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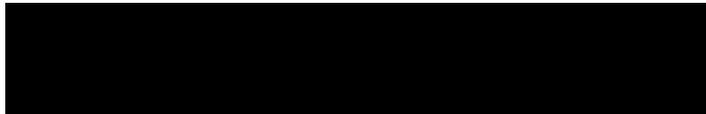


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FILE: WAC 02 148 51326 Office: CALIFORNIA SERVICE CENTER

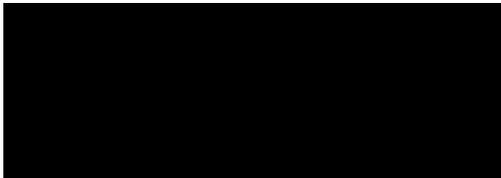
Date: JUL 06 2005

IN RE: Petitioner:
Beneficiary:



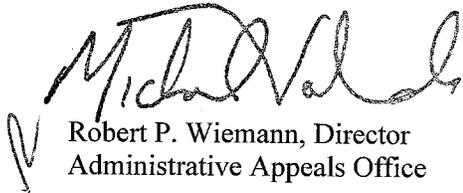
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The motion to reopen or reconsider will be granted. The prior decision of the AAO dated January 14, 2004, will be withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant.¹ It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that petitioner had the ability to pay the beneficiary on the priority date of the visa petition and denied the petition accordingly. The AAO affirmed that decision, dismissing petitioner's appeal of the director's decision. On motion to reopen, petitioner states new facts and provides other documentary evidence.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The motion does qualify as a motion to reopen. There are new facts presented by counsel that related to his initial evidence accompanying the petition, and, to the issue of whether or not, on the priority date of the alien labor application, the petitioner had the ability to pay the beneficiary the proffered wage.

The decision of the director dated July 29, 2002, stated that the petitioner had not submitted evidence to demonstrate it had sufficient income to pay the beneficiary on the priority date of the labor certification.

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.

The regulation 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 the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750

¹ The petitioner is identified as the [REDACTED] Dana Point, CA 92629 in both the certified Alien Labor Certification and in the I-140 petition.

Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 9, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024.00 per year). The Form ETA 750 states that the position requires two years experience.

Along with the petition, incomplete tax returns for 1999, 2000, and 2001 Form 1065 U.S. Partnership Income returns (only first pages were presented) in the name of Salt Creek Ltd.² This evidence was submitted with the petition along with profit/loss statements³ for Salt Creek Ltd for 2000 and 2001. Two of the returns stated taxable income insufficient to pay the proffered wage of \$24,024.00 (\$11.55 per hour). In 1999, taxable income was \$11,552, in 2000 taxable income was <\$18,839.00>⁴ but in 2001 taxable income grew to \$264,610.00. No information was submitted to explain these disparate taxable income figures, or, the ownership relationship between the petitioner and [REDACTED]

On appeal, the petitioner submitted more complete Form 1065 U.S. Partnership returns prepared for [REDACTED] from 1999 through 2001 but without accompanying schedules, and, submitted other documentary evidence.⁵

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of (\$24,024.00 per year per year from the priority date.

- In 2001, the Form 1065 for [REDACTED] stated taxable income of \$264,610.00.
- In 2000, the Form 1065 for [REDACTED] stated taxable income loss of <\$18,839.00>.
- In 1999, the Form 1120 for [REDACTED] stated taxable income of \$11,552.00.

There is a support letter from the petitioner signed by its owner. There is also a reference to an URL⁷ www.saltcreekgrille.com.⁸

Upon appeal, the petitioner particularly pointed out that:

“[The beneficiary] worked continuously during 1996 and he has been a principal key to our success being promoted and having the executive chef position”

[REDACTED] 17050 Bushard Street, Suite 203, Fountain Street, CA 92708, FEIN 33-0692798

²Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in Service deliberations in these matters. The statements presented were not audited.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁵ A return was submitted for another California restaurant in the Salt Creek chain. In 2000, the Form 1065 for [REDACTED] (FEIN #33-0803406) stated taxable income loss of <\$283,602.00>.

⁶FEIN #33-06922798.

⁷ Uniform Resource Locator used to designate Internet web page addresses.

⁸ According to the website there are three restaurant locations, two in California and one in New Jersey.

In support of the motion to reopen, counsel submits the following documents: a letter from the petitioner dated February 11, 2004; a 1999 and 2004 fictitious business name registration; State of California sales and use tax information; a State of California liquor license record; a State of California, County of Orange health care agency invoice; and, California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for 1999 and 2000 that were accepted by the State of California. There was a brief with the documents submission. The documents now submitted were not previously considered by the Service.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* However, under the circumstances (the petitioner was formerly self-represented), the AAO will consider the sufficiency of the evidence submitted on motion.

The two issues present in the case on motion to reopen are the ability of the petitioner to pay the proffered wage, and, the identity of the employer of the beneficiary.

As is shown above, two separate entities identified by separate federal employer identification numbers have employed the beneficiary. [REDACTED] the sponsoring employer in the certified Alien Labor Application and the petition. From the evidence now submitted on motion, it is apparent that [REDACTED] does business under the fictitious name of the [REDACTED]. Therefore, the true party in interest in this matter is [REDACTED]. It has a legal obligation to pay the proffered wage to the beneficiary. Although there exists a separate FEIN number for [REDACTED] there is no evidence in the record that it is a separate entity apart from [REDACTED]. For purposes of this determination, the petitioner is [REDACTED].

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

W-2 Wage and Tax Statements were submitted for the beneficiary. In 1999 he was employed by [REDACTED] (FEIN # [REDACTED] and received \$13,538.48⁹; in 2000 he was employed by the [REDACTED] (FEIN [REDACTED] and received \$39,000.00; in 2001 he was employed both by [REDACTED] (FEIN [REDACTED] and received \$51,654.34 and the Salt Creek Grill (FEIN [REDACTED] and received \$1413.46. Therefore, for the period 2000 through 2001, there is sufficient evidence that the petitioner paid the beneficiary the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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

⁹ There is another W-2 statement in evidence that shows that the beneficiary was also employed by another restaurant not affiliated with petitioner during 1999 and earned an additional \$11,181.60.

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 Service 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, now CIS, should have considered income before expenses were paid rather than net income

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage at any time between the years 1999 through 2000 for which petitioner's tax returns are offered for evidence, but it had ample income to pay the proffered wage in 2001.

Petitioner [REDACTED] doing business as [REDACTED] had paid the beneficiary the proffered wage for the period under examination 2000 through 2001. Therefore, the petitioner had established that it had the ability to pay the beneficiary the proffered wage during that period. The beneficiary's wages are payroll expenses in those returns. There are parallels in the subject case to the precedent case *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). After a period of low profits, the petitioner has experienced an exponential increase in taxable income 23 times its earnings two years previous. Taxable income in 1999 was \$11,552.00, while in 2001 it rose to \$264,610.00. Along with this increase, the beneficiary's wage rose from \$39,000.00 in 2001 to \$53,067.00 in 2002. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, as is the case here. Counsel, by forthrightly submitting complete tax and payroll records, has established a case for application of *Matter of Sonogawa*. The petitioner is a viable business that by paying the beneficiary his present wage has proved its ability to pay the proffered wage.

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 met that burden. The documentation now submitted by petitioner does establish that petitioner had the ability to pay the proffered wage on the priority date.

ORDER: The motion to reopen or reconsider is granted. The prior decision of the AAO dated January 14, 2004, is withdrawn. The appeal is sustained. The appeal is approved.