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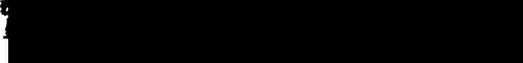
**U.S. Citizenship
and Immigration
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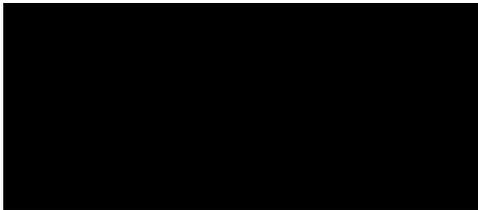
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FILE: WAC 02 201 50414 Office: CALIFORNIA SERVICE CENTER Date: MAR 28 2005

IN RE: Petitioner: 
Beneficiary: 

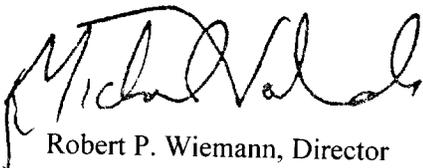
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a dry cleaner. It seeks to employ the beneficiary permanently in the United States as a dry cleaning supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief.

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 granting 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 at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 15, 1999. The proffered wage as stated on the Form ETA 750 is \$22,000 per year.

On the petition, the petitioner stated that it was established during 1990 and that it employs seven workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in San Mateo, California.

In support of the petition, counsel submitted the 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. Those returns, and the attachment to each return of a Schedule C, Profit and Loss from Business, indicate that, during each of those years, the petitioner's owner operated the petitioner as a sole proprietorship.

Because the priority date is March 15, 1999, evidence of the petitioner's financial condition prior to 1999 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The 1998 return and Schedule C shall not be further addressed.

The 1999 Schedule C shows that during that year the petitioner declared a profit of \$7,851. The 1999 tax return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$80,654, including the petitioner's profit, and that they had two dependents.

The 2000 Schedule C shows that during that year the petitioner declared profit of \$53,011. The 2000 tax return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$46,532, including the petitioner's profit, and that they had no dependents.

The 2001 Schedule C shows that during that year the petitioner declared profit of \$61,095. The 2001 tax return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$43,332, including the petitioner's profit, and that they had one dependent.

On September 26, 2002, the California Service Center issued a Request for Evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted copies of the tax returns previously submitted.

On April 30, 2003, the California Service Center issued another Request for Evidence in this matter. The only evidence requested pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, however, was a signed 2002 Federal tax return.

In response, counsel submitted the 2002 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, indicating that they had one dependent during that year. The corresponding Schedule C was not submitted with that return. The return further indicates that the petitioner's owner and owner's spouse declared adjusted gross income of \$12,576, including the petitioner's profit offset by deductions.

With that response, counsel provided a letter, dated June 19, 2003. In that letter counsel stated that the petitioner earned a net income of \$51,266 during 2002. The portion of the 2002 tax return submitted with the response to the Request for Evidence does not confirm that assertion.

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 July 23, 2003, denied the petition.

That decision was issued with the wrong cover letter. The cover letter purports to accompany another Request for Evidence. The body of the decision, however, makes clear that it is a decision of denial.

On appeal, counsel asserts that whether or not the petition has been denied is unclear because of the incorrect cover letter. The body of the decision was identified with the correct file number, contained case specific information pertinent to the tax returns and other evidence submitted, and clearly stated that the petition was denied. This office find that the decision issued made clear that the instant petition was denied. Counsel

argues that the decision of denial is based on an incorrect reading of the petitioner's tax returns. Counsel cites *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) for the proposition that if a petitioning employer's net income exceeds the amount of the proffered wage, then the employer has shown the ability to pay that proffered wage.

With the appeal, counsel provides a copy of the 2002 Schedule C, which was not previously provided. That Schedule C shows that during 2002 the petitioner earned a profit of \$51,266, as asserted by counsel.

The petitioner, however, is a sole proprietorship. *Elatos Restaurant Corp., Supra*, does not address ownership as a sole proprietorship and is not on point. Because the petitioner's sole proprietor/owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the existing expenses of his business and the proffered wage out of his adjusted gross income and assets, and supported himself and his family on the amount remaining.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The proffered wage is \$22,000 per year. The priority date is March 15, 1999.

During 1999 the petitioner's owner declared adjusted gross income of \$80,654. If obliged to pay the proffered wage out of that amount, the petitioner's owner would have been left with \$58,654 upon which to support his family of four. That amount appears sufficient to support a family of four.

During 2000 the petitioner's owner declared adjusted gross income of \$46,532. If obliged to pay the proffered wage out of that amount, the petitioner's owner would have been left with \$24,532 upon which to support his family of two. That amount appears sufficient to support a family of two.¹

During 2001 the petitioner's owner declared adjusted gross income of \$43,332. If obliged to pay the proffered wage out of that amount, the petitioner's owner would have been left with \$21,332 upon which to support his family of two. That amount appears sufficient to support a family of three.²

¹ This office notes that the Service Center was entitled, if it deemed this additional evidence necessary, to request evidence pertinent to the petitioner's owner's family's recurring monthly expenses, so as to determine with more certainty the amount the petitioner's owner requires each month to support his family. In the absence of any such request or any such evidence in the record, this office is unwilling to find that the petitioner's owner could not have supported his family of two on \$24,532 during 2000.

During 2002 the petitioner's owner declared adjusted gross income of \$12,576. That amount is insufficient to pay the proffered wage. If obliged to pay the proffered wage out of that amount, the petitioner's owner would have been unable. The petitioner has not demonstrated that it had any other funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002, and has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

² The petitioner's owner's income was less during 2001 than during 2000, and his household had one additional member. That the petitioner's owner could actually have supported his family of three on \$21,332 during 2001 is not clear, and is certainly less likely that that he could have supported his family of two on \$24,532 during 2000. However, in the absence of a request for evidence pertinent to the petitioner's owner's household expenses, and in the absence of such evidence, this office is inclined to accord the petitioner the benefit of the doubt.