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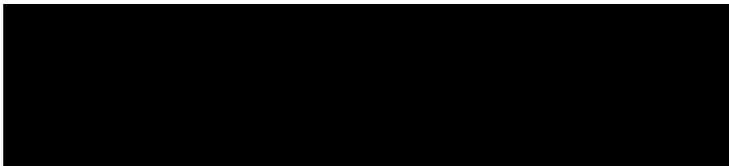
Office: VERMONT SERVICE CENTER

Date: AUG 09 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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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.

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 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is an annual salary of \$40,000.

With the petition, the petitioner submitted letters of employment verification from two Indian restaurants.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 8, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested any of the following documents to establish the petitioner's ability to pay the proffered wage: copies of the 2001 and 2002 W-2 forms issued to the beneficiary; the petitioner's 2001 and 2002 federal corporate income tax returns, with all schedules and attachments, or annual reports of 2001 and 2002 accompanied by audited or reviewed financial statements

In response, the petitioner submitted a Form 1065, U.S. Return of Partnership Income, for Desi Galaxy, L.L.C., Edison, New Jersey. Counsel described this business as the petitioning entity. Counsel stated that the company

had income of \$140,622 in 2001, as well as a total asset base of \$429,113.¹ Counsel also described the business' income for the year as \$36,181. Counsel stated that the income and assets readily available demonstrated that the petitioner could easily pay the beneficiary the offered wage of \$769.23 a week.

Counsel also stated that Mr. [REDACTED] Mr. [REDACTED] the owner of Desi Galaxy, and the sole owner of Chopstics, U.S.A., L.L.C., Iselin, New Jersey. Counsel stated that Chopstics, U.S.A., L.L.C., had an income of \$585,048 for 2001, and a total asset base of \$180,511. Counsel also stated that the gross revenues of a third company, SM Grill, L.L.C., were in excess of \$107,664 with a net income of \$34,344. Counsel stated that the business revenues of these companies demonstrated that the president of the petitioner had experience in running successful operations and that the president had access to substantial resources from other businesses that he fully owned, which could be used if the petitioner was short of funds.

Counsel also stated that the bank statements of the petitioner, indicated credit of \$17,412.63 and a total debit of \$14,700. Counsel noted that the average balance maintained in the petitioner's bank account after taking into account all expenses was \$2,932, which also demonstrated, according to counsel, that the petitioner had sufficient funds to pay the proffered wage. Counsel also submitted the petitioner's Form 1040, federal personal income tax return and stated it evidenced the availability of additional funds. Counsel finally stated that the petitioner's financial situation was analogous to the petitioner in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also referred to a previous AAO decision identified in the publication *Immigration Reports as In Re X*. Counsel stated that in this case a Citizenship and Immigration Services (CIS) service center granted the I-140 petition despite the petitioner's net loss because the petitioner was able to demonstrate by its bank accounts that it had the financial ability to pay the proffered wage.

The documentation submitted by the petitioner includes the following:

Form 1040 for the tax year 2001, for Mr. [REDACTED]. The return indicates an adjusted gross income of \$62,024. In Mr. [REDACTED]'s tax return, Part II of Schedule E, Income or Loss from Partnerships and S Corporations identifies three companies in which Mr. [REDACTED] has a partnership interest, namely M & M Hotbreads, L.L.C., Desi Galaxy, L.L.C., and Chopstics, U.S.A., L.L.C.

Form 1065 U.S. Return of Partnership Income for the year 2001 for Chopstics U.S.A. L.L.C., 227 Lincoln Highway, Iselin, New Jersey. The partnership's identifying number is [REDACTED] which is the same partnership number listed on the petitioner's I-140 petition.² This return indicates an ordinary income of \$24,843 for 2001. Schedule K-1, Part A, identified Mr. Malhotra as a limited

¹ The record is not clear as to how counsel arrived at these figures. Line 8 on Form 1065 for Desi Galaxy indicates total income of \$151,684, while Line 22 on the same return indicates ordinary income of \$7,136. Part F of Form 1065 identifies total assets for the year as \$400,917.

² While the two identification numbers are the same, the petitioner's address on the I-140 petition is listed as [REDACTED] Edison, New Jersey.

liability company member with a 50 percent partnership interest in the business. An additional Schedule K-1 identifies Matinee Singh as another 50 percent limited liability company member.

Forms 1065 and Schedule Ks for S. M Grill, L.L.C., 1700 Oak Tree Road, Edison, New Jersey, for the years 2001 and 2002. The partnership number for this business is [REDACTED]. These documents indicated Mr. [REDACTED] has a 95 per cent partnership interest in this business. The Schedule K-1 indicated an ordinary income for 2001 was \$36,152. The IRS Form 1065 for the year 2002 for S.M Grill showed ordinary income of \$31,475 in the year 2002.

Form 1065 for Desi Galaxy, L.L.C., Edison, New Jersey, (partnership number [REDACTED]) that indicates an ordinary income of \$7,136 for the tax year 2001. This return indicates no gross receipts or sales in the year 2001. Total assets are listed as \$400,917, and a Schedule K-1 indicates that Mr. [REDACTED] as having a 93 per cent partnership in the business.

Form 1065 for M & M Hotbreads, L.L.C., Edison, New Jersey, (partnership number [REDACTED]) for the year 2001 shows an ordinary income of \$36,027. Schedule K-1 indicates that Mr. [REDACTED] has a 49 per cent partnership interest in the business, and that [REDACTED] as a 51 per cent partnership interest in this business.

Form 1120S, S Corporation for 2001 for Akbar Restaurant, Inc., in Edison, New Jersey. Mr. [REDACTED] wife as identified in his individual federal income tax return, is listed as the 100 % shareholder and president. The Form 1120S indicates an ordinary income from business activities of \$94,656. This return also indicates that [REDACTED] has a passive share of Desi Galaxy, L.L.C., which is identified as a pass through entity. The petitioner provided no explanation for the submission of the Akbar Restaurant corporate income tax return in to the record.

The petitioner also submitted state income tax returns for the state of New Jersey that reiterated the partnership information contained in the federal income tax returns. Also included in the documentation was a statement from [REDACTED] C.P.A. identified as the tax preparer on several of the IRS forms submitted to the record. Mr. [REDACTED] submitted a cash flow statement that indicated that Chopstics, U.S.A., L.L.C., had a net cash flow during the year 2001 of \$53,965. Although counsel referred to the petitioner's bank statements in the petitioner's response to the director's request for further evidence, these statements are not found in the record.

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 February 10, 2004, denied the petition. The director noted that the name of the petitioning company was [REDACTED] and that Chopstics, U.S.A., L.L.C., had the same Employer Identification number listed on its Form 1065. The director further noted that the petitioner had submitted the tax returns of four other businesses, as well as a copy of Mr. [REDACTED] personal income tax return. The director stated that counsel's contention was that since Mr. [REDACTED] was the owner of all of the businesses, Mr. [REDACTED] should be able to combine the incomes and assets to establish his ability to pay the beneficiary the proffered wage. The director then stated that Mr. Malhotra was a limited partner on all the income tax returns submitted to the record, and that limited partners are only liable up to the amount of their capital

investment in the partnership. The director further stated that limited partners' income, personal assets, and liabilities may not be considered when trying to determine whether the limited partnership can pay the beneficiary's proffered wage. The director finally stated that any of the income that Mr. [REDACTED] realized from his involvement in companies other than the petitioning company could not be considered when determining whether the petitioner had the ability to pay the proffered wage.

On appeal, counsel resubmits the documentation submitted in response to the director's request for further evidence. Counsel also submits as new documentation, Schedules K-1 for Mr. [REDACTED] for the tax year 2002 for the following businesses: Chopstics U.S.A., L.L.C., M & M Hotbreads, L.L.C., and Desi Galaxy. These Schedules K indicate that Mr. [REDACTED] share of the profits in 2002 for these companies was as follows: Chopstics U.S.A., L.L.C., \$19,474; M & M Hotbreads, L.L.C., \$20,054; and Desi Galaxy, \$32,716. These three documents establish that Mr. [REDACTED] proceeds from the three businesses was \$72,244.

Counsel then reiterates that Mr. [REDACTED] is the owner of the petitioner, and the sole owner of Desi Galaxy, L.L.C., Akbar Restaurant, and M & M Hotbreads, L.L.C. Counsel refers again to the petitioner's bank statements, and also states it is submitting the U.S. income tax return for Akbar Restaurant for the years 1999 and 2000, as well as the petitioner's owner's tax returns for the years 1999 and 2000.³ Counsel states that with regard to the director's decision, Mr. [REDACTED] is more than a 50 per cent owner in the joint ventures into which he entered, and that if only his share of the profits from these ventures were considered, the enclosed documentation evidenced that his portion of the profit would easily exceed \$100,000. Counsel also reiterates income and total assets figures taken from the Desi Galaxy Form 1065 in 2001.

Counsel in its response to the director's request for further evidence appeared to state that the petitioner's bank statements were submitted to the record with the initial petition; however, these records are not found in the record. It should be noted that even if they had been submitted to the record, 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.

In addition, counsel's assertions with regard to the actual total ownership of the various businesses whose income tax returns were submitted to the record are unfounded, and in some instances, exaggerated. At a minimum, the documentation submitted to establish such ownership does not establish clear ownership of several of the businesses. For example, the Forms 1065 submitted to the file establish that Mr. [REDACTED] has a 49 per cent partnership interest in M & M Hotbreads, a 93 per cent partnership interest in Desi Galaxy, and 50 per cent partnership interest in

³ The income tax returns for Akbar Restaurant for the year 1999 and 2000, as well as personal income tax returns for Mr. [REDACTED] are not found in the appeal materials submitted to the record. It should also be noted that even if they were submitted to the record, such documents would not be dispositive in these proceedings, as they predate the priority date of April 30, 2001. The petitioner only has to establish that it has the ability to pay the proffered wage as of April 30, 2001.

Chopstics, U.S. A., L.L.C. These partnership percentage interests do not establish that Mr. [REDACTED] is the sole owner of any of the businesses. Furthermore, the Form 1120S for 2001 submitted to the record establishes that Mr. [REDACTED] wife is president, and 100 per cent sole shareholder of [REDACTED]

Counsel's assertion with regard to Mr. [REDACTED] assets during an unidentified year as totaling more than \$100,000 is equally without merit. Counsel provides no explanation or specific references to any documentation included in the record to support this statement. As stated previously, the Schedules Ks for the year 2002 submitted to the record only document income of \$72,244 for the year 2002.

But more importantly, the record is devoid of any information, other than identical partnership identification numbers, as to the relationship between [REDACTED] the petitioner identified on the I-140 petition, and Chopstics, U.S.A., L.L.C. As previously stated these two entities are not located at the same address. Counsel's assertion that Desi Galaxy, L.L.C., is the actual petitioner, is entirely without merit, without more substantive corroboratory documentation. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the assertions of counsel do not constitute evidence. *Matter of Ohaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on the I-140 petition submitted, the actual petitioner is Afghan Grill. The petitioner submitted no income tax forms or other regulatory-prescribed evidence for this business, nor did it provide any explanation of whether the Afghan Grill was a successor in interest to Desi Galaxy, or vice versa. Counsel's reference to affiliate status similar to affiliate businesses identified in non-immigrant L-1 petitions is entirely irrelevant in the instant matter involving an immigrant petition.

Without substantive documentation that identifies the relationship between [REDACTED] and Desi Galaxy and the actual ownership and business structure of [REDACTED] the AAO cannot further examine whether the petitioner has the ability to pay the proffered wage beginning on the priority date. Without more persuasive evidence, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the priority date.

With regard to the director's comments on limited liability partnerships, if the actual petitioner is a limited liability company, the AAO would amend the director's comments as follows: Although structured and taxed as a partnership, the owners of a limited liability company enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.⁴ As the owners and others are not obliged to pay those debts, the income and assets of the owners and others and their ability, if they wished, to pay the company'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. As stated previously, the petitioner provided no evidence of its own ability to pay the proffered wage.

Without more persuasive evidence, the director's decision shall stand.

⁴ This general rule may be amenable to alteration pursuant to contract or otherwise, however, no evidence appears in the record to indicate that the general rule would be inapplicable in the instant case.

The burden of proof in these proceedings rests solely with the petitioner, as to the identity of the petitioner, and the petitioner's ability to pay the proffered wage. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. The appeal is dismissed. The petition is denied.

ORDER: The appeal is dismissed.