

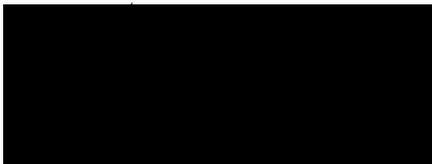
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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



36

FILE: [REDACTED]
SRC 02 208 52321

Office: TEXAS SERVICE CENTER

Date:

MAR 25 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also determined that the record contained indicators of fraud precluding the petition's approval.

On appeal, counsel submits additional evidence and asserts that the director misinterpreted simple errors as improper conduct. Counsel maintains that the petition merits approval based on the documentation submitted.

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 other 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) provides in pertinent part:

(2) *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 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 case rests, in part, upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The regulation at defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the petition's priority date is November 13, 2000. The beneficiary's salary as stated on the labor certification is \$9.50 per hour, which amounts to \$19,760 per year. The work hours and workdays specified on the labor certification are from 4 p.m. to 1 a.m., Wednesday through Sunday.

The petition was filed June 24, 2002. On Part 3 of the petition, a different beneficiary's name appears than the one originally certified on the application for alien employment certification. Counsel's transmittal letter reflects that the petitioner is requesting a substitution of beneficiaries. On Part 5 of the petition, the petitioner claims that it was established in 1999, currently employs two workers, has a gross annual income of more

than \$200,000, and a net annual income of more than \$40,000.

With the petition, the petitioner provided a copy of a letter from a Syrian restaurant called the "Orient Club" affirming that the beneficiary worked there from March 1995 to February 1998. The specific author of the letter is not identified.

In support of its ability to pay the proffered wage of \$19,760 per year, the petitioner initially submitted a partial copy of Form 1065, U.S. Return of Partnership Income for 2001, filed by "Mixta Grill & Pizza, LLC." It shows that the petitioner reported ordinary income of \$39,057. The employer identification number and address match those given by the petitioner on the visa petition. Page 4 of the return specifies figures for "analysis of net income" but lists no assets or liabilities under Schedule L.

On April 28, 2003, the director requested additional evidence from the petitioner to support the petition's eligibility for approval. With reference to its ability to pay the beneficiary's proposed wage offer, the director commented that part 5 of the petition showed that the petitioner reported two employees and the 2001 tax return for Mixta Grill & Pizza reflected only \$13,556 as the total salaries and wages paid. The director requested that the petitioner submit copies of the 2001 Wage and Tax Statements (W-2s) issued to its employees, as well as evidence that the petitioner and Mixta Grill & Pizza, LLC are the same entity. The director also instructed the petitioner to submit a copy of its 2002 tax return, but noted that if the petitioner had filed an extension for its 2002 tax return, it could submit copies of all 1099s and six months of bank statements.

The director also requested that the petitioner submit the correct ETA 750-B for the substituted beneficiary. She further requested information related to the beneficiary's extended stay in the United States without employment and noted that the biographic form (G 325A) contained in the record did not show any current employment, although the Application to Register Permanent Resident or Adjust Status, (I-485) listed the beneficiary's current occupation as a "cook." She also instructed the petitioner to clarify a statement in a letter submitted with the I-485 and explain why it would employ the beneficiary as a full-time, permanent specialty cook after he obtains permanent residency, if employment authorization could begin earlier with the approval of the appropriate application. She finally asked the petitioner to provide information of whether it was aware of the beneficiary's intention to pursue his engineering studies while employed with the petitioner and to explain the shifts and days he would work.

In response to the director's request, the petitioner, through counsel, submitted a copy of the correct ETA 750-B, signed by the beneficiary on June 17, 2002. Counsel's cover letter, dated July 25, 2003, asserts that the original ETA 750-B had been initially provided with the petition. Counsel points out that the ETA 750-B shows that the beneficiary has been unemployed since March 1998. Counsel also states that the beneficiary listed his occupation as a cook on the I-485 not to show actual employment, but to illustrate the occupation that he is qualified for by experience. Counsel explains that the petitioner's offer of full-time, permanent employment stated in the letter submitted with the I-485 was meant to show that the employer still intended to comply with the requirements of the labor certification and that he is ready and able to employ the beneficiary immediately with the appropriate authorization. In response to the director's inquiry about the beneficiary's source of financial support, counsel submitted copies of the beneficiary's application for a student visa and an affidavit of support executed by the beneficiary's brother, "Nidal Assaad."

Counsel also submitted a letter, dated July 25, 2003, from one of the petitioner's owners, Roumah Naisah, confirming awareness of the beneficiary's academic studies and certifying that he will employ the beneficiary as a

specialty cook as soon as employment authorization is received, explaining that the work hours and days specified on the labor certification do not conflict with the beneficiary's schedule and that if such conflict occurs, accommodation would be made.

Relevant to the petitioner's ability to pay the proffered wage of \$19,760 per year, counsel submitted a copy of a Harris County certificate of an assumed name filed by the petitioner's owner on behalf of the petitioner. Counsel also offered a more complete copy of the petitioner's 2001 tax return. This tax return contains copies of Schedule K identifying the petitioner's two general partners. It is noted that page 4 lists no figures under analysis of net income, but Schedule L has been completed showing the petitioner's net current assets. Net current assets represent the difference between a petitioner's current assets and current liabilities. Besides net income, CIS will examine a petitioner's net current assets as a measure of liquidity during a given period and as an alternative method to establish a petitioner's ability to pay the proffered wage. Schedule L of the petitioner's 2001 tax return shows that it had \$18,950 in current assets and \$2,741 in current liabilities, resulting in net current assets of \$16,209. The July 2003 letter from one of the petitioner's partners further affirms that the petitioner had two part-time employees in 2001 and paid them as contract labor, therefore no W-2s are available.

Counsel also provided a copy of a July 2003, Internal Revenue Service (IRS) application for an extension of time to file the petitioner's 2002 tax return, as well as copies of six W-2s issued to its employees. The beneficiary's name was not included among these documents. Copies of the petitioner's bank statements from November 2002 to June 30, 2003 were also provided.

The director denied the petition on August 9, 2003. She states that the petition is not being denied with a finding of fraud, but she draws negative inferences from some of the evidence. For example, the director initially notes that an incorrect birth year of 1968 rather than 1978 was listed on the visa petition and on the ETA 750 B. She asserts that these differing dates may have been used to avoid questions regarding the beneficiary's past work experience in that his employment would have begun at the age of sixteen.

Counsel asserts on appeal that these were typographical errors and that the correct birth date was available from other information in the record such as the employment letter from the Orient Club originally submitted with the petition. The AAO finds that the current record provides no basis to dispute counsel's assertion on appeal. Without further investigation from the director or other appropriate personnel, the director's speculation that such an error was intended to deceive is without basis and premature.

The director also makes several observations relevant to the spellings of the beneficiary's last name compared to the spelling of Nidal Assaad's last name and an additional alien who was the beneficiary of a separate I-140 filed by the petitioner. She questions the extent of Mr. Assaad's financial obligations and whether this other alien is another brother using a different spelling for his last name.

Counsel insists on appeal that nothing improper can be deduced from different spellings of the beneficiary's family members' names because English translations of alien names performed by various passport officials abroad and can lead to different results. Counsel also asserts that the beneficiary has received financial support from an uncle and submits a copy of an earlier I-20, a copy of a 1997 letter from Bassam Jayyosi, who counsel identifies as the beneficiary's uncle, a copy of a bank letter verifying Mr. Jayyosi's financial status, and copies of the beneficiary's bank statements showing receipt of overseas funds. Except to the extent that the petitioner may

have filed other petitions or the possibility of a wider relationship between the petitioner and the beneficiary,¹ the AAO does not find the director's observations as to the spellings of the beneficiary's brothers' last names and the financial obligations of Nidal Assaad directly relevant to the adjudication of the I-140. Such considerations are more related to the I-485 or the beneficiary's financial support pertinent to his status as a student.

Similarly, the AAO finds that the director's suggestion that the beneficiary's characterization of his occupation as a cook on the I-485 and his employment history as stated on G-325A to be inherently contradictory is not necessarily supported by the record. Without more, it cannot be concluded that the beneficiary's employment history has been inconsistently presented.

In her denial, the director also criticizes the procedure followed by the petitioner in submitting the documentation in order substitute a beneficiary and questions how the petitioner has managed without the needed services of a cook, yet delayed filing a petition. Counsel doesn't directly address this point but explains on appeal that no I-140 was ever filed for the original beneficiary and that the ETA 750B for the new beneficiary was filed with the petition.

Counsel also provides an additional letter, dated October 6, 2003, on appeal, from [REDACTED] Regarding that need for services of a cook(s) [REDACTED] states that with only the help of part-time employees, he cannot continue to perform as a cook and that the business needs the services of full-time cooks in order to grow. Mr. [REDACTED] again responds to the director's concern that the work hours and shifts would be substantially altered as required by the beneficiary's schedule. He states that if the beneficiary had a test or exam, he would work with him but did not anticipate a conflict at anytime because the beneficiary's classes ended well before 4 p.m. The AAO finds that the current record does not support an inference of fraudulent intent with regard to these issues and does not support a conclusion that the work hours and days were somehow misrepresented on the labor certification.

[REDACTED]'s letter submitted on appeal does present different facts pertinent to the number of the petitioner's employees in 2001. He states that he was mistaken in stating that the restaurant had only two contract employees in 2001. He adds that the earlier statement was made because he couldn't remember ever having more than two employees at one time and that his accountant was not available at the time the response to the director's request for evidence was submitted. In fact [REDACTED] states that the petitioner employed seven employees throughout 2001 but that four of them made \$644.49 or less for the year and one only worked one day. Copies of these workers' W-2s are submitted on appeal. The W-2s reveal that the minimal wages earned by these employees appear to confirm Mr. Naisah's statements about the extent of their employment.

Pertinent to the petitioner's ability to pay the proffered wage of \$19,760, the director concluded that it cannot be established "without more information on the other worker's salary and verification of your Net Annual Income." The AAO concurs with this conclusion and remands this petition to the director to complete her inquiry through further investigation in order to determine whether the petitioner established the ability to pay multiple alien beneficiaries. Please note that CIS electronic records show a total of three petitions. Besides the instant case, two petitions were filed in April and June 2002 and subsequently approved in September

¹A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000); *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986) [relied upon a Department of Labor advisory opinion in invalidating the labor certification].