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

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 01 160 56699 Office: CALIFORNIA SERVICE CENTER Date: FEB 24 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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)

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese 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 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 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 August 7, 2000. The beneficiary's salary as stated on the labor certification is $2,410 per month or $28,920 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence submitted was the following:

1. Copy of Schedule C for 1999; and
2. Letter from Dragon Door Seafood Restaurant, dated 4/10/00, confirming beneficiary's experience.

In a request for evidence (RFE) dated July 11, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE stated the following:

> **[CIS] needs additional information, therefore submit the following documentation:**
>
> **Ability to Pay:** Provide evidence of the petitioner's ability to pay the beneficiary's 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, **copies of filed (must be signed)** federal tax returns, or **audited** financial statements. The tax return information should be accompanied by all supporting documents such as related tables, schedules, and notes. The petitioner is requested to provide this evidence for the years **2000 and 2001**.

> **Note**: If the petitioning company is a Sole Proprietorship, the petitioner needs to submit **Form 1040 U.S. Individual Income Tax Return for the years indicated above**.

In response to the director's RFE, the petitioner submitted the following documents:

3. Copy of signed Form 1040, U.S. Individual Income Tax Return, for 2000 and
4. Copy of signed Form 1040, U.S. Individual Income Tax Return, for 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits a brief and the following evidence:

5. Statement of Account, dated 12/13/02, from [redacted] for savings account of [redacted] with supporting bank statement, dated 12/31/01, and copy of savings account passbook;
6. Statement of Account, dated 12/13/02, from [redacted] for commercial checking account of [the petitioner];
7. Statement of Account, dated 12/13/02, from EastWest Bank for checking, certificate of deposit and savings accounts for [redacted] with supporting bank statements;
8. Statements of Account from investment brokerage E-W Investments Inc. for [redacted] for certain months between 1/26/01 and 11/29/02;
9. Letter from [redacted] CPA, dated 12/20/02, explaining his compilation of the personal financial statement of [redacted] with accompanying signed financial statement; and
10. Letter from [redacted] CPA, dated 12/19/02 explaining his compilation of the profit and loss statement of [the petitioner] for the nine months ended September 30, 2002, with accompanying profit and lost statement and balance sheet.

Counsel states on appeal that the director should have considered depreciation and other non-cash expenses shown on the petitioner's tax returns as evidence of the petitioner's ability to pay the proffered wage. Counsel also states that the financial documents submitted on appeal show substantial net worth of the petitioner which is sufficient to pay the beneficiary's proffered wage.

An analysis of the evidence follows.

An initial question concerns the evidence submitted by counsel with his Notice of Appeal, all of which is being submitted for the first time on appeal. 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 as follows:

> Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or Regional Service Center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various means, such as a requirement in the regulations that a particular document be submitted with the visa petition; a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence; or an oral statement at an interview that additional evidence is required. Where, however, 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 evidence submitted on appeal is relevant to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) quoted in part above, which states in full as follows:

> *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].

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated July 11, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. The RFE mentioned that evidence was required for the years 2000 and 2001, and it mentioned audited financial statements as one form of acceptable evidence.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case 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 for the first time on appeal will not be considered for any purpose. We will therefore evaluate the director's decision based on an analysis of the evidence in the record before the director.

The director found that the Form 1040 income tax returns of the owner of the petitioner showed total income for the year 2000 of $29,114 and for the year 2001 of $28,920. The director took these figures from Line 22 of each return, for total income. Line 33 of each return shows the adjusted gross income, which for 2000 was $26,511 and for 2001 was $21,170, figures which are lower than total income for each year. The adjusted gross income figures show the resources available to the petitioner more accurately than the total income figures used by the director. Nonetheless, the conclusion of the director that the tax returns failed to establish the petitioner's proffered annual wage of $28,920 was correct. It should be noted that petitioner is a sole proprietorship, so that even if the adjusted gross income were higher than the proffered wage in each year, the personal living expenses of the owner and his family member would have to be deducted to show the funds available to pay the proffered wage.

The director's decision did not mention the petitioner's net current assets as potential sources of funds to pay the beneficiary's proffered wages. But the tax returns submitted by the petitioner contained no schedules

showing assets and liabilities, so the record before the director lacked any evidence on which to base such an analysis.

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.