U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-251-50646 Office: CALIFORNIA SERVICE CENTER Date: APR 28 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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:

> *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 [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered 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. The petition's priority date in this instance is March 31, 2000. The beneficiary's salary as stated on the labor certification is $11.99 per hour or $24,939.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. All of the evidence on that issue pertained to a restaurant with a name similar to, but not identical to, that of the restaurant which is the petitioner. That second restaurant is hereinafter referred to as restaurant #2. The evidence initially submitted on the issue of the petitioner's ability to pay the proffered wage consisted of the following: a Form 1065 U.S. return of partnership income for restaurant #2 for the year 2001; a California Form 565 partnership return of income for restaurant #2 for 2001; an unaudited financial statement for restaurant #2 for the year 2001; a general ledger for restaurant #2 for the year 2001; and a Form 1099-MISC for the owner of the petitioner showing income received from restaurant #2 in the year 2001. Counsel did not submit any documentary evidence to corroborate the beneficiary's experience with the initial submission.

In a request for evidence (RFE) dated October 20, 2002, the director requested additional evidence on the beneficiary's experience and on the petitioner's ability to pay the proffered wage. The RFE also requested an explanation of the relationship between the petitioner and restaurant #2, and, if restaurant #2 was claimed to be a successor in interest to the petitioner, evidence to establish that fact.

The petitioner responded to the RFE with a letter dated January 10, 2003 from the petitioner's owners, accompanied by copies of the following documents: a letter dated November 25, 2002 from a Chinese restaurant in Vietnam confirming the beneficiary's experience with that restaurant from 1997 to the present; Form W-3 transmittal of wage and tax statements for the petitioner for 2000 and 2001; Form W-2 statements showing wage

payments by the petitioner for 2000 and 2001; quarterly wage reports for the petitioner for the years 2000 and 2001; quarterly payroll tax deposits the petitioner for the years 2000 and 2001; quarterly Form SC5 state, local and district sales and use tax returns for restaurant #2 for the year 2001; quarterly wage reports for restaurant #2 for the second, third and fourth quarters of 2001; a Form 1065 U.S. return of partnership income for restaurant #2 for 2000; a California Form 565 U.S. return of partnership income for restaurant #2 for 2000; an unaudited financial statement for restaurant #2 for the year 2000; a general ledger for restaurant #2 for the year 2000; a Form 1040 U.S. individual income tax joint return for the petitioner's owners for 2001; a California Form 540 individual income tax joint return for the petitioner's owners for 2001; an unaudited financial statement for the petitioner for the year 2001; and a general ledger for the petitioner for the year 2001. With the letter dated January 10, 2003 were also additional copies of documents previously submitted pertaining to restaurant #2, namely Form 1065 for 2001, California Form 565 for 2001, an unaudited financial statement for 2001, and general ledger for 2001, plus an additional copy of Form 1099-MISC for the petitioner's owner showing income received from restaurant #2 in 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits no brief, but submits additional evidence. Most of the evidence submitted on appeal consists of additional copies of documents previously submitted for the record. The evidence submitted for the first time on appeal consists of copies of the following: Form 1040 U.S. individual tax joint return for the petitioner's owners for the year 2000; and California Form 540 individual tax joint return for the petitioner's owners for the year 2000.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The AAO will then consider the evidence newly submitted on appeal.

Among the documents submitted in response to the RFE is a letter dated January 10, 2003 from the petitioner's owners. In that letter the owners state that they are husband and wife and that they are the owners of three restaurants, the petitioner, restaurant #2, and a third restaurant (hereinafter restaurant #3). Restaurant #3 has the same name as restaurant #2, but has a different address.

The Form 1040 tax return for the owners for the year 2001 states that the petitioner is a sole proprietorship, and also states that restaurant #2 and restaurant #3 are partnerships. That tax return also states that the husband and the wife are each 50% owners of restaurant #2 and of restaurant #3.

No tax returns or other financial documents are found in the record for restaurant #3. The employer identification number for restaurant #3 as shown on the owners' form 1040 for 2001 is the same as the employer identification number shown on that same form for restaurant #2.

The Form 1040 for the owners for the year 2001 shows adjusted gross income as $35,510. That amount is only $10,570.80 higher than the proffered wage of $24,939.20. No statement of monthly expenses was submitted by the petitioner. The director found that the owner's adjusted gross income was insufficient to pay the proffered wage and to pay the reasonable household expenses of the petitioner's two owners. The owner was correct in that finding. The $10,570.80 which would remain after paying the proffered wage is considered not to be a reasonable amount to pay the household expenses of the petitioner's two owners.

The record contains extensive documentation on the financial condition of restaurant #2. Nonetheless, that evidence on restaurant #2 adds nothing significant to the foregoing analysis of the owners' income based on the owners' Form 1040 joint tax return. The income received by the owners from their partnership shares in restaurant #2 is reflected on the Form 1040 for 2001, and in fact the income from restaurant #2 comprises the

greater part of the owner's adjusted gross income, which, as noted above, is insufficient to establish the ability of the petitioner to pay the proffered wage.

The record also contains a financial statement and a general ledger for the petitioner for the year 2001. Neither of those documents is an audited financial statement, as required by 8 C.F.R. § 204.5(g)(2). Therefore, those documents are not acceptable evidence. Moreover, since the petitioner is a sole proprietorship rather than an independent legal entity, the relevant financial information is that which pertains to the owners, not simply that which pertains to the petitioning business.

For the foregoing reasons, the decision of the director that the petitioner had failed to establish its ability to pay the proffered wage was correct.

On appeal the petitioner submits additional evidence. As noted above, this evidence consists of joint federal and state tax returns for the petitioner's owners for the year 2000. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the petitioner was put on notice by the director in the RFE dated October 20, 2002 that the evidence which it submitted with its I-140 petition was insufficient. The RFE requested clarification of the relationship between the petitioner and restaurant #2, and requested tax returns for the petitioning company for the year 2000. The petitioner failed to submit the owners' tax returns for 2000 in its response to the RFE.

The petitioner therefore was given reasonable notice of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted on that issue for the first time on appeal will not be considered.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director. The adjusted gross income of the owners for the year 2000 is shown as $31,010, a figure even lower than the owners' adjusted gross income for the year 2001 of $35,510, which, as discussed above, was found to be insufficient to pay the proffered wage and to pay the reasonable living expenses of the petitioner's owners. Moreover, even if the owner's tax information for the year 2000 were sufficient to establish the petitioner's ability to pay the proffered wage in the year 2000, that fact would not overcome the director's finding that the petitioner had failed to establish its ability to pay the proffered wage in the year 2001. The petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established "and continuing until the beneficiary obtains lawful permanent residence." 8 C.F.R. § 204.5(g)(2)

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.