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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

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FILE: EAC-04-262-50407 Office: VERMONT SERVICE CENTER Date: **MAY 23 2006**

IN RE: 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 food service manager. 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 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.

On appeal, counsel submits a brief statement and additional evidence.¹

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. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$74,870.65 per year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1985, and currently to employ 10 workers. The petitioner did not provide any information on its gross annual income and net annual income on the petition.

The petitioner submitted the petition with its Form 1120S tax returns for 2001 through 2003, the owner's Form 1040 tax returns for 2001 through 2003, and an experience letter from the beneficiary's previous

¹ The submission of additional evidence on appeal is allowed by the instructions to the 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). 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.

employer. On November 22, 2004, the director denied the petition, finding that the petitioner did not establish that it had the ability to pay the proffered wage beginning on the priority date.

On appeal counsel asserts that in considering the petitioner's ability to pay the proffered wage the income of the previous owner and the current owner for 2001 should be considered since the current owner purchased the business from the previous owner in June 2001, and submits the previous owner's tax return for 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not submit any evidence of the beneficiary's compensation from the petitioner and did not claim to have 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.

On appeal counsel asserts that the petitioner "was established in 1985 with [REDACTED] owning and operating the restaurant as a sole proprietor. [REDACTED] remained the owner and sole proprietor until he sold the restaurant to [REDACTED] in June 2001 who continued to operate the restaurant as a sole proprietor until an S Corp., Beyti Kebab Corp., was operable in March 2002." [REDACTED] reported his business income from Beyti Kebab Restaurant at 4105 Park Avenue, Union City, NJ 07087 on Line 12 and on Schedule C to the Form 1040 individual income tax return for 2001. [REDACTED] 2001 individual income tax return in the record shows that he also reported his business income from the same Beyti Kebab Restaurant on Line 12 and on Schedule C to the Form 1040. The AAO concurs with counsel's argument that the petitioner was structured as a sole proprietorship in 2001 with either [REDACTED] or [REDACTED]. Contrary to counsel's assertion, the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation indicates that the petitioner was incorporated as Beyti Kebab Corp. and elected as an S corporation on August 30, 2001. The petitioner filed its Form 1120S for 2001 as an S corporation but reported no income for that year. Therefore, the AAO will treat the petitioner as a sole proprietorship for 2001 and review the individual income tax return and related financial documents for the previous and current owners in determining the petitioner's ability to pay the proffered wage in 2001, the year of the priority date in the instant case, but from 2002 through the present, the petitioner must be treated as an S corporation.

Reliance on corporation 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 its gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

As previously noted, the petitioner has been an S corporation since 2002. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 and 2003. The petitioner's tax return indicates that its fiscal year is based on a calendar year. The petitioner's tax return for 2002 stated net income² of \$462 and the 2003 tax return stated net income of \$3,425. Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the years 2002 and 2003.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield that the petitioner had current assets of \$11,506 and current liabilities of \$21,011, therefore, its net current assets were \$(9,505) in 2002; and current assets of \$13,151 and current liabilities of \$21,369, therefore, its net current assets were \$(8,218) in 2003. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage for the years 2002 and 2003.

Ordinary income (loss) from trade or business activities as reported on Line 21.

³According 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.

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage in 2002 and 2003 through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts on appeal that: “[the current owner of the petitioner] has other business interests including a bakery. He is willing to use whatever income and assets he has available from Beyti Kebab Restaurant and his other sources to pay the offered wage to the beneficiary to manage his restaurant.” However, counsel does not submit any evidence or affidavit to support his assertion. 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). 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)). Furthermore, because an S 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.”

As previously noted, the evidence indicates that the petitioner was a sole proprietorship in 2001. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor’s income, liquefiable assets, 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 (7th Cir. 1983).

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 (approximately thirty percent of the petitioner’s gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33⁴, Adjusted Gross Income, of the owner’s Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietors for 2001. The tax returns demonstrated the following financial information concerning the petitioner’s ability to pay the proffered wage of \$74,870.65 per year.

Form 1040 for 2001 stated adjustable gross income of \$43,598.

Form 1040 for 2001 stated adjustable gross income of \$77,538.

adjusted gross income on Form 1040 was \$31,272.65 less than the beneficiary’s proffered wage in 2001. Therefore, the sole proprietor had insufficient income to pay the proffered wage to the

⁴ The line for adjusted gross income on Form 1040 is Line 33 for most years, including 2001.

beneficiary for year 2001 even without consideration of monthly expenses for the sole proprietor's household. [REDACTED] adjusted gross income on Form 1040 was \$2,667.35 more than the beneficiary's proffered wage. The petitioner did not submit a statement of monthly expenses for this current owner's household. However, it is most likely that the sole proprietor could not meet his two members household's living expenses with \$2,667.35 in 2001.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets in 2001 for either [REDACTED] or [REDACTED].

The petitioner has not demonstrated that either the previous owner or current owner had the ability to pay the proffered wage as well as to cover existing business and personal expenses with their adjusted gross income for 2001. Contrary to counsel's argument, the petitioner must demonstrate that either of them had the ability to pay the proffered wage and to cover the sole proprietor's living expenses instead of combining their income together.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.