U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 012 51063 Office: CALIFORNIA SERVICE CENTER Date: SEP 24 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The matter will be remanded for further consideration and action.

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 accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

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 unavailable in the United States.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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). The petitioner must also show the continuing ability to pay the proffered wage beginning on the priority date.

The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on February 15, 2001. The labor certification states that the position requires two years experience. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which equals $24,024 annually.

With the petition counsel submitted a copy of a letter, dated February 12, 2001, from The Cheesecake Factory in Newport Beach, California. That letter states that the beneficiary worked at that restaurant as a cook from August 1997 through December 1999.

On February 12, 2003, the California Service Center issued a Request for Evidence in this matter. Among other things, the Service Center requested that the petitioner provide additional evidence of the petitioner's employment history. Consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The Service Center emphasized that the beneficiary's employment verification must state the number of hours she worked per week and the duties of her position. The Service Center requested that the petitioner, as additional evidence of the beneficiary's employment claim, provide copies of the beneficiary's W-2 forms or pay stubs.

The Service Center also requested that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence be in the form of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a copy of the employment verification letter previously submitted. Pertinent to the petitioner's ability to pay the proffered wage, the petitioner also provided (1) the 2000 and 2001 annual reports, including audited financial statements, of Brinker International of Dallas, Texas, (2) two news releases of Brinker International (3) Brinker International's Form 10-K for the fiscal year ended June 26, 2002, (4) Brinker International's Form 10-Q for the quarter ended December 25, 2002, and (5) copies of check stubs issued to the beneficiary by Brinker International,

The petitioner submitted IRS printouts of the joint 2001 Form 1040 U.S. Personal Income Tax Return of Vale and [redacted] The petitioner submitted a notice of the annual meeting of Brinker International. The relevance of those documents to the petitioner's ability to pay the proffered wage is unknown to this office.

The check stubs submitted were issued on various dates from January 10, 2001 to March 19, 2003. The latest pay stubs from each of those calendar years were November 14, 2001, December 24, 2002, and March 19, 2003. Those pay stubs show year to date payments of $14,692.31 and $18,997.10, and $4,200.50, respectively.

On June 16, 2003, the director denied the petition, finding that the evidence submitted did not sufficiently demonstrate that the beneficiary has the requisite two years of salient work experience. The decision did not mention the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits a second employment verification letter from the same restaurant. In addition to the information previously provided, that letter states that the beneficiary worked 40 hours per week and that her duties were to prepare meat, chicken, ribs, pasta, sandwiches and salads. In a letter dated June 27, 2003, counsel stated that the beneficiary was paid in cash and did not receive W-2 forms or pay stubs.

The evidence submitted demonstrates credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position and has overcome the original basis for denial of the petition.

Beyond the decision of the director, however, this office notes that the petitioner has not sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petitioner, Romano's Macaroni Grill/Brinker International of Costa Mesa, California, is likely a franchise or owned pursuant to some similar agreement. The petitioner submitted no evidence pertinent to its own financial condition, but submitted volumes of information on the financial condition of Brinker International of Dallas, Texas. The petitioner, the individual restaurant that will employ the petitioner, submitted no evidence that the income and assets of the parent corporation, Brinker International of Dallas, Texas, are available to pay the petitioner's debts and obligations. Without any such evidence, this office cannot consider the income and assets of Brinker International of Dallas, Texas in assessing the ability of the petitioner to pay the proffered wage.

The petitioner has failed to demonstrate its ability to pay the proffered wage. The annual reports and financial statements that the petitioner submitted might seem, absent analysis, to be responsive to the Service Center's request of February 12, 2003. Further, the Service Center never informed the petitioner that the evidence it provided was insufficient to demonstrate its ability to pay the proffered wage.

The petitioner shall be given a chance to provide additional evidence. The petitioner may demonstrate that its form of ownership renders the funds of Brinker International, of Dallas Texas available to it, as a matter of right, to pay its own debts and obligations. In the alternative, the petitioner may show that its own funds are sufficient to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

Again, consistent with 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate, with annual reports, federal tax returns, or audited financial statements, the ability to pay the proffered wage.

ORDER: The decision of the director is withdrawn. The matter is remanded for further action and consideration.