

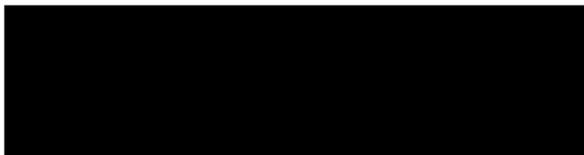
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Office: VERMONT SERVICE CENTER

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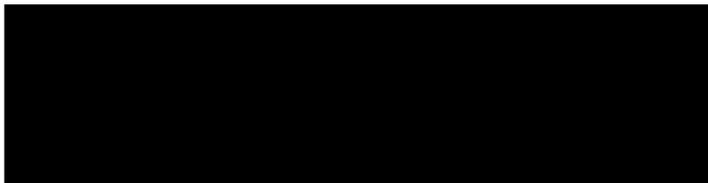
Petitioner:

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:

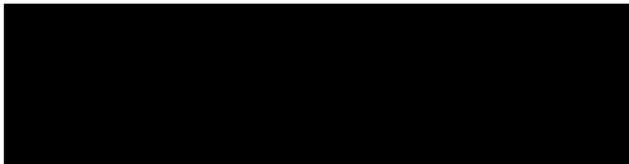


INSTRUCTIONS:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

CC:



DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 14, 2002. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which amounts to \$24,689.60 annually. On the Form ETA 750B, signed by the beneficiary on November 28, 2001, the beneficiary claimed to have worked for the petitioner beginning in December 2001.¹ The ETA 750 was certified by the Department of Labor on February 13, 2004.

¹ December 2001 is after the date the beneficiary signed the ETA 750B. According to the Schedule C from the Form 1040 U.S. Individual Income Tax Returns for 2001, 2002, and 2003, [REDACTED] has a business named Tony's Pizza. He is also part of a partnership named [REDACTED] Ristorante, presumably the petitioner. On the Form ETA 750B, the beneficiary claimed to have worked for Tony's Pizza from September 2001 to November 2001, and Tony's Pizza has a different address than the petitioner, [REDACTED] Ristorante Italiano. Thus, it appears that Tony's Pizza is a restaurant owned by [REDACTED] and operated as a sole proprietorship and located at a different location from the petitioner, [REDACTED] s Ristorante Italiano, and is therefore a different entity.

The I-140 petition was submitted on September 13, 2004. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$60,113.00,² and to have a net annual income of \$42,782.00 for 2001. With the petition, the petitioner submitted supporting evidence.

In a decision dated November 19, 2004, 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 denied the petition.

On appeal, counsel submits additional evidence.³ Counsel states that the petitioner has sufficient cash assets and the petitioner is not a corporation. Counsel submits a copy of the petitioner's bank statement in the name of the petitioner's owner for November 20, 2001 through December 17, 2001 and a letter from SunTrust Bank stating the bank balance as of December 13, 2004 for the petitioner's owner.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 instant case, on the Form ETA 750B, signed by the beneficiary on November 28, 2001, the beneficiary claimed to have worked for the petitioner, [REDACTED] Ristorante Italiano, beginning in December 2001. However, the record does not contain any Form W-2, Form 1099, or other evidence of compensation from the petitioner.

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 for a given year, 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*

² According to [REDACTED]'s Form 1040 U.S. Individual Income Tax Return for 2001, \$60,113.00 is the income for Tony's Pizza.

³ The record includes two copies of the Form G-28 Notice of Entry of Appearance as Attorney or Representative, dated September 9, 2004, with Paul A. Murphy listed as the beneficiary's counsel and one copy of the Form G-28, dated August 24, 2004, with Mr. Murphy listed as the petitioner's counsel. The record also contains a copy of the Form G-28, dated April 12, 2005, with Joe W. Nesari listed as the beneficiary's counsel. Even though Mr. Nesari appears to be the current counsel on this case, the AAO will treat Mr. Murphy as the counsel of record because the Form G-28 with Mr. Nesari listed as counsel is unsigned and Mr. Murphy is listed as the person filing the appeal on the Form I-290B.

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 the Immigration and Naturalization Service, now 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 the Service 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.

The evidence indicates that the petitioner is a partnership. A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment. The record of proceeding indicates that the petitioner is a partnership in which [REDACTED] has some interest. However, the record of proceeding does not contain any of the required evidence such as the petitioner's tax returns (Form 1065 U.S. Return of Partnership Income), annual reports, or audited statements. Without such documents, the AAO cannot determine whether or not [REDACTED] is a limited partner or a general partner. If he is a limited partner, his Form 1040 U.S. Individual Income Tax Returns and bank account funds would not be usable to demonstrate the petitioner's ability to pay the proffered wage. If he is a general partner, then, like a sole proprietor, his personal funds may be utilized to show the petitioner's ability to pay the proffered wage. In any event, the regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to submit documentation.

Counsel states that [REDACTED] has sufficient cash assets. See [December 13, 2004] SunTrust letter and [b]ank [b]alance of [p]ersonal account of \$32,178.80 for [REDACTED] has [at] SunTrust [Bank] \$107,929.74 cash [b]alance as of [December] 13, 2004." Counsel, in essence, is asserting that the petitioner has sufficient cash assets based on one of its owner's bank account information. Evidence in support of this assertion includes a copy of the [REDACTED]'s bank statement for November 20, 2001 through December 17, 2001 and a letter from SunTrust Bank stating the bank balance as of December 13, 2004 for [REDACTED]. As stated above, due to a lack of documents in the record, the AAO is unable to determine whether [REDACTED] is a general partner and whether [REDACTED]'s personal funds may be utilized to show the petitioner's ability to pay the proffered wage.

Counsel also states that the petitioner is not a corporation. The AAO does not treat the petitioner as a corporation; it treats the petitioner as a partnership. The director also did not treat the petitioner as a corporation. However, the director did treat the petitioner as a sole proprietorship instead of a partnership in her decision. The director, by not treating the petitioner as a partnership, did not give the petitioner the opportunity to submit the required documents, such as the petitioner's Form 1065 U.S. Returns of Partnership Income, showing that it is a partnership with the ability to pay the proffered wage.

In view of the foregoing, the previous decision of the director will be withdrawn and the petition is remanded to the director for consideration of whether the petitioner, as a partnership, had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director may request additional evidence. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.