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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 18 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition 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 is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign foods. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on October 17, 2000. The proffered salary as stated on the labor certification is $9.40 per hour or $19,552 per year.

With the petition, previous counsel failed to submit any evidence of the petitioner's ability to pay the proffered wage, therefore, on November 26, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel provided copies of the petitioner's Form 1120, U.S. Corporation Income Tax Returns for the fiscal years (August 1 through July 31) 1999 through 2001. The 1999 federal tax return reflected a taxable income before net operating loss deduction and special deductions of $3,443 and net current assets of $8,779. The 2000 federal tax return reflected a taxable income before net operating loss deduction and special deductions of -$217 and net current assets of $9,817. The 2001 federal tax returns

reflected a taxable income before net operating loss deduction and special deductions of $52 and net current assets of $10,765.

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 May 30, 2003, denied the petition.

On appeal, previous counsel asserts:

> The petitioner has sufficient financial ability to pay the proffered wage to support this, the petitioner request that the Service consider the following:
>
> 1. The priority date for the beneficiary is October 17, 2000. The tax returns for 1997 is [sic] irrelevant to the showing of financial ability to pay the proffered wage.
> 2. The tax returns for tax year 2000 (08/01/2000 – 7/31/2001 shows a total income of $44,704.
>
> Page 4 of the 2000 Tax returns (attached) shows that the business had $9,817 in cash to be carried over from 2000 t [sic] 2001. It also shows "depreciable assets" of $10,50 [sic]. There for the calculations of financial ability to make proffered wage is as follow:
>
> Proffered wage for 2000 Tax year (ending July 31, 2001)
> November 2000 – July 01 = 9 Months
> ½ October ½ Month
> $1629 (salary) x 9 ½ (months) = $15,416
> With depreciable assets of $10050 and
> Cash assets of $9817
> Total available to pay wages = $19,857
> Therefore the petitioner has more than sufficient to pay proffered wage.
>
> The Tax returns of Tax year 2001 (8/1/01 – 07/30/02) shows an income of $48,314
> There is cash carried over to 2003 $10,765.00
> There are depreciable assets of $10,050.00
> Total available to pay wage $20,815.00
> Therefore petitioner has more than sufficient assets to pay proffered wage of $19,552 for the tax year 2001-2002.
>
> Since the Tax year 2002 is not completed yet, the petitioner does not have the tax Returns filed for the tax year – however a financial report is enclosed showing that the petitioner has sufficient income to pay proffered wage for this year.

> The losses on the income tax returns do not result from actual cash losses – The year end cash for each year exceeds the Tax losses (cash for 2000 is $9,817 tax loss is $217 cash for 2001 is $10,765, tax losses is $0)
>
> The "tax losses" should not be determinate of the petitioner ability to pay the actual cash assets and depreciable assets should be determinate Stella's Pizza of North Carolina has sufficient cash and depreciable assets to pay the proffered wages. Therefore the I-140 should be approved.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1999, 2000, and 2001. It is noted that the record indicates that each year the beneficiary was compensated as an officer of the corporation (who owns 100% of the stock). While counsel asserts that this amount may be considered when determining the ability to pay the wage (since the beneficiary/owner is also an employee), there are no Forms W-2, Wage and Tax Statements, in the record that classify this compensation as wages. In addition, there is a discrepancy in the fact that the compensation of officers would be the only wages paid even though the Form I-140 reflected two employees. It is not reasonable to assume that anyone would work for a corporation without receiving wages.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds

available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. The petitioner's net current assets during the years in question, 1999, 2000, and 2001 were $8,779, $9,817 and $10,765, respectively. The petitioner could not have paid the proffered wage in any of those years from its net current assets.

The 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of $3,443 and net current assets of $8,779. The petitioner could not pay the proffered wage in 1999 from either its taxable income or its net current assets.

The 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of -$217 and net current assets of $9,817. The petitioner could not pay the proffered wage in 2000 from either its taxable income or its net current assets.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of $52 and net current assets of $10,765. The petitioner could not pay the proffered wage in 2001 from either its taxable income or its net current assets.

This office notes that even if it were to accept counsel's assertion that compensation to officers can be used as wages paid to the beneficiary because in the instant case the officer is the beneficiary, the petitioner would still not have demonstrated the ability to pay the proffered wage for each of the pertinent years.

In summary, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether the pre-existing family or business relationship may have influenced the labor certification. The Form ETA 750 was signed, under penalty of perjury, by Abdou Hussein as owner of the corporation on November 11, 1999. The tax returns, however, reflect that the beneficiary is 100% owner of the corporation. There is no other mention of Abdou Hussein in the record or

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

what his current relationship is to the business. Furthermore, the I-140 is signed by the beneficiary's wife as the petitioner, but it does not appear that she receives any income from the business and there is no explanation in the record as to her status in the corporation. In fact, this appears to be a one or two person operation owned and managed by the beneficiary, and, therefore, it does not appear that a bona fide job opportunity is available to U.S. workers.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Given that the beneficiary is the 100% stockowner of the petitioner, the facts of the instant case suggest that this too is the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of the this beneficiary.

In addition, *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

> 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.

* * *

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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.