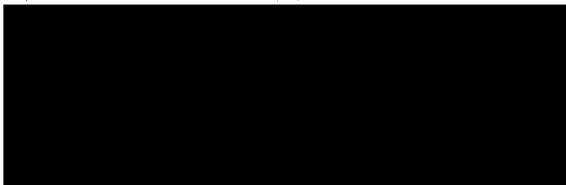


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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

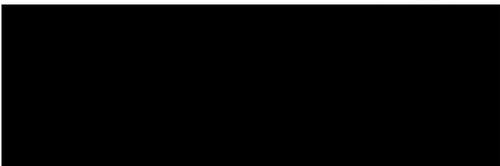


FILE: WAC 03 063 51595 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2004

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:



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.

Michael Valdez

For Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

The petitioner is an Asian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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 submits a brief and additional evidence.

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:

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. 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, Asian Rose Cafe, must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998.¹ The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, annualized to \$26,000.² As reflected Form ETA 750B, signed on January 8, 1998, by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

¹ The ETA 750 contained in the record is a copy of the original ETA 750, which petitioner's counsel states is located in a previous I-140, filed by the petitioner on behalf of the same beneficiary under receipt number WAC 0208053266. That petition was denied on June 25, 2002. Even if this petition were otherwise eligible for approval, it could not be approved unless the original labor certification is made part of this proceeding. *See* 8 C.F.R. § 204.5(g).

² The director misstated the proffered wage as \$24,000 per year.

On Part 5 of the petition, the petitioner claims to have been established in 1991, to have a gross annual income of approximately \$375,200, and to currently employ five workers. In support of its ability to pay the beneficiary's proposed wage offer of \$26,000 per year, the petitioner submitted copies of its Form 1065, U.S. Partnership Return of Income for 1998 through 2002. All copies of these tax returns are incomplete, as they have omitted the attachments and schedules. They do, however, provide the following information:

	1998	1999	2000	2001
Net income	\$8,882	\$83,369	\$73,225	-\$5,063
Current Assets	\$ 268	\$10,036	\$12,492	-\$ 352
Current Liabilities	\$ -0-	\$ -0-	\$ -0-	\$ 347
Net current assets	\$ 268	\$10,036	\$12,492.	-\$ 699

Counsel's original cover letter submitted with the petition states that the 1999 and 2000 tax returns were prepared in the names of the owners as the filers, but the employer identification number remains the same. It must further be noted that the amounts appearing as the end-of-tax year figures on Schedule L of the petitioner's 1998 tax return filed in the petitioner's name of Asian Rose, LLC, do not correlate to the beginning-of-tax year figures set forth on the 1999 tax return filed in the partners' names.

In addition to these tax returns, the petitioner initially submitted copies of its state quarterly wage reports for the last quarter of 2001 and the first three quarters of 2002. They show that the petitioner employed from three to six individuals during that period. The beneficiary's name did not appear among the employees listed. It provided a copy of its federal Form W-3, Transmittal of Wage and Tax Statement for 2001, showing that it reported \$50,278.71 in total wages paid. It also submitted copies of twenty Wage and Tax Statements (W-2s) issued to workers in 2001 in varying amounts ranging from approximately \$204 to \$7,913.

The petitioner also initially submitted a copy of a state registration of a fictitious business name statement in the name of another restaurant called [REDACTED] a fictitious business name statement application and proof of publication for [REDACTED] and a federal application for a tax identification number, which indicates that Asian [REDACTED] was started in May 2001 and is organized as a limited liability company under a different employer identification number. Copies of [REDACTED] 2001 federal tax return, copies of the [REDACTED] I state quarterly wage reports for three quarters of 2002 and the first quarter of 2001 were provided, as well as copies of several 2001 Asian Rose II Wage and Tax Statements (W-2s) issued to various employees, and a copy of its 2001 W-3.

On June 16, 2003, the director requested additional evidence from the petitioner pertinent to its ability to pay the proffered salary. In accordance with 8 C.F.R. § 204.5(g)(2), the director instructed the petitioner to provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and continuing until the present. The director specifically requested this evidence for 2002.

In response, counsel resubmitted the partial copies of the tax returns that were previously offered, as well as a partial copy of Asian Rose II's 2002 tax return and a copy of the petitioner's Form 1065, U.S. Return of Partnership Income for 2002. The petitioner's tax return reflects that it reported a net income of -\$4,004. Schedule L of the tax return shows that the petitioner had \$455 in current assets and \$1,388 in current liabilities, resulting in -\$933 in net current assets.

The director denied the petition on September 16, 2003, concluding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority.

On appeal, counsel resubmits copies of page one of the petitioner's 1998, 2001, and 2002 tax return. He also provides a copy of [REDACTED] 2001 and 2002 tax returns. Counsel asserts that for 2001 and 2002, the proffered wage could have been paid out of the wages of the part-time employees. Counsel references line 9 of the petitioner's 2001 tax return, showing that \$50,279 in salaries and wages was paid, and the 2002 tax return showing that \$45,516 in salaries and wages were paid. Counsel also suggests that the sums paid as guaranteed payments to partners as reflected in the 2001 and 2002 tax returns could have been available. For 1998, counsel asserts that the petitioner could have also used the funds paid as salaries and wages combined with the \$8,882 reported as petitioner's net income. Finally, counsel suggests that the combined gross profit of both restaurants should be considered as monies available to pay the proffered salary.

Counsel's hypothesis that the petitioner could have replaced part-time employees with the beneficiary does not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no objective evidence that demonstrates that the petitioner had planned such a personnel change. Further, there is no evidence that the beneficiary's position involves the same duties as any of the part-time employees. If an employee performed other kinds of work, then the beneficiary could not have replaced him or her. Moreover, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel's suggested reliance on the ability of a separate firm to pay the beneficiary's proffered wage is misplaced. Both the petitioner and [REDACTED] are operated as separate limited liability companies under separate employer identification numbers and separate obligations to report revenue and pay taxes on their income. There is no evidence in the record that either entity was contractually obligated to the other in such a way that guarantees the mutual payment of salaries or wages. CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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 establish that it employed and paid the beneficiary the full proffered wage in any of relevant years. To the extent that the beneficiary may have been compensated at a rate less than the proffered wage during a designated period, CIS will consider those amounts in its review of the petitioner's ability to pay the proffered wage. If the shortfall can be covered by either the petitioner's net income

or net current assets, the petitioner is deemed to have established its ability to pay the full proffered salary for the given period.

If the petitioner does not establish that it may have 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to other employees in excess of the proffered salary is insufficient. Counsel's assertion that salaries and wages already paid to the petitioner's other employees or paid as compensation to its partners is not persuasive as it represents monies already expended and not readily available to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner show by its federal tax returns, audited financial statements, or annual reports, that it has the continuing ability to pay the proffered wage beginning on the priority date. It is noted that 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.

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. As suggested above, CIS will consider a petitioner's net current assets as an alternative means to demonstrate a petitioner's ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A petitioner's current assets and current liabilities are generally shown on Schedule L of its federal income tax return. If its 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.

In this case, as stated above, the petitioner's net income of \$8,882, -\$5,063, and -\$4,004 in 1998, 2001, and 2002, respectively, was insufficient to pay the proffered salary of \$26,000 per year. Similarly the petitioner's net current assets of \$268, -\$699, and -\$933 in each of those respective years was also insufficient to pay the proposed wage offer. Thus, in three out of the relevant five years, the evidence failed to establish that the petitioner had the continuing financial ability to pay the proffered salary. Therefore, 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 raises a question as to whether the petition is based on a bona fide job offer or whether the a pre-existing family or business relationship may have influenced the labor certification. The record reveals that the petitioner's owner and the beneficiary share the same last name. The beneficiary's name is very similar, although not identical, to one of the partner's names given on the

³ 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.

petitioner's 1999 and 2000 federal tax returns, which were filed in the partners' individual names. The beneficiary's address, as stated on the visa petition, is the same as the address of one of the owners named on [REDACTED] fictitious business name statement application form and statement, as well as the address of the partner who signed [REDACTED] federal tax return. The beneficiary's name is also extremely similar to that of the partner who signed Asian Rose II's 2001 federal tax return.

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 petitioner is owned by the person applying for position, 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.

Although this appeal is being dismissed on other grounds, 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.

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.