

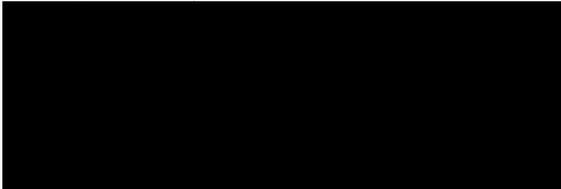
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

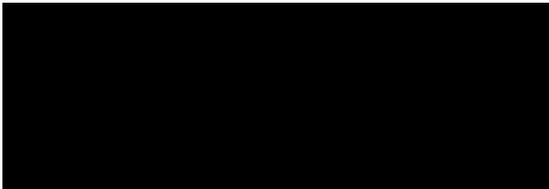


FILE: LIN 01 239 54166 Office: NEBRASKA SERVICE CENTER Date: APR 28 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



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, Nebraska 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 of foreign food. As required by statute, the petition is accompanied by an individual labor certification 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.

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 (Form ETA 750) was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). In this case, the petition's priority date is April 4, 2001. The beneficiary's salary as stated on the labor certification is \$1,970 per month or \$23,460 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date. In a Request for Evidence dated November 7, 2001 (RFE), the director requested a complete 1999 tax return.

Counsel responded with the petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation and 1999 and 2000 quarterly wage reports. The petitioner had submitted the 2000 federal tax return initially. The federal tax returns showed an ordinary (loss) in both years, (\$27,190) in 2000 and (\$25,854) in 1999.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and that the beneficiary met the minimum requirements for the position, and denied the petition accordingly.

On appeal, five (5) exhibits, including the 2000 tax return, accompany the brief. Counsel contends, first, that the evidence supports the petitioner's ability to pay the proffered wage.

Counsel states that the W-2 wage and tax statement proves that the petitioner has paid the beneficiary's "proffered wage of \$21,450." The alleged payment is, in fact, less than the proffered wage, \$23,460.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel next invokes the opinion of the petitioner's accountant that payrolls of \$220,620 in 1999 and of \$271,451 in 2000 prove the ability to pay the wage. Further, the accountant advises that depreciation is a positive cash flow to add into funds available. Counsel does not state how these funds are available to apply to the deficiency of the beneficiary's proffered wage. The petitioner already paid them to others. Depreciation does not appear as an asset in Schedule L of the federal tax return, or on any other financial document, and is not available to pay the proffered wage.

Counsel's arguments are not persuasive. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

After a review of the federal tax returns and evidence, it is concluded that the petitioner has not established that it had the ability to pay the salary offered as of the priority date of the petition and until the petitioner obtains lawful permanent residence.

In addition, the director's decision noted that the petitioner had not established that the beneficiary met all of the minimum requirements for the position, as stated on Form ETA 750 in blocks 14 and 15 of Part A. Form ETA 750 exacted two (2) years of experience in the job or in a related occupation. The director noted that the petition indicated that the beneficiary entered the United States on May 7, 1998. In the beneficiary's experience letter, dated December 22, 1998, the overseas employer claimed to have employed the beneficiary until December 15, 1998. The director determined that the discrepancy undermined the experience letter's validity. Therefore, the director concluded, the petitioner did not establish that the beneficiary met the petitioner's qualifications for the position.

Counsel takes issue with the director's finding, and advises on appeal that:

The discrepancy is due to a clerical error. The petition should have indicated that the Alien entered the U.S. May 7, 1999 and not May 7, 1998. The petitioner regrets causing this confusion and assures [CIS] that no doubt on the validity of the letter of experience should

exist. The former employer was correct in stating that beneficiary was employed from November 2, 1993 until December 15, 1998. The discrepancy is due to a clerical mistake in the petition and should not affect the validity of the experience letter. It was mere oversight. See attached affidavit of the beneficiary. (Ex. 5) [sic, but apparently (Ex. 3)].

CIS records show May 7, 1998 as the beneficiary's date of entry. Counsel offers no documentary evidence, either of the supposed clerical error or of any claimed 1999 entry. The facts contradict dates in the experience letter, claiming employment in India until December 15, 1998.

*Matter of Ho*, 19 I & N Dec. 582 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977).

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.