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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



B6

FILE: LIN 00 179 53047 Office: NEBRASKA SERVICE CENTER Date: AUG 12 2005

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

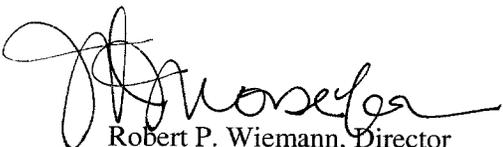
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner, "Dunkin Donuts" is a donut business. It seeks to employ the beneficiary permanently in the United States as an area supervisor. 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 asserts that the director erred in denying the petition and that the petitioner has had the ability to pay the proffered wage. The notice of appeal reflects that a brief and/or evidence will be submitted to the AAO within thirty days. As nothing further has been received to the record, the case will be reviewed on the record as it currently stands.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 23, 1996. The name and address of the employer described on the ETA 750 is the same as that set forth as the petitioner on the visa petition. The proffered wage as stated on the Form ETA 750 is \$27,750 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since 1994.

On Part 5 of the petition, the petitioner claims to have been established in 1993, to have a gross annual income of \$650,000, a net annual income of \$100,000, and to currently employ six workers.

In support of its ability to pay the proffered annual salary of \$27,750, the petitioner submitted no evidence in support of its continuing financial ability to pay the proposed wage offer. On June 8, 2001, the director requested additional evidence pertinent to that ability. The director informed the petitioner that its evidence must show that it has had the financial ability to pay the offered wage as of the visa priority date of May 23, 1996 and continue to have such ability. The director also advised the petitioner that its evidence must include its latest annual report,

latest federal tax return, or audited financial statement. In response, the petitioner provided incomplete copies of two corporate federal tax returns for 1998 and 2000. They are filed in the name of "Halkias, Inc.," with a different address as that given for the petitioner. On line 2 of Schedule B of the 1998 return, the business activity of Halkias, Inc. is described as a franchisee of Dunkin' Donuts. Both returns indicate that Halkias, Inc. reported net income of over \$200,000 in each of those years.

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 10, 2001, denied the petition. The director noted that the relationship between Halkias, Inc. and the petitioner has not been established and that the evidence only related to 1996 and 1998.

On appeal, counsel asserts that the petitioner "does have sufficient funds and ability to pay the offered wage. Halkias, Inc., D/B/A Dunkin Donuts, is the parent corporation and has been since this petition was filed."

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 may have 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, no documentation of any wages paid to the beneficiary was submitted in support of the petitioner's ability to pay the proffered salary.

If the petitioner does not establish that it may have 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). Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed salary, CIS will also examine a petitioner's net current assets as a measure of its liquidity during a given period. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporate petitioner's year-end current assets are shown on Schedule L, line(s) 1 through 6 of the federal tax return. Its year-end current liabilities are shown on line(s) 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.

In this case, the only hint that Halkias, Inc.'s tax returns relate to the petitioner is the statement on the 1998 tax return relating to its status as a franchisee of Dunkin Donuts. No other corporate, contractual, municipal or state documentation is contained in the record that clearly establishes the relationship between this particular petitioner at a

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

specific location and Halkias, Inc. As such, the director's decision to reject consideration of such tax returns was not erroneous, notwithstanding counsel's assertion on appeal. Assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). Moreover, as noted by the director, such incomplete tax returns relating to only two of the relevant years do not adequately establish the petitioner's ability to pay the proffered wage. As set forth above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner submit sufficient evidence demonstrating its *continuing* ability to pay the proffered salary beginning on the priority date. Here, even if the petitioner had clearly demonstrated that the financial documentation relating to Halkias, Inc. should be considered as its own, it failed to provide any evidence relating to 1996, 1997, 1999, or 2001.

Upon review of the evidence contained in the underlying record and the argument submitted on appeal, it is concluded that the petitioner failed to persuasively demonstrate that it has had the continuing financial 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.