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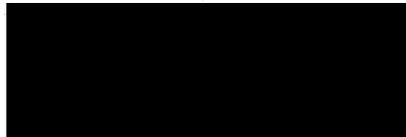
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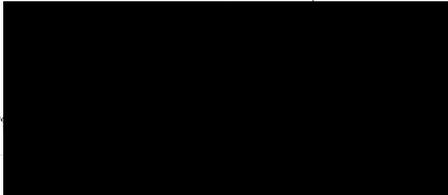
FILE: WAC-03-028-52006 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



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:



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 as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition. On appeal counsel submits evidence relating to the petitioner's ability 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 [Citizenship and Immigration Services (CIS)].

Eligibility in this matter turns 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 5, 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 California Form 568 Limited Liability Company Return of Income for 2000 for Varuj, L.L.C; and a letter dated February 9, 2001 from a restaurant owner in Corona Del Mar, California, a prior employer of the beneficiary, confirming the beneficiary's experience as a cook with that restaurant from May 1995 through the date of the letter.

In a request for evidence (RFE) dated March 31, 2003 the director requested additional evidence of the petitioner's ability to pay the proffered wage. Counsel responded to the RFE with a letter dated April 15, 2003 accompanied by additional evidence consisting of the following: a copy of a California Fictitious Business Name Statement dated August 30, 2001 stating that the name used by the petitioner in these proceedings is the fictitious business name of Varuj L.L.C; copies of the petitioner's quarterly wage and withholding reports for the four

quarters of 2001 and the four quarters of 2002; copies of two Form 8027 Employer's Annual Information Returns of Tip Income and Allocated Tips of the petitioner for 2000, apparently reflecting quarterly figures rather than annual figures; a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2001; and a copy of the petitioner's California Form 568 Limited Liability Company Return of Income for 2001.

In a decision dated May 7, 2003 the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence, and denied the petition.

On appeal counsel submits additional evidence. All of the evidence consists of additional copies of documents previously submitted for the record, except for a copy of the petitioner's quarterly wage and withholding report for the last quarter of 2000, which is submitted for the first time on appeal.

The AAO will first evaluate the decision of the director based on the evidence in the record as of the date of that decision. The evidence submitted for the first time on appeal will then be considered.

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.

The evidence in the record contains quarterly wage and withholding reports which show that the beneficiary was on the payroll of the petitioner as of the first quarter of 2001. The reports show that the petitioner paid the following amounts in compensation to the beneficiary: \$1,520.28 for the first quarter of 2001; \$1,471.74 for the second quarter of 2001; \$1,620.69 for the third quarter of 2001 and \$1,439.19 for the fourth quarter of 2001 zero for the first quarter of 2002; \$1,424.19 for the second quarter of 2002; \$824.57 for the third quarter of 2002; and zero for the fourth quarter of 2002. The totals of the payments for each year are \$6,051.90 for 2001, and \$2,248.76 for 2002.

The amounts paid by the petitioner to the beneficiary in 2001 and 2002 were far below the proffered wage of \$24,024.00. For the year 2001 the amount needed to raise the beneficiary's salary to the proffered wage was \$17,972.10, and for the year 2002 the amount needed to raise the beneficiary's salary to the proffered wage was \$21,775.24. Therefore, the information in the petitioner's quarterly wage and withholding reports fails to establish the ability of the petitioner to pay the proffered wage during 2001 and 2002.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.*, 632 F. Supp. 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 6. 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 increase in wages needed to raise the beneficiary's wages to the proffered wage in 2001.

In his decision, the director failed to analyze the quarterly wage and withholding reports. Nonetheless, this error did not affect the director's conclusion, since, as shown above, the amounts paid by the petitioner to the beneficiary were insufficient to establish the ability of the petitioner to pay the proffered wage. In the decision the director correctly stated the figure for the petitioner's net income for 2001, and correctly calculated the petitioner's net current assets for the end of the year 2001. 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. Most of the evidence submitted on appeal consists of additional copies of documents previously submitted for the record. The only evidence submitted for the first time on appeal is a copy of the petitioner's quarterly wage and tax withholding statement for the last quarter of 2000. That report shows that the petitioner paid the beneficiary a total of \$1,465.29 in compensation that quarter. That amount for is equivalent to an annual rate of \$5,861.16, an amount far below the proffered wage of \$24,024.00 per year. 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.