

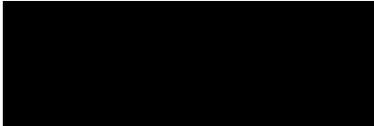
PUBLIC COPY

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
Citizenship and Immigration Services

B6

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: EAC 01 110 53439 Office: VERMONT SERVICE CENTER

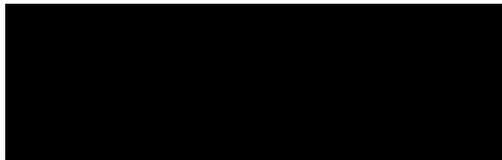
Date: DEC 13 2003

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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. In response to a motion to reopen/reconsider, the director affirmed the previous decision, denying the petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant and catering company. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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.

On appeal, counsel submits a brief.

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.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted on August 10, 2000. The proffered salary as stated on the labor certification is \$18.89 per hour, which equals \$39,291.20 per year.

With the petition counsel submitted copies of the 1997, 1998, and

1999 Form 1120 U.S. Corporation Income Tax Return of Joe Louis and Corrado Corporation, which presumably does business as Trattoria Corrado, the named petitioner in this case. Because the priority date in this case is August 10, 2000, however, the information contained in those returns bears no direct relevance to the petitioner's continuing ability to pay the proffered wage beginning on the priority date or any other issue in this case.

Because 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 August 6, 2001, requested additional evidence pertinent to that ability. The Service Center requested a copy of the petitioner's 2000 tax return and copies of the beneficiary's 2000 Form W-2 Wage and Tax Statement, if the petitioner employed him during that year. The Service Center also asked whether the proffered position was newly created or existed previously.

In response, counsel submitted stated that the position is newly created and that the petitioner did not employ the beneficiary during 2000. Counsel also submitted a copy of the 2000 Form 1120 U.S. Corporation Income Tax Return of Joe Louis and Corrado Corporation. The return covers the petitioner's 2000 fiscal year, which ran from July 1, 2000 to June 30, 2001. The tax return shows that the company declared a taxable income before net operating loss deduction and special deductions of \$0. The corresponding Schedule L shows that at the end of that year the company's current liabilities exceeded its current assets.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on May 29, 2002, denied the petition.

Counsel filed a motion to reopen and reconsider. In that motion, counsel stated that the beneficiary would not replace the petitioner's chef. Counsel stated that as one of the owner/officers of the company no longer actively participates in its management, the compensation of officers that was previously paid to that officer is now available to pay the proffered wage. Counsel also implied that the petitioner had always intended to replace that owner/officer with the beneficiary. Counsel noted that if the petitioner's FY 2000 depreciation deduction of \$14,812 is added to the portion of the compensation of officers which was paid to that officer who has now left the company, \$29,000, the sum is \$42,812, which amount sufficient to pay the proffered wage of \$39,291.20.

In that motion, counsel also stated that the petitioner paid \$34,325 to part-time temporary cooks. Counsel implied that hiring the beneficiary would obviate some or all of that expense.

On March 26, 2002, the Director, Vermont Service Center, found

that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage during 2000 and denied the petition again. The director noted that the petitioner's 2000 tax return did not indicate that the officer who left the company was paid \$29,000 during that year, but only \$23,800.

On appeal, counsel argues that because the priority date of the petition is August 10, 2000 and the petitioner's fiscal year begins on July 1, 2000, the petitioner should only be obliged to show the ability to pay a pro-rated portion of the proffered wage during 2000. Because the petitioner would not have been obliged to pay the proffered wage during July of 2000, counsel urges that the proffered wage of \$39,291.20 should be multiplied by 11/12 to yield \$36,016.93*. Counsel urges that this amount is the portion of the proffered wage that the petitioner might have been obliged to pay during its 2000 fiscal year.

Counsel further argues that the director correctly considered the petitioner's depreciation deduction as funds available to pay the proffered wage. Counsel urges that the petitioner's depreciation deduction for 2000, \$14,812, plus the compensation paid during 2000 to the officer who since left the company, \$23,800, equals \$38,612. Counsel notes that this amount, which counsel argues was available to pay the proffered wage, exceeds \$36,016.93, that portion of the proffered wage which counsel states that the petitioner is obliged to show the ability to pay.

Initially, this office notes that counsel failed to pro-rate the amount of the compensation of the departed officer that could be paid to the beneficiary. That is, if the petitioner did not hire the beneficiary until August of 2000, then the departed officer would have worked through July. A portion of his 2000 compensation would still have been due to him, and not available to pay the proffered wage. To pursue that line of reasoning, however, would be to further reduce this case to a study of minutiae, and a more serious flaw exists in counsel's argument.

Counsel has stated that the departed officer's compensation was available to pay the proffered wage because the beneficiary would have replaced him. Counsel has stated that this officer no longer works in the restaurant and is no longer due compensation. Counsel produced no evidence of those assertions, however. Other than counsel's assertion, the record contains no indication, for instance, that the named officer no longer works at the restaurant. Other than counsel's assertion, the record contains no evidence that the named officer no longer receives compensation from the petitioner. An unsupported statement is insufficient to sustain the burden of proof in these proceedings.

* Although counsel's math was wrong by a few cents, that error does not affect the result.

Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). No portion of that officer's compensation shall be considered in the calculation of the petitioner's ability to pay the proffered wage.

Further, counsel argues, and the director implicitly agreed, that the amount of the petitioner's depreciation deduction should be included in the calculation of the funds available to pay the proffered wage during that year. A depreciation deduction, however, while not necessarily a cash expenditure during the year claimed, represents value lost as equipment and buildings deteriorate. This deduction represents the expense of buildings and equipment spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The depreciation deduction represents the accumulation of funds necessary to replace perishable equipment and buildings, and that amount is not available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532, 537 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986).

In calculating the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, *Supra.* at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, *Supra.*; *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. v. Sava*, *Supra.* at 1084, the court held that CIS, then the Immigration and Naturalization Service, had properly relied upon 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 Bureau should have considered income before expenses were paid rather than net income.

Finally, counsel stated on the motion that \$34,325 had been paid to part-time temporary cooks during 2000 and implied that some portion of that expense should be included in the calculation of the petitioner's ability to pay the proffered wage.

When directly asked by the Service Center, counsel responded that the proffered position is a new position. Now, counsel indicates

that the beneficiary would take over the duties of one of the officers and the duties of part-time, temporary cooks. Other than counsel's assertion, the record contains no indication that the petitioner employed part-time temporary cooks during 2000. The petitioner's tax return shows \$34,325 paid as salary and wages. Counsel's assertion implies that all of the petitioner's salary and wage expense was for part-time temporary cooks. Other than counsel's assertion, the record contains no evidence of this unlikely scenario. Further, counsel previously mentioned that the petitioner employs a chef, whom the beneficiary will not replace, and who is presumably paid wages. This seems to contradict counsel's implicit assertion that all of the petitioner's wage and salary expense was for payments to part-time temporary cooks. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

During 2000, the petitioner declared a taxable income of \$0 and had negative net current assets. The record does not demonstrate that the petitioner was able to pay the proffered wage out of its income or its assets. The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2000. Therefore, the petitioner has not established that it 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.