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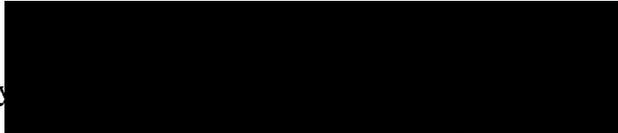
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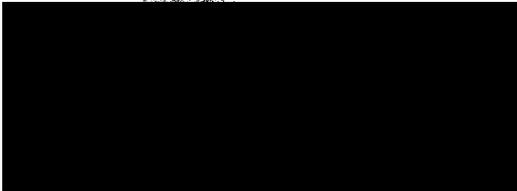
IN RE:

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:



PUBLIC COPY

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
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 sole proprietor who operates a Lebanese restaurant. He seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 he 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, the counsel submits additional evidence and a brief in the matter.

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 regulation 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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).

Here, the Form ETA 750 was accepted on April 27, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$13.01 per hour (\$27,060.80 per year). The Form ETA 750 states that the position requires two years of experience in related occupations.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on May 23, 2003, requested evidence related to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center request stated in pertinent parts:

"The petitioner must demonstrate ability to pay the beneficiary's wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of the ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements...."

"[S]ubmit evidence to establish that the employer [petitioner] had the ability to pay the proffered wage or salary of \$520.40 per week [i.e. \$27,060.80 per year]...."

"... [S]ubmit the 2002 ... federal income tax [return], with all schedules and attachments ... If the business is organized as a sole proprietorship submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business."

"Submit an itemized list of all your monthly expenses, including rent or mortgages payments, food, utilities, clothing, transportation, insurance, medical costs, etc. for 2002."²

"If the beneficiary was ever employed by you, submit copies of the beneficiary's Form W-2 Wage and Tax Statement (s) showing how much the beneficiary was paid by your business."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's IRS Form 1040 tax returns for years 2001, 2002 and 2003, a statement evidencing a line of credit, and, a copy of the beneficiary's Form 1099 for 2002.

In determining the petitioner's ability to pay the proffered wage, CIS will 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). The court specifically rejected the argument that the INS, now CIS, should have considered

¹ The November 25, 2002, "Final Determination" letter sent to petitioner by the U.S. Department of Labor ETA contained a typographical error carried over on the Alien Labor Certification. The correct date is April 27, 2001 instead of April 27, 2002. April 27, 2001 is the priority date.

² This evidence was never submitted. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

Petitioner is a sole proprietorship. 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 returns 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.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$27,060.80 per year from the priority date:

- In year 2001, Schedule C to Form 1040 stated a profit on line 31 of \$2,524.00, and, an adjusted gross income of \$2,345.00 on line 33 of Form 1040.
- In year 2002³, Schedule C to Form 1040 stated a loss on line 31 of <\$35,179.00>, and, an adjusted gross income of a negative <\$35,179.00> on line 33 of Form 1040.
- In year 2003, Schedule C to Form 1040 stated a profit on line 31 of \$2,497.00, and, an adjusted gross income of a negative <\$177.00> on line 33 of Form 1040.

The director denied the petition on June 1, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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.⁴

On this issue, the director found:

"The initial filing contained the petitioner's 2001 individual tax return, which showed an adjusted gross income of \$2,345.00. Since the petitioner is basing his/her [ability to pay the proffered wage upon his] individual tax return, the petitioner must establish an ability to pay the proffered wage and an ability to comfortably support his or her family. Based on the evidence submitted the petitioner's ability to pay was not established...."

A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir.

³ Petitioner's Individual Income Tax return 1040 for 2002 is marked "Not Final" "To be Supplemented" states an adjusted gross income loss of a negative -\$35,179.00, and, a business loss on the accompanying Schedule "C" of a negative -\$35,179.00. The return was signed and dated April 10, 2003. There is no other 2002 1040 return for the petitioner in the record amended or otherwise.

⁴The beneficiary's Form 1099 for 2002 stated wage earnings of \$4,000.00, substantially below the proffered wage of \$27,060.80 per year.

1983). The court⁵ in *Ubeda* concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

On appeal, counsel asserts⁶ in pertinent part:

"The restaurant owner is self-employed and shows no "cost for labor"⁷. The beneficiary, who was working part time, has more recently submitted pay stubs showing that he is earning the amount proffered by the employer. The Employer, in addition, has a \$10,000 line of credit. Wages paid in 2001 total \$14,025, which in addition to the profit that year, the line of credit and value of assets, exceed the salary offered to the beneficiary. Wages paid in 2002 (\$29,348) exceed those offered to... [the beneficiary], therefore evidencing the employer's ability to pay the proffered salary. The Vermont Service Center abused its discretion in failing to consider all relevant factors in this case...."

The only evidence of wages paid to the beneficiary in the record is a copy of the beneficiary's Form 1099 for 2002. It evidences payment of \$4,000.00 for 2002. There is no evidence of the identity of the recipients of the wages paid in 2001 totaling \$14,025⁸, or of the wages paid in 2002 totaling \$29,348⁹. The petitioner has not established by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage.

As an additional, or alternative method to demonstrate its ability to pay, petitioner submits that it has an established line of credit. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's suggestion that its income could be augmented with a line of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

⁵*Ubeda v. Palmer, Supra* at 650.

⁶In section three of Form I-290B.

⁷Although petitioner does not show "cost of labor" on Schedule "C" for tax years 2001 and 2002 from his business, he does state a "Wage" expense under Schedule "C" Part II, Line 26. Presumably, this Wage expense "for business use of your home" relates to his restaurant business.

⁸Found on Schedule "C" to petitioner's tax year 2001 1040 tax return, stated under Expenses "...for business use of your home." Line 26.

⁹Found on Schedule "C" to petitioner's tax year 2002 1040 tax return, stated under Expenses "...for business use of your home." Line 26.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel states in his appeal brief, "... Further, the tax returns show assets (tangible property-IRS Form 4562) valued at \$200,000.00." We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

Lastly, counsel states in that, "... The Vermont Service Center ...erred and abused its discretion in failing to consider all relevant factors in this case...." The U.S. Citizenship and Immigration Service examines evidence presented by sole proprietors, such as petitioner, in a variety of ways that takes into account both the wages actually paid beneficiaries, the taxable personal income stated in tax returns, and the profit or loss of businesses as well as other evidence. The AAO has followed those procedures in this case based upon the evidence petitioner presented.

Not all the Service Center's evidence requested was received from petitioner. The petitioner did not submit an itemized list of all his monthly personal expenses, including rent or mortgages payments, food, utilities, clothing, transportation, insurance, and medical costs, for 2002, or submit pay stubs¹⁰ showing that the beneficiary "... is earning the amount proffered by the employer..." as is asserted by counsel. Petitioner did not present that evidence, and, 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).

The totality of the evidence submitted by petitioner, including his tax returns and all schedules, overwhelmingly supports the director's decision that, by the evidence submitted, the petitioner did not establish that he had 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 not met that burden.

ORDER: The appeal is dismissed.

¹⁰ The "pay stubs" are not in evidence.