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**U.S. Citizenship
and Immigration
Services**



FILE: WAC 02 194 52617 Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(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 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, 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 on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian style cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on September 19, 1997, and approved by the Department of Labor on June 29, 1999. 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, the petitioner has submitted a letter in support of the appeal 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.

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 petitioner must demonstrate eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on September 19, 1997. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour or approximately \$22,176 per year.

With the petition, the petitioner submitted the I-140 and the ETA 750. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 28, 2002, requested additional evidence pertinent to that ability as well as requesting additional evidence regarding the beneficiary's experience. Specifically, the Service Center requested that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements. On the issue of the beneficiary's experience issue it requested letters from the previous employer documenting the beneficiary's work experience. In response, on October 23, 2002 the petitioner submitted letters documenting the work experience from the beneficiary's previous employers in Mexico. On the ability to pay issue, the petitioner submitted copies of tax returns from 1997 to 2000, noting that the taxes for 2001 had not been completed.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on December 4, 2002, denied the petition.

On appeal, the petitioner has submitted a letter along with several attachments, including a copy of the 2001 Form 1120 U.S. Corporation Income Tax Return with various schedules and attachments, and documentation relating to the petitioner's estimated taxes for 2002, including Form 100-ES.

The brief submitted by the petitioner urges reversal of the director's decision. The petitioner's letter makes several points in support of the appeal. First, the petitioner argues that the beneficiary has been working for and being paid by the petitioner and notes that the beneficiary will continue to be paid at the new hourly wage regardless of the petitioner's net income. Second, the petitioner notes that it has an approved line of credit of over \$30,000 available that could be accessed when needed. Third, the petitioner argues that the business' income should be augmented by depreciation and amortization. Finally, the petitioner's letter notes that 2002 had proven to be a successful year for the petitioner, the business has been operating for several years, and the beneficiary's abilities as a cook will enable the business to further prosper. The petitioner takes issue with the director's method of calculating the ability to pay the wage and asks that the AAO consider the fact that the petitioner is an ongoing business that has employed, and plans to continue to employ, the beneficiary.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, 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. *Supra* at 1084. The court specifically rejected the argument that the INS should have considered 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.

The petitioner's net income as reflected on line 30 of the Forms 1120 for tax years 1997 through 2001 is as follows: 1997, (\$74,434); 1998, (\$16,116); 1999, (\$1,001); 2000, (\$23,026); 2001, \$0. The petitioner argues that the income should be supplemented by the amount of depreciation. However, as noted above, no authority supports the petitioner's argument and in fact, the authorities cited serve to refute it.

Aside from the information disclosed by the contents of the corporate tax returns, the petitioner argues that the AAO should consider the fact that the petitioner has a line of credit of up to \$30,000 that could be accessed to pay the beneficiary's wages. Additionally, the petitioner asserts that it has employed the beneficiary and paid his wages and would continue to do so in the future. Finally, it asks that the AAO consider the business' expected increase in earnings in 2002 and the beneficiary's effect upon the business' earnings.

The AAO is not persuaded that the line of credit is a sufficient indicator of the petitioner's ability to pay the proffered wage. As the cases identified have indicated, it is appropriate for the director and the AAO to rely upon tax records to determine the petitioner's ability to pay the wage. As to the petitioner's assertion that it has been paying the beneficiary's wages and will continue to do so, although the Form I-140 reflects that the

beneficiary has been employed by the petitioner from 1993 through at least 1997, and the petitioner asserts that the beneficiary is still employed, no evidence of the beneficiary's employment and the amount of wages paid has been submitted. However, even if evidence of wages paid had been submitted, unless the wages meet or exceed the amount of the proffered wage, such evidence of wages will not of itself demonstrate the petitioner's ability to pay the proffered wage.

Although the petitioner asserts that the beneficiary has contributed to the business' growth, and that it was expected to grow even more in 2002, the record contains no evidence regarding the petitioner's impact upon the business' growth. Although the tax records do reflect generally consistent increases in the amount of the business' gross receipts, these gains appear to have been offset by corresponding deductions to that income that have resulted in net income amounts below the amount of the proffered wage.

Finally, we turn to one additional issue beyond the decision of the director. The issue relates to the change in the business entity involved in this petition. The ETA 750 reflects that the original entity which received the certification of the position was Demario's Café and Pizzeria, located at [REDACTED]

[REDACTED] The entity that filed the petition, however, is Jack's Restaurant, Inc., located at [REDACTED]

[REDACTED] Although the Form I-140 notes that Jack's Restaurant was previously known as Demario's Café and Pizzeria, there is no evidence in the record to demonstrate that the current petitioner is a true successor in interest to the original entity which sought, and obtained the labor certification. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also 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).

While it is true that both Demario's Café and Pizzeria and Jack's Restaurant appear to be same type of business, and it may have been a simple change of name and location, the record contains no evidence of what the relationship is between the two entities, although the AAO acknowledges that Mr. [REDACTED] an officer of the current corporation, appears to be involved in both entities. However, these facts, as well as the fact that the beneficiary worked for both entities is not sufficient as the petitioner must address not only the entity's intentions with respect to pursuing the labor petition, it also must establish that the labor certification approval, granted on the basis of the original employer's application, should be honored because the current petitioner is for all intents and purposes, the same employer or has all of the same "rights, duties, obligations and assets of the original employer." Evidence such as tax or other financial records demonstrating the type of entity, i.e., sole proprietorship, partnership, corporation, would be useful in making this determination. Also, documentation surrounding the dissolution, if any, of the prior business and its reopening as the current business, such as business licenses, records relating to a corporate name changes, etc. would also be of aid in this determination. While the director did not specifically request this type of information, it remains an issue in the case that will need to be resolved should there be any additional proceedings relative to this case.

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.