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U.S. Citizenship
and Immigration
Services

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MAR 21 2007

FILE: [REDACTED]
EAC 03 122 51255

Office: VERMONT SERVICE CENTER

Date:

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:

[REDACTED]

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 "RWiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a Middle Eastern restaurant. It seeks to employ the beneficiary¹ permanently in the United States as a Middle Eastern style cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated June 29, 2005, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, 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. See 8 C.F.R. § 204.5(d). 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

¹ The instant petition is for a substituted beneficiary. A I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 15, 2001.² The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience as a cook.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with a new ETA 750 Part B substituting the beneficiary; a 2001 U.S. Internal Revenue Service Form 1120S tax return for Three-D Corporation, located at [REDACTED], having a federal employer identification number (FEIN) [REDACTED]; explanatory letters dated January 4, 2002, and March 15, 2005, from [REDACTED], stating that there exists a Lebanese Taverna Group (LTG) of five restaurants of which the petitioner is one; 2001, 2002 and 2003 U.S. Internal Revenue Service Form 1120S tax returns for [REDACTED], located at [REDACTED], having a federal employer identification number (FEIN) [REDACTED]; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. Counsel submitted not only the tax returns for [REDACTED], but the return for [REDACTED]. There is no explanation why tax returns for two entities were submitted.

On the Form ETA 750B, signed by the beneficiary on October 2, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that the petitioner restaurant located at [REDACTED]e, Arlington, Virginia is "operated" by the corporation ABICO, Inc., and its tax returns "can be used by the director to determine the petitioner's ability to pay the proffered wage."

² It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ FEIN numbers are obscured for privacy purposes.

⁵ According to the tax returns submitted, ABICO Inc. is structured as an S corporation that was established in 1991. ABICO Inc.'s fiscal year is based on a calendar year.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes copies of the following documents: a letter from the petitioner dated July 27, 2005; and, a 2001 U.S. Internal Revenue Service Form 1120S tax return for [REDACTED]

As preface to the following discussion, Citizenship and Immigration Services (CIS) may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’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. 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.” Therefore, the tax return submitted for Three-D Corporation, 2641 Connecticut Ave, NW Washington, District of Columbia has no probative value in this matter since there is no assertion in the record of proceeding that it has an interest in the 4400 Old Dominion Drive, Arlington, Virginia, restaurant business.

We have accessed the corporate website at <<http://lebanesetaverna.com>> (accessed March 1, 2007), that confirmed that there are multiple locations in the Washington, D.C. Metro area at which LTG operates its businesses. The webpage for the subject business location is <<http://lebanesetaverna.com/market>> (as accessed March 1, 2007). It identifies the LTG business at 4400 Old Dominion Drive, Arlington, Virginia, 22207 as the “Market” that according to the description on the webpage opened in 1991. The Market provides catering, prepared food take-out, and dine-in services. According to a letter dated January 4, 2002, [REDACTED] Vice-President of the Lebanese Taverna Group, stated that “for the time being, Abico Inc. operates the catering and the market on Old Dominion Drive; we are working on separating catering and creating an independent corporation due to its growth and demand.” There was no evidence submitted of an independent corporation at that location other than ABICO, Inc. Further, there is a letter from the petitioner dated July 27, 2005 submitted upon appeal that “the sponsoring entity for the labor certification and the I-140 petition is ABICO, Inc. which is the corporate name for the Lebanese Taverna located at [REDACTED] [REDACTED], Arlington, Virginia.”

The preponderance of the evidence submitted by the petitioner, as well as information accessed on the Internet by the AAO (that is not adverse to the petitioner’s interests here) demonstrate that the Lebanese Taverna restaurant located at [REDACTED] [REDACTED]. There is no explanation in the record why the petition and alien employment application were prepared in the name of the [REDACTED] when in fact this is just a generic trade name used by the Lebanese Taverna Group for its multiple locations in the Washington, D.C. Metropolitan area in which LTG operates its businesses.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 CFR § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS)

requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 has not established that it employed and paid the beneficiary.

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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income net income of \$97,298.00.
- In 2002, the Form 1120S stated net income net income⁶ of \$116,535.00.
- In 2003, the Form 1120S stated net income net income of \$129,734.00.

⁶ Ordinary income (loss) from trade or business activities as reported on Line 21. Internal Revenue Service Form 1120S, Line 21, states the petitioner's ordinary business income or loss. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

Since the proffered wage is \$24,689.00 per year, the petitioner did have the ability to pay the proffered wage from an examination of its net income for years 2001, 2002 and 2003.

The evidence submitted establishes that the petitioner has the continuing 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.