACTED] the document indicates that he is the Managing Director of the petitioner and his duties are the following:

- Day to day [m]anagement of business transactions.
- Arrangements of funds and other credit facilities through banks and other institutions to ensure free cash flow as required in retail business.
- Purchasing and approval of the inventory[.]
- Review of monthly and annual [b]udget of the incorporation and designing the policies accordingly[.]
- Resolution of [t]ax related matters with company's tax consultants.
- Approval and finalization of company's monthly and annual financial statement for the management[.]
- Management of [a]ccount [r]eivable including weekly review of the current status of company's debt position.
- Management of [a]ccounts [p]ayable[.]
- Review of marketing report[.]
- Organizing of [s]hareholder [a]nnual [b]oard meetings and preparation of minutes thereof.
- Compliance of all corporate laws and laws related to business operations.
- Day to day management of operations.

¹ The tax returns are signed by [REDACTED] in his capacity as the petitioner's President & CEO.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

- The above also includes sales, marketing, [h]uman [r]esource management and [b]usiness management.

The director determined 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, on October 20, 2004, denied the petition, citing the petitioner's negative net income and net current assets in 2001, failure to provide evidence in 2002, and low net income in 2003 and negative net current assets in 2003.

On appeal, counsel asserts that the petitioner's owner, [REDACTED], has significant cash assets in bank accounts, and real estate property worth millions, from which the petitioner could pay the proffered wage. The petitioner submits a letter from Habib American Bank stating account balances held by Mr. [REDACTED] an unaudited "Details of Properties and Rental income As at September 30, 2004" held by Mr. [REDACTED] unaudited income statements for Mr. [REDACTED] and the petitioner's checking account held by Bank of America showing an ending balance of \$17,921.27 in October 2004. Mr. [REDACTED] also submits an unnotarized letter stating that he will cease his duties as an Islamic butcher to "tend to [his] real business which is real-estate," and the beneficiary would replace him and take his salary. Finally, the petitioner submits copies of corporate documents pertaining to Max Greenbriar Properties, LLC, a company without any clear relationship to the petitioner.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the balances 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's reliance on the assets of Mr. [REDACTED] is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Citizenship and Immigration Services (CIS) will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). 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 at 530. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL at 22203713 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 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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002, or 2003.

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). 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.³ 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 a corporation's end-of-year 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 petitioner has not demonstrated that it paid any wages to the beneficiary during 2001, 2002, or 2003. In 2001, the petitioner shows a net income of -\$1,555 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

³ 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 2003, the petitioner shows a net income of only \$3,223 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2003.

The petitioner did not submit any evidence pertaining to 2002, even though the director specifically requested evidence for that year. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2002. The 2002 tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The petitioner's owner advised that the beneficiary would replace himself in his responsibilities as an Islamic Halal butcher. However, the record of proceeding does not support Mr. [REDACTED] representation that he works as an Islamic Halal butcher. Documentation submitted in response to the director's request for evidence provided a detailed description of the duties Mr. [REDACTED] is engaged in, and none of them suggest he works as an Islamic Halal butcher. Conversely, the job description indicates that Mr. [REDACTED] is involved in the management of the business as its "managing director," and performs such duties as managing business transactions, arranging funds with banks and credit facilities, purchasing inventory, reviewing budgets, handling tax matters, managing accounts receivable and accounts payable, reviewing marketing reports, organizing shareholder meetings and preparing minutes, and handling the sales, marketing, and human resource management for the petitioner. The petitioner's tax returns are signed by Mr. [REDACTED] also in his capacity as the petitioner's president and chief executive officer, not as an Islamic Halal butcher. The petitioner's quarterly wage reports indicate wages paid to Mr. [REDACTED] but do not indicate that his compensation was for duties performed as a butcher. 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, especially if, as in this case, there is no evidence that Mr. [REDACTED] employment capacity and the proffered position of Islamic Halal butcher involve the same duties. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record of proceeding contains significant inconsistencies in the information provided by the petitioner that undermine Mr. [REDACTED] assertion that the beneficiary would replace him. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 15, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

| | |
|-------------------------|-----|
| 14. Education | |
| Grade School | 6 |
| High School | -- |
| College | N/A |
| College Degree Required | N/A |
| Major Field of Study | N/A |

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states the following:

Butchers and cuts meat and chicken according tot [sic] eh [sic] rules of the Islamic religion by performing the required prayers and rituals prior to cutting the meat, cuts, trims and bones the meat using knives [sic], claver [sic], power saws and other tools, cuts and shapes stuks [sic] and chops according to individual order...etc.

Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated employment with Halal Meat Shop in Morocco as an Islamic Halal butcher and meat cutter from June 1984 to June 1987 performing the following duties: "Butchered and cut meat according to the Islamic rules after performing the required prayers and rituals, cuts, trims and bones meat as requested for steaks and chops ready for cooking."

With the initial petition, the petitioner submitted no evidence that the beneficiary is qualified to perform the duties of the proffered position.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on August 9, 2004. The director specifically requested a letter from the beneficiary's prior employer and set forth content requirements for the letter that conform to the regulatory requirements found at 8 C.F.R. § 204.5(l)(3)⁴.

⁴ The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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

In response to the director's request for evidence, the petitioner provided a letter in French with a certified English translation. The letter is not on letterhead and provides an address but no other contact information about the author, whose name is [REDACTED] and states that the beneficiary resides at an address in Morocco and "was employed in [his] shop as a butcher and a merchant of meat that is Hallal (meat that is legalized by Islam) to Moroccans, Europeans and American tourists or Americans residing in Morocco and this from June 1984 to June 1987." The translation was provided by an "official interpreter for the federal district court of Los Angeles."

The director's decision stated that the employment verification letter was deficient as it failed to provide a phone number and the number of hours worked by the beneficiary.

On appeal, counsel states that the "beneficiary was able to obtain a corrected letter of experience as requested by [CIS]," and submits another letter in French with a certified English translation. The letter submitted on appeal gives the employer's name as [REDACTED] provides a telephone number, and a description of the duties performed by the beneficiary from 6:00 a.m. to 6:00 p.m. 5 days a week from June 1984 to June 1987. The translation was provided by the same person translating the letter previously submitted.

The employment verification letter submitted on appeal conforms to the requirements for demonstrating the beneficiary's past experience. Nevertheless, the director requested specific contact information concerning the business where the beneficiary gained his experience, including the name of the business and its phone number. The director also requested specific supporting evidence to demonstrate the beneficiary's employment, such as wage receipts or other records. As stated above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Additionally, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Since the instant appeal is being dismissed, this office will not dwell on the issue of the beneficiary's experience, but will note that any further proceedings concerning the instant petition should consider the authenticity of the experience letter.

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.

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.