

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

[Handwritten signature]

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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:

[Redacted]

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.

for 
Robert P. Wiemann, Director
Administrative Appeals Office

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 a Chinese buffet restaurant. It seeks to employ the beneficiary permanently in the United States, as a specialty cook, and filed the Immigrant Petition for Alien Worker (I-140) on October 30, 2002. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 2, 2001. The beneficiary's salary as stated on the labor certification is \$14 per hour or \$29,120 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 22, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE requested, for 2001 and 2002, signed federal income tax returns with schedules and tables, annual reports, or audited financial statements, as well as quarterly wage reports for the last three (3) quarters with the title and job duties of each employee. The RFE exacted, also, proof of the petitioner's business name and current business license. The RFE originated the idea of photographic evidence of the interior floor plan, including a showing of square footage, the work area, and work stations for the number of employees that the petitioner intends to hire. The RFE detailed that photographs of the exterior of the business must include the sign and address together. Finally, the RFE sought more specific evidence of the beneficiary's experience.

Counsel submitted 2001 and 2002 Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns, but the petitioner had signed neither one, as requested. The 2001 Form 1120-A reflected no compensation to officers and \$133,093 paid as salaries and wages. The 2002 Form 1120-A reflected \$90,700 in compensation to officers and \$35,644 paid as salaries and wages.

The RFE specified the last three (3) Nevada Employer's Quarterly Contribution and Wage Report (NVCS-4702). Responsive submissions included only one (1) with the list of employees, i.e., for the quarter ending September 30, 2002 (2002Q3). Other fragments of Forms NVCS-4702 referred to attached sheets, but there were none. In

addition, counsel's brief asserted that the corporate treasurer served as the specialty cook and received \$36,000 per year for such duties, though the sole NVCS-4702 for 2002Q3 stated only \$9,000. Moreover, no offer of proof clarified that she was paid as a cook, rather than as a corporate treasurer. Counsel forwarded the petitioner's four (4) Federal Employer's Quarterly Federal Tax Return (Form 941), for 2002, but they listed neither employees nor duties. The Wage and Tax Statements (W-2) for 2001 and 2002 both reported that the petitioner paid the corporate treasurer (Ms. Luong) \$36,000 in each year, equal to, or greater than, the proffered wage.

The petitioner's 2001 and 2002 Forms 1120-A reported taxable income before net operating loss deduction and special deductions as, respectively, a loss of (\$10,278) and \$24,787, both less than the proffered wage. The petitioner omitted any entry in Part III, Balance Sheet per Books, of Form 1120-A for both 2001 and 2002. The director, consequently, could not whether net current assets favored the ability to pay the proffered wage.¹

The director weighed the fact that the beneficiary did not work for the petitioner in 2001 or 2002, but mistakenly referred to line 26 of the 2002 Form 1120-A for net income, instead of line 24, i.e., \$24,787, as noted above. Since no amount in any year established that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, the director denied the petition.

On appeal, counsel, again, submits 2001 and 2002 Forms 1120-A without signatures, fragments of Forms 941 and NVCS-4702, and the same four (4) pages of Internal Revenue Service (IRS) computer printouts, still without balance sheets, for the 2002 Form 1120-A. Counsel considers that Citizenship and Immigration Services (CIS), formerly the Service or INS, should add depreciation back into income, but that computation does not reach a sum equal to, or greater than, the proffered wage.

Counsel, on appeal, reiterates that:

Also, as previously indicated, the position instantly offered, Specialty Cook, is currently performed by [redacted] Treasurer/Director of [the petitioner]. [redacted] will be expected to concentrate on the management of [the petitioner], once the alien for whom the [petitioner] has filed immigrant petition is authorized to work. [redacted] is currently receiving \$36,000.00 per year as compensation for her services (please see Employer's Quarterly Contribution and Wage Report and W-2 issued to [redacted] for reference), which is more than the \$29,120.00 to be paid to the prospective worker.

Also, as indicated on the **Employer's Quarterly Contribution and Wage Report**, the average wage reported each quarter exceed [sic] \$30,000.00.

¹ Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear on designated lines of Part III of Form 1120-A. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

As of the priority date, in 2001, the salary of [REDACTED] \$36,000, minus the (\$10,278) loss, reported on Form 1120-A, leaves a difference, available to pay the proffered wage, of \$25,722, less than the proffered wage. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

Moreover, the petitioner indicates on its 2002 federal income tax return that it paid Ms. Luong as an officer, not as a specialty cook. Form W-2 states that the petitioner paid Ms. Luong \$36,000, but the 2002 Form 1120-A reports only \$35,644 paid to all employees other than officers.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The RFE requested the description of duties, but the 2003Q3 NVCS-4702 only named some employees. The response to the RFE withheld descriptions of duties, and the record, as presently constituted, does not contain them in other sources. Ms. Luong, specifically, provided no evidence that her duties, as an officer, involve the same as those in the Form ETA 750 for the beneficiary. Only counsel's averment supports the performance work of Ms. Luong as a specialty cook.

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 petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If Ms. Luong or that employee, in 2002, performed other kinds of work than those described for the beneficiary in Form ETA 750, then the beneficiary could not have replaced him or her.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns, Forms 941, Forms NVCS-4702, one (1) list of employees, a record with no descriptions of duties of the petitioner's employees, and Forms W-2, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The RFE raised an issue as to whether the petitioner has established that the beneficiary met qualifications for the job as of the petition's priority date, as stated in the Form ETA 750. The petitioner provided evidence of the prior

experience in the job offered in an employment verification dated "4/3/2003." The director's decision did not question it, and the question of prior experience does not affect the conclusion of the AAO.

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.