



U.S. Citizenship
and Immigration
Services

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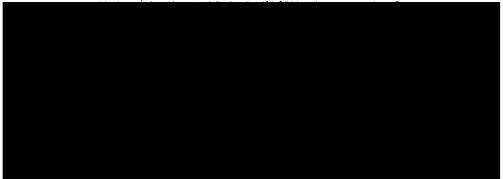


FILE: WAC-02-153-50480 Office: CALIFORNIA SERVICE CENTER Date: MAY 20 2004

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:

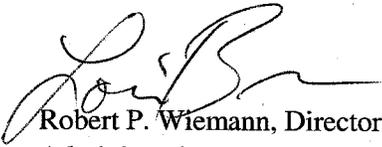


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INSTRUCTIONS:

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 an Italian style restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Italian style. 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.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage in the year of the priority date, and denied the petition. On appeal counsel states that the evidence enclosed with the notice of appeal is sufficient to show that the income of the petitioner is sufficient to pay the proffered wage.

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:

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. 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 [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is March 12, 2001. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence consisted of a copy of the first page of the petitioner's Form 1065 U.S. partnership return of income for 1999. The petitioner did not initially submit evidence corroborating the beneficiary's work experience. In a request for evidence (RFE) dated May 24, 2002 the director requested evidence on each of those issues.

Counsel responded to the RFE with a letter dated July 17, 2002 accompanied by the following evidence: a copy of an undated letter from a restaurant in Newport Beach, California confirming the beneficiary's experience as a cook with that restaurant from August 1989 until October 1999; a copy of the petitioner's California Form 568 Limited Liability Company Return of Income for 2000; copies of the petitioner's California Form DE6 quarterly wage and withholding reports for the last two quarters of 1999, the first two quarters of 2000, and all four quarters

of 2001; and copies of the petitioner's Form 8027 employer's annual information return of tip income and allocated tips of the petitioner attached to the California Form DE6's for the quarters ending March 31, 2001, December 31, 2000 and December 31 2001. The tax documents all name the employer as Varuj L.L.C.

In a second RFE dated August 5, 2002 the petitioner requested further evidence of the petitioner's ability to pay the proffered wage and evidence to explain the difference between the name of the petitioner as shown on the I-140 petition and the name of the limited liability company which appears on the tax return submitted in the record.

In response to the second RFE counsel submitted a letter dated August 15, 2002 accompanied by the following evidence: a California fictitious business name statement dated August 30, 2001 establishing that the name used by the petitioner in these proceedings is the fictitious business name of Varuj L.L.C.; an additional copy of the petitioner's California Form 568 limited liability company return of income for 2000; additional copies of the petitioner's California Form DE6 quarterly wage and withholding reports for the last three quarters of 2001 with additional copies of the petitioner's Form 8027's attached to the reports for the quarters ending March 31, 2001 and December, 2001; and copies of Form W-2 wage and tax statements for the beneficiary for compensation received from the petitioner and from another employer in 2001.

The director issued a notice of intent to deny (ITD) dated December 18, 2002, informing the petitioner that the director intended to deny the petition for failure of the evidence to establish the petitioner's ability to pay the proffered wage up to the present. Specifically, the director noted the lack of completed federal tax returns.

Counsel responded to the ITD with a letter dated January 17, 2003 accompanied by the following: copies of the petitioner's Form 1065 U.S. returns of partnership income for 2000 and 2001, with attached schedules; and copies of the petitioner's California Form 568 limited liability company returns of income for 2000 and 2001, with attached schedules.

In a decision dated March 26, 2002 the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage for the year 2001, and denied the petition.

On appeal, counsel submits additional evidence consisting of the following: copies of the beneficiary's Form W-2 wage and tax statements for compensation received from a former employer for the year 1999 and compensation received from the petitioner for the years 2000; an additional copy of the beneficiary's W-2 form from the petitioner for 2001; additional copies of the petitioner's California Form DE 6 quarterly wage and withholding reports for all four quarters of 2001; and copies of the petitioner's California Form DE 6 quarter wage and withholding reports for the first two quarters of 2002.

Counsel states on appeal that the evidence submitted on appeal shows the income of the petitioner to be sufficient to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

In the present matter, the record contains copies of the beneficiary's Form W-2 wage and tax statements for compensation received from the petitioner in 2000 and 2001. In the year 2000 the petitioner paid the beneficiary \$12,617.60, which was \$11,406.40 less than the proffered wage of \$24,024.00. The beneficiary's wages in 2000,

however, are not directly relevant in the instant petition, since the year 2000 was before the priority date. In the year 2001, which was the year of the priority date, the petitioner paid the beneficiary \$13,198.10, an amount \$10,825.90 less than the proffered wage. Since the amount was less than the proffered wage, that evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, *supra*, at 1054.

In the case of a partnership the relevant figure for a petitioner's net income is shown on the petitioner's Form 1065, U.S. return of partnership income, line 22, for ordinary income. In the instant petition, the petitioner's Form 1065 tax return for 2001 shows ordinary income as -\$71,850. Since that figure is negative it fails to establish the ability of the petitioner to pay the increase in wages needed to raise the beneficiary's wages to the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a petitioner's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's current assets are shown on Schedule L, lines 1 through 5. Its current liabilities are shown on lines 15 through 17. If a partnership's 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In the instant petition, calculations based on the figures on the Schedule L attached to the petitioner's tax return for 2001 yield the figures for net current assets of -\$1,567,943 for the beginning of 2001 and -\$1,501,945 for the end of 2001. Since both of those figures are negative they fail to establish the ability of the petitioner to pay the \$10,825.90 increase needed to raise the beneficiary's wages to the proffered wage in 2001.

In his decision the director correctly stated the relevant information on the petitioner's tax return for 2001 and on the beneficiary's W-2 form for 2001, and correctly calculated the petitioner's net current assets for the end of the year 2001. The director failed to calculate the petitioner's net current assets for the beginning of the year 2001, but that error did not affect the director's conclusion, since, as shown above, the net current assets for the beginning of 2001 were negative. The director's conclusion that the evidence fails to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence was correct.

On appeal counsel submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2), which is quoted on page two above, and by published decisions of the AAO and its predecessor agencies.

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE's dated July 17, 2002 and August 5, 2002, and in the ITD dated December 18, 2002 that the evidence which had submitted was insufficient concerning the petitioner's ability to pay the proffered wage.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted on that issue for the first time on appeal will not be considered.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director. The evidence pertaining to the years 1999 and 2000 is not directly relevant to the instant petition because those years were before the priority date. The evidence pertaining to the year 2001 consists of additional copies of documents which were previously submitted. That evidence fails to establish the ability of the petitioner to pay the proffered wage as of the March 12, 2001 priority date, as discussed above. The evidence pertaining to the year 2002 consists only of the petitioner's first two California quarterly wage and tax reports for that year. Those reports contain no information which helps to establish the ability of the petitioner to pay the proffered wage as of the priority date. Therefore the evidence submitted on appeal would fail to overcome the decision of the director, even if it were properly before 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.