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U.S. Citizenship  
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Services

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FILE: [REDACTED]  
SRC 03 193 52448

Office: TEXAS SERVICE CENTER

Date: **MAY 04 2006**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

DISCUSSION: The preference visa petition<sup>1</sup> was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner has secured a labor certification identifying her as a food caterer. She seeks to employ the beneficiary permanently in the United States as a baker, Brazilian pasta pies. Required information was not stated in Part 5 of the Form I-140 concerning the date the business was established, the current (as of the date of the petition) number of employees, gross annual income, net annual income or NAICS code.<sup>2</sup>

As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director denied the petition on October 22, 2004, finding that the petitioner had not submitted evidence to establish filing eligibility at the time the petition was filed; that the evidence submitted did not demonstrate that the petitioner had formed or had been operating a business in the United States to qualify as an employer in the United States; and, that the petitioner was not shown by the evidence submitted to have the ability to pay the proffered wage.

On appeal, the 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 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, 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 U.S. 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).

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<sup>1</sup> This is the second petition filed by the same parties. The first petition was denied (SRC 02 228 51115).

<sup>2</sup> The petition did state in that section that the employer was an individual whose occupation was "caterer" and under the information block "Annual Income" stated "See Exhibits" without stating any financial data. "NAICS" is the acronym for the North American Industrial Classification System used to categorize industry sectors.

Here, the Form ETA 750 was accepted on April 19, 2000. The proffered wage as stated on the Form ETA 750 is \$11.01 per hour (\$22,900.80 per year). The Form ETA 750 states that the position requires two years experience.

The director issued a notice to deny the petition on September 20, 2004. Among other items, the director requested evidence that “the petitioner is a valid and legal U.S. employer,” and, the director requested the last two U.S. federal tax returns, wages paid to the petitioner’s employees, annual report or an audited financial statement.

With the I-140 petition and response to the notice to deny the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; an explanatory statement;<sup>3</sup> the petitioner’s affidavit; a business plan; the petitioner’s application for an occupational license; the petitioner’s business lease; the petitioner’s and spouse’s (i.e. joint) money market saving’s account statement as of April 20, 2000; the petitioner’s and spouse’s brokerage account statements as of December 1, 2000 to December 31, 2000, April 1, 2000 to April 30, 2000, and, April 1, 2001 to June 30, 2001; a joint tax return for Brazil for tax years 2000 and 2001; a deed; a Form 1040 joint tax return for tax year 2000, 2001 and 2002; a closing statement in which the petitioner and her spouse purchased on March 9, 2001, 1,000 shares of D.L. Folsom Air Conditioning & Heating Corp. for \$120,000.00 and assumed a \$30,000.00 note of repayment; three quarterly financial statements of D.L. Folsom Air Conditioning & Heating Corp.; a Form 1120 U.S. federal tax return for D.L. Folsom Air Conditioning & Heating Corp. for tax year 2001; 51 pages of joint checking account statements; 12 joint money market account statements; 14 joint bank saving accounts statements; two business checking account statements for D.L. Folsom Air Conditioning & Heating Corp.; and, copies of documentation concerning the petitioner and beneficiary’s qualifications as well as other documents.

The director denied the petition on October 22, 2004, finding that the petitioner had not submitted evidence to establish filing eligibility at the time the petition was filed; that the evidence submitted did not demonstrate that the petitioner had formed or had been operating a business in the United States to qualify as an employer in the United States; and, that the petitioner was not shown to have the ability to pay the proffered wage.

Counsel states in his brief on appeal that “Because the business is a sole proprietorship, supported by the finances of the Petitioner as an individual, the ...[director] is essentially mounting a challenge to the Petitioner to present a financial overview of her own personal assets and liabilities ...” and then, as described in detail below, counsel submits documentary evidence on appeal. Counsel also stated that the decision raised “several points in its decision for the first time”<sup>4</sup> rather, by an elaboration of counsel’s statement, the director should have instead issued a request for evidence concerning those issues.

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<sup>3</sup> According to the statement, the petitioner is a businesswoman who intends to replicate the success of a Brazilian catering business that employed her in Brazil, in the United States.

<sup>4</sup> There is no regulatory requirement for CIS to issue such a request. When petitions on their face, do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. On appeal, counsel submitted a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, that states that “If the required initial evidence does not establish ability to pay, the CIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit.” Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

As a preface to the discussion below, the financial information concerning D.L. Folsom Air Conditioning & Heating Corp. is not relevant or probative to determine the issues raised by the director. Citizenship and Immigration Services (CIS) may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the petitioner’s ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. 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 Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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.”

On appeal, counsel has submitted copies of the following evidence: a joint “Confidential Personal Financial Statement” that is undated; a bill of sale to the business and assets known as D.L. Folsom Air Conditioning & Heating Corp. to the petitioner and spouse; a UCC-1 instrument given by the petitioner and spouse; stock certificates and other corporate governance instruments involving D.L. Folsom Air Conditioning & Heating Corp.; two automobile titles, one to the petitioner and spouse and one to her spouse; automobile titles to D.L. Folsom Air Conditioning & Heating Corp.; a property tax bill to the petitioner and spouse; a U.S. federal tax return for 2003 for D.L. Folsom Air Conditioning & Heating Corp.; and, a 2002 Brazilian personal tax return<sup>5</sup> in Portuguese that was not translated, with an English language summary sheet.

A close reading of the above documentary evidence concerning the joint finances does not demonstrate any assets or income not held as husband and wife. The petitioner has not presented evidence of her own personal funds, but the petitioner has presented evidence of joint jointly owned assets. Based upon the voluminous financial data submitted, the petitioner does not have assets that are not jointly owned with her spouse. Counsel states in his brief submitted on appeal that the petitioner has “actually formed” the food catering business. As proof, counsel submits the “Petitioner’s business plan for operations, including the plan to operate the business as a sole proprietorship using her ... [the petitioner’s] own personal funds to operate the business with the assistance of the ... [beneficiary] ....” Based upon this admission, and the clear intent of the petitioner as found in the record of proceeding to operate the business using non-marital funds (i.e. her “own personal funds”), coupled with the lack of evidence that the business was in existence and producing profits to pay the proffered wage, the petitioner has failed to come forward with independent or objective evidence to demonstrate the ability to pay the proffered wage.

According to the regulation at 20 C.F.R. § 656.3:

“Employer” means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which

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<sup>5</sup> Based upon the English language summary sheet to the Brazilian tax return, the income and assets are either jointly held by the petitioner and her spouse, or owned by the petitioner’s spouse. It is unclear, even if not so encumbered, whether assets located in a foreign country would be available to pay the proffered wage to a United States worker, be available to fund the petitioner’s food catering business, or would be subject to levy for the petitioner’s food catering business debts.

proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation .....

According to the undated "Business Lease" submitted by petitioner into evidence, the petitioner has leased office space from D.L. Folsom Air Conditioning & Heating Corp. since April 2000 to April 2005. The rental stated was \$1,800.00 per year. The undated "Occupational License Application"<sup>6</sup> in the record of proceeding describes the lease premises as 150 square feet. The space rented was a portion of the premises of the air conditioning company. A review of the Form 1120 U.S. federal tax returns for 2000, 2001 and 2003 of D.L. Folsom Air Conditioning & Heating Corp. demonstrates that the returns do not state rental income received from the petitioner, and, no evidence was submitted to show payment of rent including the Form 1040 joint tax returns (for the petitioner and her husband) submitted into evidence.

There is no evidence that the application mentioned above was submitted, a license fee paid, a license issued or rent paid. There is no credible evidence in the record of proceeding that the petitioner has premises within the United States to which U.S. workers may be referred for employment. There is no evidence in the record of proceeding that the petitioner is in business, or that the petitioner has invested "her own personal funds" in a food catering business. 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 *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Nevertheless, even if the petitioner could have demonstrated that it is a United States employer, the petitioner has not shown its ability to pay the proffered wage.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. 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).

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<sup>6</sup> The number of employees indicated on the license, including the owner is "one."

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

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.

There are no tax returns, annual reports, or audited financial statements from the catering business submitted by the petitioner, or personal living expenses that could be utilized to determine if the petitioner had the ability to pay the proffered wage. There were no tax returns submitted by the petitioner for the catering food business discussed in the business plan submitted into evidence, nor are there Schedule C's from the joint tax returns that show that the petitioner is in the food catering business to demonstrate financial information concerning the petitioner's ability to pay the proffered wage of \$22,900.80 per year from April 19, 2000.

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).

If the petitioner establishes by documentary evidence that she 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. No evidence was submitted that the petitioner employed the beneficiary.

Although the petitioner's business plan indicated that the petitioner would have the ability to pay the proffered wage in the future, this is insufficient and not probative evidence to demonstrate the ability to pay the proffered wage. Petitioner's taxable income is examined from the priority date, April 19, 2000. It is not examined contingent upon some event in the future. Based upon the evidence submitted, the petitioner could not pay the proffered wage from the priority date, and, there is no evidence submitted that the petitioner is in fact in business as a caterer. Counsel cites *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958) contending that that case supports his contention that a prospective employer may file a visa petition. The director explained the facts of that case in the decision that involve agency and theatrical engagements. To summarize here, to qualify as an employer, an organization must be a United States employer in existence. In the subject case, the petitioner failed to prove it was a United States employer in existence capable of paying the proffered wage.

The petitioner has not come forward with evidence to establish filing eligibility at the time the petition was filed. The evidence submitted did not demonstrate that the petitioner had formed or had been operating a business in the United States to qualify as an employer in the United States. The petitioner was not shown by the evidence submitted to have the ability to pay the proffered wage.



Page 7

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.