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Washington, DC 20536

U.S. Citizenship and Immigration Services

B6

[redacted]

MAR 11 2004

FILE: EAC-02-083-52437 Office: VERMONT SERVICE CENTER Date:

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]

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, Vermont 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 specialty 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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 January 14, 1998. The beneficiary's salary as stated on the labor certification is $11.47 per hour or $23,857.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 13, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

The petitioner responded to the RFE by a letter dated July 11, 2002 accompanied by additional evidence.

Following the petitioner's response to the RFE the evidence in the record then consisted of a letter dated April 20, 1999 from the Hotel Gulshan, Dhaka, Bangladesh confirming the beneficiary's experience with that hotel from December 1996 until April 1999; copies of Form 1040 U.S. individual tax returns for 1999, 2000, and 2001 for the petitioner's owner; and a copy of a bank statement of the petitioner's owner dated June 30, 2002 and showing an ending balance of $18,361.41. No tax return copy was submitted for 1998, the year of the priority date. The record also contained a letter from counsel in which he asserted that the owner had a net income in 1998 of $27,258.00, but no documentation was submitted to support that assertion by counsel.

The Schedule C statements of profit or loss from a business attached to the Form 1040 tax returns for the owner indicate that the petitioner is a sole proprietorship. The bank statement in the record also indicates that the petitioner is a sole proprietorship, since the statement is in the owner's name, trading as ("t/a") the petitioner. The

owner's tax returns show the following amounts for adjusted gross income: $25,213 for 1999, $34,364 for 2000, and $148,255 for 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the January 14, 1998 priority date or in the year 1999 because the petitioner's adjusted gross income was not sufficient to pay the proffered wage and cover the petitioner's own expenses, and denied the petition.

On appeal, counsel submits a brief and evidence. All of the evidentiary documents are additional copies of previously submitted documents, except for a copy of the Form 1040 tax return for 1998 of the owner of the petitioner. 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 of the need for evidence concerning its ability to pay the proffered wage by the regulation quoted on page two above, which explicitly states that evidence is required to establish the ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and which describes in detail the types of acceptable evidence on this issue. 8 C.F.R. § 204.5(g)(2)

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 May 13, 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 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. The AAO will therefore evaluate the director's decision based on an analysis of the evidence in the record prior to the decision of the director.

The director found that the individual tax return for 1999 of the petitioner's owner showed adjusted gross income of $25,213, which was only $1,355 greater than the proffered annual wage of $23,858. The director found that the amount remaining after paying the proffered wage would be insufficient to support the owner and his family. Concerning 1998, the director said that the attorney had stated that the owner's income for that year was $27,258, but that the owner's 1998 tax return had not been submitted for the record. The director said that even if the attorney's figure were assumed to be accurate that amount would not be sufficient to pay the proffered wage and to sustain the owner and his dependents. The director was correct in not accepting the attorney's assertion as evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the director's analysis on the above matters was correct.

Counsel asserts that the personal savings of the owner of the petitioner were sufficient to maintain the owner and his family without recourse to the income shown on the owner's Form 1040 tax returns. But the only bank statement in evidence is one dated June 30, 2002, which shows an ending balance of $18,361.41. There is no proof those funds somehow represent additional funds beyond those reflected on the tax returns. Moreover the years for which the petitioner was found not to have established its ability to pay the proffered wage were 1998 and 1999. Evidence concerning the owner's bank balances from the January 15, 1998 priority date and continuing forward is lacking from the record. As noted above, the assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez, supra.*

Although the director made no explicit finding on the petitioner's ability to pay the proffered wage in the year 2000, we note that the owner's adjusted gross income that year of $34,364 was only $10,506.40 greater than the proffered annual wage of $23,857.60 Therefore the amount remaining in 2000 after paying the proffered wage would have been insufficient to support the owner and his family.

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.