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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO 30 Mass., Rm., 3042
425 I St., N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 133 51180 Office: California Service Center Date: APR 21 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 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The employer named on that Form ETA 740 is the Brio Bistro Tuscany Grill o[redacted]

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. 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 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.

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

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's continuing ability to pay the wage offered beginning on the priority date, 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 January 13, 1999. The proffered salary as stated on the labor certification is $11.55 per hour, which equals $24,024 annually.

A letter from counsel to the Employment Development Department dated April 15, 2000, was submitted with the petition. In that letter, counsel requested amendment of the labor certification to reflect that the restaurant had been purchased by [redacted] and renamed Brio Tuscany Grill. [redacted] also signed that letter.

The employer named on the petition is Gruppo La Forza, Inc. dba Brio Bistro Bar/Cafe Rizzi of [redacted] With the initial petition, counsel submitted a copy of the Form 1120 U.S. Corporate Income Tax Return of Cafe Rizzi, Inc. for the 1999 calendar year. The return states that the corporation's taxable income before net operating loss deduction and special deductions was $18,225 during that year. The return was not accompanied by the associated schedules and tables and was unsigned.

The Form ETA 750, Part B states that the beneficiary worked full-time as a cook at Savorie, a restaurant in Ontario, Canada, from May 1988 through August 1991. Counsel submitted a copy of a July 10, 1999 letter from Savorie stating that the beneficiary worked there as a cook during that period. That letter does not identify the writer by name or title and the signature is illegible.

The California Service Center, on April 29, 2002, requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. The Service Center requested evidence for 1999, 2000, and 2001, and specified that the evidence must consist of the petitioner's annual reports, signed federal tax returns, or audited financial statements. The Service Center also requested copies of Gruppo La Forza, Inc.'s Form DE-6 quarterly wage reports for the previous four quarters.

The Service Center also requested additional evidence of the beneficiary's qualifying experience. The Service Center requested that, "Evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week." (Emphasis in the original.)

In response, counsel provided an additional copy of the July 10, 1999 letter previously submitted and described above. That letter does not state the name or title of the writer or the number of hours the beneficiary worked per week.

Counsel also submitted Form DE-6 wage reports for third and fourth quarters of 2000, the second, third and fourth quarters of 2001, and the first quarter of 2002. The employer identified on those reports is Gruppo La Forza, Inc., of 24050 Camino Del Avion, Suite B, Dana Point, California.

Although the DE-6 covering the first quarter of 2001 is missing, counsel did provide DE-6 forms for the most recent four quarters as requested. Those DE-6 reports indicate that the petitioner did not employ the beneficiary during any of the quarters for which reports were provided.

Counsel also provided signed copies of the Form 1120 U.S. corporate income tax returns of Gruppo La

Forza, Inc. for the 1999, 2000, and 2001 calendar years. The 1999 tax return shows that Gruppo La Forza declared a taxable income before net operating loss deduction and special deductions of $17,523 during that year. The accompanying Schedule L shows that the petitioner had neither current assets nor current liabilities at the end of that calendar year. As such, the petitioner had no net current assets at the end of that year.

That 1999 tax return of Gruppo La Forza, Inc. is entirely different from the unsigned 1999 return of Cafe Rizzi, Inc., which counsel submitted with the petition. Counsel did not then state the relationship of Cafe Rizzi, Inc., to the petitioner, Gruppo la Forza, Inc., dba Brio Bistro Bar/Cafe Rizzi. Counsel appears to be implicitly asserting that Cafe Rizzi, Inc., previously owned the subject bar and café and sold it to Gruppo La Forza, Inc., who is the current owner, sometime during 1999 after the priority date. Absent that assumption, the relevance of Café Rizzi, Incorporated's 1999 tax return and the 1999, 2000, and 2001 returns of Gruppo La Forza would be unclear. Ramifications of that apparent change in ownership are addressed below.

Counsel has neither stated explicitly nor provided evidence to demonstrate, however, which entity originally owned the petitioner, which entity now owns it, or the date, if any, upon which ownership transferred. This omission complicates this office's determination of whether the petitioner has demonstrated the ability to pay the proffered wage.

[redacted] tax return shows that it declared taxable income before net operating loss deduction and special deductions of $0 during that year. The accompanying Schedule L shows that the petitioner had current assets of $64,280 at the end of that year and current liabilities of $0 at the end of that year, which yields net current assets of $64,280.

[redacted] 2001 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $1,439 for that year. The accompanying Schedule L shows that the petitioner had current assets of $62,883 and current liabilities of $29,014, yielding net current assets of $33,869.

On July 9, 2002, the Director, California Service Center, denied the petition, finding that the petitioner's net income during 1999, 2000, and 2001 was insufficient to pay the proffered wage during each of those years. The director also noted that, contrary to the Service Center's request, the employment verification letter submitted does not contain the name and title of the person verifying the beneficiary's employment.

On appeal, counsel submits a brief. Although counsel's assertions are not phrased clearly, counsel appears to argue that the beneficiary, if hired by the petitioner, would replace another employee, and that the wages of that other employee would then be available to pay the proffered wage. Counsel does not demonstrate the amount of the wages paid that anonymous employee or that they are sufficient to pay the proffered wage.

Counsel also submits evidence that the petitioner possesses a $100,000 line of credit with a California bank and states that funds from that line of credit could be used to pay the proffered wage.

Finally, counsel asserts that the petitioner generates gross receipts of almost $1 million annually, and that the income shown on the petitioner's tax returns, reduced by various tax avoidance strategies, are a poor

indicator of the petitioner's actual financial position and ability to pay the proffered wage.

Counsel's implicit assertion that the petitioner would replace an employee whose wages would be sufficient to pay the proffered wage is absolutely unsupported. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's assertion that the petitioner could use its credit to pay the proffered wage similarly falls short. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Finally, counsel asserts that the petitioner's tax returns do not show the true financial condition of the corporation. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to.

The director's decision stated that the petitioner's tax returns do not evince the ability to pay the proffered wage out of income during 1999, 2000, or 2001. As to 2000 and 2001, that is not necessarily correct. If [redacted] owned the petitioner during 2000 and 2001, then the petitioner could have paid the proffered wage out of its net current assets.

Counsel submitted 1999 tax information pertinent to two entities. Counsel has not stated, and has certainly not demonstrated, which of those two entities owned the petitioner during on the priority date and when, or whether, the business changed hands. Whichever entity owned the petitioner, however, the result is the same.

The 1999 tax return of Cafe Rizzi, Inc. declared taxable income before net operating loss deduction and special deductions of $18,225. That amount is insufficient to pay the proffered wage. As no Schedule L accompanied that return, this office is unable to compute the petitioner's year-end net current assets. Therefore, no net current assets will be included in the determination of Cafe Rizzi's ability to pay the proffered wage. The evidence does not demonstrate that Cafe Rizzi was able to pay the proffered wage during 1999.

The 1999 tax return of Gruppo La Forza, Inc. shows that it declared a taxable income before net operating loss deduction and special deductions of $17,523. That amount is insufficient to pay the proffered wage. [redacted] ended the year with no net current assets. The evidence does not demonstrate tha[redacted] was able to pay the proffered wage during 1999.

Counsel has not demonstrated which entity owned the bar and café that is the subject business during 1999. If ownership was transferred during 1999 from one entity to another, counsel has not demonstrated the date upon which it was transferred. No remand is necessary to unravel that mystery, however, as counsel has not

demonstrated that either entity had the ability to pay the proffered wage during 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered salary beginning on the priority date.

Beyond the issue of the petitioner's ability to pay the proffered wage, we note that the person who verified the petitioner's qualifying work experience in the letter of July 10, 1999 is unidentified. That the writer apparently preferred to remain anonymous adversely affects the credibility of the information he or she provided. Further, the writer did not state whether the beneficiary worked full-time at that position. Despite a direct request from the Service Center, the petitioner and counsel failed to submit more credible evidence.

Beyond the decision of the director, this office notes that the petitioner appears to imply that Café Rizzi, Incorporated owned the Brio Bistro Bar/Café Rizzi on the priority date. If this is so, then the petitioner, Gruppo la Forza, Incorporated dba Brio Bistro Bar/Café Rizzi, is obliged to demonstrate that it is Café Rizzi, Incorporated's successor-at-interest in the sense contemplated in *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. With no such proof, the petitioner has not demonstrated that it is entitled to use the approved labor certification in this case. The petitioner has not demonstrated, therefore, that it has an approved labor certification. The petition should have been denied for this additional reason.

Further still, the petitioner has never submitted the original Form ETA 750. That form should have accompanied the petition, but did not. Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(B), the petition should have been denied for this additional reason.

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.