U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

APR 01 2005

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC-03-016-50679

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a produce and grocery supermarket. It seeks to employ the beneficiary permanently in the United States as a manager. 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 states that hiring the beneficiary is projected to generate additional income, and that the financial resources of the petitioner's owner are sufficient to pay the proffered wage to the beneficiary.

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 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:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is $18.00 per hour, which amounts to $37,440.00 annually. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 5, 2002. On the petition, the petitioner claimed to have been established on August 15, 1993, to have a gross annual income of $246,000.00, to have a net annual income of $93,000.00, and to currently have four employees.

The evidence indicates that the petitioner is a general partnership. In support of the petition, the petitioner submitted a letter dated September 23, 2002 from one of the petitioner's partners confirming a job offer to the beneficiary; and a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2001.

In a request for evidence (RFE) dated December 6, 2002, the director requested additional evidence pertaining to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and requested evidence pertaining to the beneficiary's work experience.

In response to the RFE, counsel submitted a letter dated February 25, 2003 and the following evidence: a copy of a letter from the manager of Bosco Restaurant, New York, New York, stating the beneficiary's prior employment as an assistant manager from 1994 to 1996; and a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2000.

In a decision dated May 16, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief in the form of a letter dated June 16, 2003 and the following evidence: a copy of the Form 1040 U.S. Individual Income Tax Return for 2002 of the petitioner's two partners, a husband and wife; and a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2002.

Counsel states on appeal that hiring the beneficiary is projected to generate additional income, and that the financial resources of the petition are sufficient to pay the proffered wage to the beneficiary. Counsel states that the "petitioner" has two retail store businesses, one of which is registered as a partnership. Counsel further states that before the end of fiscal year 2002 the "petitioner" sold his shares in the partnership to a corporation, producing a profit of $20,000.00 in capital gains, and also received partnership income of $12,687.00. Counsel further states, "He invested all these monies in his other retail store, which is doing business as a sole proprietorship." As discussed below, in his brief counsel uses the term "petitioner" where the intended reference appears to be to one of the petitioners' partners.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, 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 previously employed the beneficiary.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a general partnership. Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below."

The petitioner's tax returns for 2000 and 2001 show that the petitioner's income in each of those years was exclusively from a trade or business, therefore the petitioner's ordinary income is the measure of its net income for each of those years. The petitioner's tax returns show the following amounts for ordinary income on Form 1065, line 22: $35,002.00 for 2000; and $33,842.00 for 2001. Since each of those figures is less than the proffered wage of $37,440.00, those figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a partnership taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership'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 15(d) through 17(d). If a partnership's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Certain partnerships, however, are not required to complete Schedule L, namely partnerships which answer "yes" to question 5 of Schedule B of the Form 1065 return. That question is to be answered "yes" if the partnership's total receipts for the tax year were less than $250,000.00, if the partnership's total assets at the end of the year were less than $600,000.00 and if Schedules K-1 are filed with the return and furnished to the partners on or before the due date (including extensions) for the partnership return.

In the instant petition, the petitioner answered "yes" to Schedule B, question 5 on its return for 2000 and on its return for 2001. The petitioner therefore was not required to complete Schedule L on its returns for those years, and the petitioner did not do so on either of those returns. For this reason, the petitioner's tax returns provide no information from which to calculate the petitioner's net current assets for the end of 2000 or for the end of 2001.

Counsel states in his letter dated February 25, 2003 that the offered job is not a newly created position, but is a job currently being held by an owner of the business. Counsel also states that additional salary expenses could be paid from the personal funds of the "employer," apparently referring to one of the petitioner's partners. Counsel also states that the petitioner expects to generate additional income from the hiring of the beneficiary which, over time, will be more than sufficient to cover the increased salary costs for the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertions on the foregoing matter are not supported by evidence in the record of the instant petition, therefore counsel's assertions may not serve as the basis for findings of fact in the instant petition.

No other financial evidence was submitted for the record prior to the decision of the director. The petitioner's evidence therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly found that the petitioner's net income as shown on its tax returns for 2000 and 2001 was insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. The director's decision to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal, counsel submits additional evidence consisting of a copy of the Form 1040 U.S. Individual Income Tax Return for 2002 of the petitioner's two partners; and a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2002.

The record before the director closed on March 3, 2003 with the petitioner's submissions in response to the RFE. As of that date the tax return of the petitioner for 2002 was not yet due, nor was the individual return for 2002 of the petitioner's two partners. Since the foregoing documents were not available prior to the decision of the director, those documents are not precluded from consideration on appeal by *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's Form 1065 tax return for 2002 shows that the petitioner's income in 2002 was not exclusively from a trade or business. Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1.

The petitioner's Form 1065 tax return for 2002 shows the figure of $32,687.00 on Schedule K, Analysis of Net Income, line 1. That figure is less than the proffered wage of $37,440.00, and it therefore fails to establish the petitioner's ability to pay the proffered wage in the year 2002. On its 2002 return, as it had done on its returns for 2000 and 2001, the petitioner answered "yes" to question 5 of Schedule B, and accordingly the petitioner did not submit information on assets and liabilities on Schedule L. The petitioner's tax return for 2002 therefore provided no information from which to calculate the petitioner's year-end net current assets.

Also submitted on appeal is a copy of the Form 1040 U.S. Individual Income Tax Return for 2002 of the petitioner's two partners, a husband and wife. The return shows three children as dependents. Since partners are individually liable for the debts of a general partnership, the individual income tax return of the petitioner's two partners is relevant to the petitioner's ability to pay the proffered wage. The figure for total income on line 22 of that return is $57,687.00. Of that amount, however, $32,687.00 is stated to have been received in the form of income from the petitioning partnership. That figure matches the figure for the partnership's net income, as discussed above. Therefore that income may not be counted a second time as evidence of the petitioner's ability to pay the proffered wage. The only non-partnership income stated on the Form 1040 is $25,000.00 stated on line 7, for "Wages, salaries, tips, etc." The amount of $25,000.00 in non-partnership total income must be considered a minimal amount necessary to pay the reasonable household expenses of the five-person household of the petitioner's two partners and their children. Therefore the Form 1040 U.S. Individual Income Tax Return for 2002 of the petitioner's two partners adds no significant evidence in support of the petitioner's ability to pay the proffered wage during the year 2002.

Counsel's brief contains several assertions about the petitioning business. Some of these assertions are similar to assertions made earlier in counsel's letter dated February 25, 2003. In his brief, counsel repeatedly refers to the "petitioner" when the context indicates that counsel intends to refer to one of the individuals who is a partner in

the petitioner. Counsel states: "Before the end of FY 2002, petitioner sold his shares in the partnership to a corporation. He gained a profit of $20,000 from the sale of capital gains, and received partnership income of $12,687.00. He invested all these monies in his other retail store, which is doing business as a sole proprietorship." (Brief, page 2).

As noted above, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. The tax returns in the record do not support counsel's assertions about the sale of partnership shares. Rather, the returns indicate that the partnership sold all of its assets in 2002 and ceased doing business that year. The petitioner's Form 1065 U.S. Return of Partnership Income for 2002 shows entries totaling $20,000.00 which appear to indicate capital gains realized by the partnership for the sale of its assets. The block beside line G (2), for "Final return" is marked with an "x" on the petitioner's Form 1065 for 2002, indicating that the petitioner ceased operations in 2002. The Form 1040 U.S. Individual Income Tax Return of the petitioner's two partners shows $20,000.00 in capital gains, a figure shown to be the result of capital gains received by the partnership, passed through to the partners on the Schedule K-1's of the petitioner's tax return for that year.

Counsel's assertions in his brief appear to suggest a claim that one of the petitioner's partners is continuing to operate the business as a sole proprietorship, which in turn might suggest that the sole proprietorship is a successor in interest to the petitioning partnership. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). However, no documentation of an ongoing business was submitted for the record. On the I-140 petition, the IRS tax number of the petitioner matches the employer identification number of the partnership on the Form 1065 tax returns in the record. The record contains no evidence that a different legal entity assumed the rights and obligations of the partnership after 2002. Moreover, the Form 1040 U.S. Individual Income Tax Return for the petitioner's partners for 2002 shows no business income and has no attached Schedule C or Schedule C-EZ.

For the above reasons, the petitioner's evidence submitted on appeal fails to establish the petitioner's ability to pay the proffered wage during 2002. Moreover, the fact that the petitioner's Form 1065 U.S. Return of Partnership Income for 2002 is marked as a final return indicates that the petitioner ceased doing business in 2002. Lacking any evidence of a successor in interest, the petitioner's evidence on appeal indicates that the petitioner is no longer able to offer employment to the beneficiary. Therefore, even if the evidence on appeal were sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period, the evidence would still require a dismissal of the appeal, since the evidence indicates that the petitioner no longer intends to offer employment to the beneficiary.

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.