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**U.S. Department of Justice**

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

File: EAC 01.233 58400 Office: VERMONT SERVICE CENTER Date: FEB 25 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian food specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (Form ETA 750A). The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits letters and further copies of tax returns of the petitioner and other businesses. These proceedings put in issue whether the petitioner had the ability to pay the beneficiary the proffered wage.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the proffered wage as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 13, 1998. The beneficiary's salary as stated on the labor certification is $18.89 per hour or $39,291.20 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On September 12, 2001, the director requested additional evidence to establish that the petitioner either had the ability to pay the proffered wage as of the priority date and continuing to the present or had paid it to the beneficiary or others. Counsel submitted the U.S Income

Tax Return for an S Corporation (Form 1120S) for 1998, 1999, and 2000 for the petitioner, as well as another business, 297 Church Gourmet Inc. (297).

The director considered the federal tax returns of the petitioner only and concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition.

On appeal, counsel again presents the 1998 federal tax returns of the petitioner and 297 and a co-owner's letter of November 29, 2001 on the petitioner's letterhead (the Corrales letter). An anonymous note dated March 12, 2002 makes several factual claims, but has no signature, return address, or attribution.

The Corrales letter states:

> Please be advised that Venice Bar and Grill d/b/a/ Barrocco [sic] Foods, located at 301 Church Street, New York, N.Y. was the original filer of the ETA 750 A. Subsequently, two new corporations were formed, … incorporated on May 19, 1998 … [and] May 21, 1998. The original location of the business was moved to an address adjacent to the original address, and both corporations acquired all the assets of Venice bar, operate the same business and are linked to each other….
>
> The combined gross sales for six and a half months for the two corporations for 1998, was of $162,075
> Net Annual Income $(33,432)….
>
> [The beneficiary's] is not a newly created position, moreover our business plan is to have [the beneficiary] replace two part-time employees and replace me in the duties as cook, for which I was compensated as an officer. [The beneficiary's] culinary expertise in the kitchen would permit me to devote full time in administrative duties. The business can easily afford a salary for a full-time cook in the $40,000 range.

The priority date of the petition is January 13, 1998. The petitioner concedes, evidently, that it did not then have the net income to pay the proffered wage. The director may not properly consider assets and gross income without reference to the liabilities and expenses incurred to generate them. The courts have endorsed net income and rejected the argument that the Service should consider income before expenses are paid. K.C.P.

Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985). *See also* Chi-Feng Chang v. Thornburgh, 719 F.Supp.532 (N.D.Tex 1989).

The petitioner, finally, claims that it plans to replace two part-time employees and Corrales with the beneficiary. It documents no such action at the priority date of the petition or continuing to the present. It states no wages paid to the part-time employees and apportions no value to Corrales' services as a cook. Funds already expended on wages for others are not readily available to apply to the proffered wage of the beneficiary.

In any case, the assets of the combined corporations did not exist until months after the priority date. Contentions concerning personnel and combined assets do not help the petitioner establish the ability to pay the proffered wage at the priority date of the petition. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I & N Dec. 45, 49 (Comm. 1971).

In passing, the petition and the Form ETA 750A do not support the assumption in the Corrales letter that the Venice Bar and Grill d/b/a Barrocco Foods at 301 Church Street in New York City commenced the instant petition. The Form ETA 750A pertains to Barocco Foods, Inc. d/b/a Barocco Food to Go at 297 Church Street.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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 appeal is dismissed.