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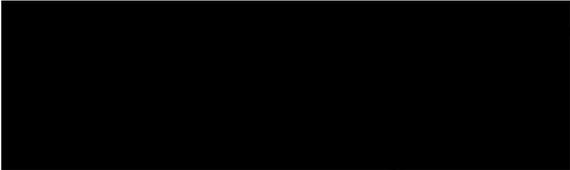
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U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

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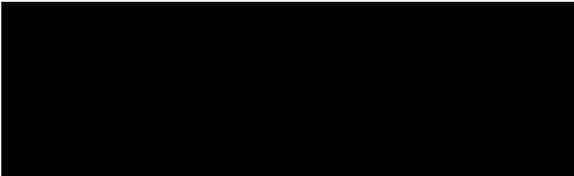
Petitioner:

Beneficiary:



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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 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 responded to a Request for Evidence and dismissed the petition. In response to a motion to reopen/reconsider 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 statement 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 granting 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 October 15, 2001. The proffered wage as stated on the Form ETA 750 is \$10.49 per hour, which equals \$21,819.20 per year.

On the petition, the petitioner did not state the date it was established in the space provided for that purpose. The petitioner did not state its current number of employees, its gross annual income, or its net annual income in the spaces provided for those figures.

The petitioner did not provide the Form ETA 750, Part B, which would ordinarily be included and would detail the beneficiary's employment history. As such, the documentation submitted with the petition did not state whether the beneficiary claims to have worked for the petitioner.

Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Fort Lauderdale, Florida.

With the petition counsel submitted no evidence pertinent to the petitioner's ability to pay the proffered wage. Therefore the Texas Service Center, on November 4, 2004, requested, *inter alia*, evidence pertinent to that ability. The petitioner did not respond to that request and, on February 4, 2005, the director denied the petition as abandoned.

Counsel filed a motion to reopen/reconsider on March 3, 2005. With the motion counsel provided copies of the 2001 and 2002 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse. Both of those returns show that the petitioner's owner was married and had no additional dependents during that year. Both of those returns include a Schedule C, Profit or Loss from Business, showing that the petitioner's owner operates a restaurant and delicatessen named Mr. Greek at 1901 Fletcher Street in Hollywood, Florida. The return shows that is also the home address of the petitioner's owner and owner's spouse. The relationship of that company to the petitioner, Mr. Greek Taverna Restaurant at 1924 Hollywood Boulevard in Hollywood, Florida, is unknown.

The 2001 tax return shows that the petitioner's owner had adjusted gross income of \$30,230 during that year. That adjusted gross income may, after subtraction of a reasonable allowance for the petitioner's owner to use supporting himself and his family, be considered.

The 2002 return shows that during that year the petitioner's owner declared adjusted gross income of \$32,807.

On March 15, 2003 the Director, Texas Service Center found that the evidence submitted did not overcome the reason for denial,<sup>1</sup> and dismissed the motion to reopen/reconsider.

On appeal, counsel states, "The Decision states that: 'There is no profit to pay the proffered wage.' And the Petitioner disputes this statement."

Counsel submitted a letter, dated June 27, 2005, to supplement the appeal. Counsel requests, based on the evidence of record, that the decision of denial be reversed. With that letter counsel submits a mortgage loan statement pertinent to a mortgage on the home of the petitioner's owner and owner's spouse.

The proposition that the petitioner's owner's mortgage loan statement was submitted is unclear. Under these circumstances the petitioner loan statement will not be considered.

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.

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<sup>1</sup> Because the petition was originally denied for abandonment, this office questions whether the director meant to find that the reason for the denial had not been overcome. A more appropriate handling of the motion might have been to reopen the matter and render a decision on the merits or to explicitly decline to reopen because counsel did not overcome the finding that the petitioner failed to respond to the Request for Evidence. Even if the director failed to properly consider evidence in the record, however, that error may be addressed on appeal, as the remedy for that error would be to consider the evidence, which this office will do.

If the petitioner fails to demonstrate that it paid an amount equal to the proffered wage to the beneficiary since the priority date, CIS will, in the case of a corporate petitioner, examine its tax returns, its audited financial statements, or its annual reports<sup>2</sup> for evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. To demonstrate the ability to pay the proffered wage during a given year, the petitioner may either show that its net income was sufficient to pay the proffered wage during that year or that its end-of-year net current assets were sufficient.

In the instant case, Schedules C attached to the petitioner's owner's tax returns appear to indicate that he operates a deli and restaurant, but those Schedules C appear to indicate that his deli/restaurant is at an address different from that given for the petitioner on both the Form I-140 petition and the Form ETA 750. Under these circumstances, counsel cannot be said to have demonstrated that the evidence submitted pertains to the petitioner's finances.

The proffered wage is \$21,819.20 per year. The priority date is October 15, 2001.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself on his remaining adjusted gross income and assets.

During 2001 the petitioner's owner had adjusted gross income of \$30,230. If the petitioner's owner were obliged to pay the proffered wage out of that amount he would have been left with \$8,410.80 with which to support himself and his spouse during that year. To expect a family of two to live for a year on that amount is unreasonable.

The petitioner has not shown that it was able to pay the proffered wage out of its owner's adjusted gross income. The petitioner has submitted no reliable evidence of other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$32,807. Again, if the petitioner's owner had been obliged to pay the proffered wage out of that amount he would have been left with

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<sup>2</sup> Pursuant to 8 C.F.R. § 204.5(g)(2) a petitioner may select from among those three types of evidence to demonstrate its ability to pay the proffered wage. Because an individual petitioner would typically not have audited financial statements or annual reports, it may only demonstrate its ability to pay the proffered wage either by demonstrating that it paid wages to the beneficiary equal to the proffered wage, or by submitting tax returns sufficient to show its ability to pay the proffered wage.

\$10,987.80 with which to support himself and his spouse during that year. To expect a family of two to live for a year on that amount is unreasonable. The petitioner has not shown that it was able to pay the proffered wage out of its owner's adjusted gross income. The petitioner has submitted no other reliable evidence of funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

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

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.