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U.S. Department of Homeland Security

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE*

*CIS, AAO, 20 Mass, 3F*

*425 I Street N.W.*

*Washington, D.C. 20536*



*Bo*

File: EAC 01 103 51076 Office: Vermont Service Center

Date: APR 07 2004

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: SELF-REPRESENTED

**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.

A handwritten signature in black ink, appearing to read "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 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 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 and denied the petition accordingly.

On appeal, the petitioner states that its losses during 1997 were uncharacteristic and provides evidence pertinent to its expenses during that year.

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 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 either 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 proffered wage beginning on the priority date, the date the Form ETA 750 Request for Labor Certification was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also show that, as of the priority date, the beneficiary was qualified for the proffered position pursuant to the terms of the certified Form ETA

750 Request for Labor Certification. (Labor Certification) *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on July 7, 1997. The proffered salary as stated on the Labor Certification is \$17.43 per hour, which equals \$36,254.40 annually. The Labor Certification states that the proffered position requires two years of experience in the job offered.

With its initial petition, the petitioner submitted no evidence of its ability to pay the proffered wage. On the Form ETA 750, Labor Certification, Part B, the beneficiary stated that he had experience in three restaurants, one in his native Ecuador, one in Flushing, New York, and the petitioner. As to the experience in Ecuador, the beneficiary stated that he worked at the *Restaurante Italiano*, on Calle 9 de Octubre, in Cuenca, Azuay, Ecuador, from January 1984 to November 1986.

Because the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage and because the petitioner's employment experience was insufficiently documented, the Vermont Service Center, on August 20, 2001, requested additional evidence. The Service Center requested that the petitioner submit evidence of its continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested the petitioner's tax returns, annual reports, or audited financial statements for 1997 and, if the petitioner then employed the beneficiary, Federal Form W-2 wage and tax statements showing the wages paid to the beneficiary.

In addition, the Service Center requested that the petitioner submit evidence in support of the beneficiary's claim of two years of experience as a cook.

In response, the petitioner submitted a copy of the 1997 Form 1040S U.S. tax return of an S corporation of Ravni Restaurant, Inc. ("Ravni"). That tax return shows that Ravni suffered a loss of \$476 during that year. The corresponding Schedule C shows that, at the end of that year, Ravni had current assets of \$2,636 and current liabilities of \$1,259, which yields net current assets of \$1,377.

The petitioner did not submit any W-2 forms, although the Form ETA 750, Labor Certification, Part B, states that the beneficiary has worked for the petitioner since November 1988. The petitioner did not explain that omission.

Although the petitioner did not explain the relationship of Ravni and the petitioner, the petitioner was apparently asserting either that Ravni is identical to the petitioner, is a subsidiary, or

that it is the petitioner's successor-at-interest.

As to his employment experience, the beneficiary submitted a letter, purportedly from the manager-proprietor of the La Cascada reception hall at the corner of General Enriquez and Marginal al Rio, in Azoguez, Ecuador. That letter states that the beneficiary worked at that reception hall from January 10, 1984 until June 12, 1986.

On January 15, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director noted that the net income and the net current assets of the business in 1997 were insufficient to pay the proffered wage.

On February 21, 2002, the petitioner submitted a Form I-290B appeal. Because that document was untimely submitted under 8 C.F.R. § 103.3(a)(2), the Vermont Service Center treated it as a motion to reopen, rather than as an appeal.

In that motion, the petitioner stated that during 1997 the restaurant underwent a renovation that cost more than \$40,000, which depleted the petitioner's net income during that year. The petitioner also asserted that its assets at the end of that year were \$71,229.

On April 6, 2002, the Director, Vermont Service Center, ruled on the motion. The director noted that the petitioner submitted no evidence to support its claim that it underwent a renovation of over \$40,000 during 1997. The director further noted that no evidence was submitted to support a claim that 1997 was an uncharacteristically unprofitable year. Finally, the director noted that the petitioner's *total* assets are not available to pay the proffered wage and denied the petition again.

On appeal, the petitioner submitted an unsigned copy of the 1998 Form 1120S U.S. income tax return for an S corporation of Ravni. Again, the petitioner offered no explanation of the relationship between Ravni and the petitioner. That tax return shows that Ravni declared an ordinary income of \$33,850 during that year. The corresponding Schedule C shows that Ravni had current assets of \$5,000 and current liabilities of \$1,259, which yields net current assets of 3,741.

If the petitioner was attempting to assert that Ravni is the same entity as the petitioner, or a wholly-owned subsidiary, the petitioner failed to provide evidence of, or even to explicitly state that proposition.

If the petitioner intended to assert that Ravni is a successor-at-interest to the petitioner, then the petitioner failed to explicitly state that assertion. Further, in that event, Ravni, the successor-at-interest, would be obliged to submit proof of the change in ownership and of how the change in ownership occurred. It would also be obliged to show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

A successor-at-interest petitioner is further obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *Id.*

The petitioner also submitted an invoice, dated June 17, 1997, from a construction company to the petitioner for \$18,619. Finally, the petitioner submitted a signed statement from its president averring that the renovations forced the petitioner to close for approximately six weeks.

On the appeal form, the petitioner reiterated that renovations depleted the petitioner's income during 1997, and cited the petitioner's 1998 income tax return as confirmation of that assertion. The petitioner's assertion is an apparent reference to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), which outlined circumstances pursuant to which a petitioner's losses or low profits might be disregarded in the determination of ability to pay the proffered wage.

The petitioning entity in *Sonogawa* changed business locations during the year in which the petition was filed and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society

matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsels is correct that, if losses or very low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Merely demonstrating that the petitioner declared a profit during 1998, however, does not demonstrate that its loss during 1997 was uncharacteristic. Further, the record contains no evidence that the petitioner has ever posted a large profit, or even a profit equal to the amount of the proffered wage. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. Thus, *Sonegawa's* holding is inapplicable to this case.

This office notes that the petitioner previously claimed that it underwent a renovation that cost more than \$40,000. On appeal, it produced an invoice for less than \$20,000. The petitioner did not explain the difference between its assertion and its evidence. 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).

As was noted above, the only financial information submitted pertains to Ravni. The record contains no evidence that Ravni is identical to the petitioner or is the petitioner's successor-at-interest. As such, evidence pertinent to Ravni is insufficient to show the petitioner's ability to pay the proffered wage.

If Ravni were shown to be identical to the petitioner or to be the petitioner's successor-at-interest, Ravni would be obliged to demonstrate the ability to pay the proffered wage. The priority date is July 7, 1997. The proffered salary is \$36,254.40 annually. During 1997, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date. On the priority date, 187 days of that 365-day year had elapsed. The petitioner is obliged to

demonstrate the ability to pay the proffered wage during the remaining 178 days. The proffered wage multiplied by  $178/365^{\text{th}}$  equals \$17,680.23, which is the amount the petitioner must show the ability to pay during 1997.

During 1997, Ravni declared a loss of \$476 as its ordinary income. Ravni has not demonstrated that it was able to pay any portion of the proffered wage out of its income during 1997. Ravni had 1997 year-end net current assets of \$1,377. That amount is insufficient to pay the salient portion of the proffered wage. The petitioner did not demonstrate that Ravni had the ability to pay the proffered wage during 1997.

During 1998 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 1998, Ravni declared ordinary income of \$33,850. That amount is insufficient to pay the proffered wage. The corresponding Schedule C shows that the petitioner had net current assets of \$3,741. That amount is also insufficient to pay the proffered wage. The petitioner has not shown that any other funds were available to it to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

The petitioner has never submitted any evidence of its ability to pay the proffered wage during 1999 or 2000, or any evidence pertinent to Ravni's ability to pay the proffered wage during those years. The petitioner omitted this evidence even though the Director, Vermont Service Center requested, on August 20, 2001, that the petitioner submit evidence of its continuing ability to pay the proffered wage beginning on the priority date. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during 1999 or 2000. Further, a 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).

The petitioner has failed to submit evidence sufficient to demonstrate the ability to pay the proffered wage during the portion of 1997 after the priority date. The petitioner has also failed to demonstrate the ability to pay the proffered wage during 1998, 1999, and 2000. 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 file contains reason to doubt the beneficiary's employment history. On the Form ETA 750, Part B, the beneficiary stated that he had experience in three restaurants, one in his native Ecuador, one in Flushing, New York, and the petitioner. The beneficiary stated that he worked at the Restaurante Italiano, on Calle 9 de Octubre, in Cuenca, Azuay,

Ecuador, from January 1984 to November 1986.

In the request for evidence issued August 20, 2001, the Vermont Service Center requested that the petitioner submit evidence in support of the beneficiary's claim of two years of experience as a cook. In response, the beneficiary submitted a letter, purportedly from the manager-proprietor of the La Cascada reception hall at the corner of General Enriquez and Marginal al Rio, in Azoguez, Ecuador. That letter states that the beneficiary worked at that reception hall from January 10, 1984 until June 12, 1986.

The employment experience that the beneficiary chose to document in response to the request for evidence was not mentioned in the employment history the beneficiary provided on the Form ETA 750, Part B. Further, the period of time during which the beneficiary initially claimed to have worked in Cuenca overlaps the period during which he later claimed to have worked in Azoguez, approximately 20 miles to the North of Cuenca. No explanation was offered for the two apparently contradictory employment claims. As was stated above, 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. The petitioner failed to demonstrate that the beneficiary has the requisite two years of experience as a cook.

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.