U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

APR 25 2005

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN-01-233-54306

IN RE: Petitioner:
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:

[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 employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. Upon further review, the director served the petitioner with notice of intent to revoke the approval of the petition. In a Notice of Revocation, the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is an Indian restaurant and banquet hall. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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, as well as to pay the proffered wages to beneficiaries of other approved and pending petitions, and revoked the petition accordingly.

On appeal, counsel states that the petitioner's resources are sufficient to establish its ability to pay all of the beneficiaries of its approved and pending petitions, including the beneficiary of the instant petition.

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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 14, 1998. The proffered wage as stated on the Form ETA 750 is $23,000.00 annually. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on July 27, 2001. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of $1,800,000.00 and to currently have 27 employees. The item for net annual income was left blank on the petition.

In support of the petition, counsel submitted a letter dated July 23, 2001 signed by himself, and supporting evidence.

In a request for evidence (RFE) dated October 9, 2001, the director requested additional evidence pertaining to the petitioner's ability to pay the proffered wage.

In response, counsel submitted a letter dated October 22, 2001 and additional evidence.

The director initially approved the decision on November 27, 2001.

The beneficiary filed an I-185 Application to Register Permanent Residence or Adjust Status on December 13, 2001.

After further review, the director issued a notice of intent to revoke (ITR) dated August 14, 2003 stating that CIS records indicated that the petitioner had filed multiple immigrant petitions and that the evidence failed to establish the petitioner's ability to pay the proffered wages in all of the pending and approved petitions. The petitioner was given fifteen days to submit additional evidence in opposition to the ITR and in support of the petition.

In response to the ITR, counsel submitted a letter dated August 26, 2003 and additional evidence.

In a decision dated October 17, 2003 the director found 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, as well as to pay the proffered wages to beneficiaries of other approved and pending petitions, and revoked the petition accordingly. In a separate decision also dated October 17, 2003, the director denied the beneficiary's I-485 adjustment of status application, based on the revocation of the I-140 petition on which the I-485 application was based.

On appeal, counsel submits a brief and additional evidence. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, in the instant case, the petitioner provided all documents specifically requested by the director in his RFE. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The evidence in the record is voluminous and the order of documents in the file does not clearly indicate when some of the documents were submitted. But the evidence now in the record consists of the following documents: a copy of a letter dated October 27, 1997 from the manager of a restaurant in New Delhi, India, stating the beneficiary's experience with that restaurant as an Indian specialty cook from September 1, 1994 to October 24, 1997; a copy of a letter dated August 10, 1994 from the director of a restaurant in Hamamatsu City, Japan, stating the beneficiary's experience with that restaurant as an Indian cook from December 30,

1989 to the date of the letter; a copy of a letter dated July 2, 2001 from the petitioner's manager stating a job offer to the beneficiary; a letter dated November 10, 2003 from the manager of , stating a job offer to the beneficiary; a letter dated November 12, 2003 from the petitioner's general manager giving details on the petitioner's other immigrant petitions; copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1998, 1999, 2000, 2001 and 2002; a copy of a letter dated October 17, 2001 from the petitioner's tax preparer stating the filing date of the petitioner's 1999 tax return; a copy of an undated letter from the petitioner's tax preparer summarizing the petitioner's tax returns for 2000; a copy of the petitioner's Form IL-1120-ST tax return for Illinois for 2000; copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns in the years 2002 and 2003; copies of the petitioner's Illinois Contribution and Wage Reports in the years 2002 and 2003; copies of the petitioner's statements of tax deposits and filings in the years 2001 and 2002; a copy of a letter dated August 24, 2003 from the petitioner's accountant; a copy of an unaudited income statement of the petitioner dated December 31, 2001; copies of an unaudited income statement and of a balance sheet of the petitioner, each dated December 31, 2002; copies of pay checks and pay statements dated August 29, 2003 for the beneficiary and other employees of the petitioner; copies of seven letters of reference from business associates of the petitioner; a copy of an unaudited profit and loss statement of the petitioner dated August 27, 2003; a copy of a capacity certificate for the petitioner's premises issued by the Village of ; photographs of the petitioner's place of business; copies of bank statements for accounts of the petitioner for the years 2001 through 2003; and copies of various Form I-797 receipt notices and approval notices relating to the petitioner or to the beneficiary. The record also contains duplicate copies of many of the evidentiary documents listed above.

The record contains a copy of a memorandum dated August 4, 2003 by Acting Associate Director for Operations, which is not an evidentiary document, but which is submitted as a legal authority pertinent to the instant petition. The record also contains various letters and other documents signed by counsel summarizing the evidence and presenting counsel's analysis of the case,

Counsel states on appeal that the petitioner's resources are sufficient to establish its ability to pay all of the beneficiaries of its approved and pending petitions, including the beneficiary of the instant petition. Counsel also presents a detailed analysis of the numbers of the petitioner's pending and approved petitions as of different time periods relevant to the instant petition. Counsel also asserts in a letter dated November 17, 2003 and in his brief that the portability provisions of the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, apply to this petition

Since no evidence is precluded from consideration on appeal, AAO will evaluate the appeal based on the evidence in the entire record.

As noted above, the director's revocation decision was based on a finding that the evidence failed to establish the petitioner's ability to pay the beneficiary the proffered wage while also paying the proffered wages to the beneficiaries of the petitioner's other pending and approved petitions.

The petitioner must establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The reason for beginning the financial analysis on the priority date, which is the date of filing of the ETA 750, rather than on the date of filing the I-140 petition is to assure that the petitioner's job offer which begins the process is a realistic offer. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (beneficiary's required education must have been completed before the priority date).

In determining the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary did not claim to have worked for the petitioner. A copy of a pay statement for the beneficiary dated August 29, 2003 shows wages paid to the beneficiary by the petitioner for the pay period of August 2, 2003 to September 1, 2003, showing earnings of $2,015.70 for the pay period, and $12,800.00 for the year to date. That pay statement therefore indicates that the beneficiary began employment with the petitioner in February 2003 or thereabouts. That information is insufficient to establish the petitioner's ability to pay the beneficiary the proffered wage beginning on the priority date of January 14, 1998.

In determining the petitioner's ability to pay its total proffered wage commitments, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9th 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. For an S corporation for which the income is exclusively from a trade or business, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. In the instant case, the petitioner's tax returns show minor amounts of income on Schedule K's from sources other than a trade or business, namely interest income. However, the amounts of additional income shown on the petitioner's Schedule K's are generally lower than the amounts of additional deductions shown on those Schedule K's, which consist of charitable contributions. Since charitable contributions shown on the Schedule K's may be considered as discretionary expenses, for purposes of the present analysis, the AAO will consider the petitioner's ordinary income as the measure of its net income.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

As of the October 17, 2003 date of the director's revocation decision, the petitioner's tax return for 2002 was the most recent return available. Therefore the financial analysis on appeal will be from 1998, which is the year of the priority date, until 2002.

The petitioner's tax returns show the amounts for ordinary income as listed below, and calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets at the beginning of each year as listed below.

	Net income (ordinary income)	Net current assets (beginning of year)
1998	$100,401.00	$383,310.00
1999	-$125,634.00	-$101,823.00
2000	$127,761.00	$684,175.00
2001	$27,664.00	$174,010.00
2002	$76,905.00	$186,895.00

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage of $23,000.00 to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has had the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

Where CIS intends to deny or to revoke a petition based on adverse or derogatory information which is not a part of the record, the petitioner must be given an opportunity to rebut that information. *See* 8 C.F.R. § 103.2(b)(16). *See also Matter of Estime* 19 I&N Dec. 450 (BIA 1978); *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

In the instant case, the petitioner initially submitted no information on the other petitions submitted by the petitioner. In his notice of intent to revoke (ITR) the director informed the petitioner that CIS records showed multiple petitions filed under the petitioner's name. Similarly, in his revocation decision, the director stated that CIS records showed multiple petitions under the petitioner's name, and stated that the petitioner's evidence failed to establish its ability to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of the petitioner's other petitions. The director's actions thereby complied with the requirements of 8 C.F.R. § 103.2(b)(16).

In the record on appeal, a letter dated November 12, 2003 from the petitioner's general manager gives some information on the petitioner's other immigrant petitions, but it fails to provide information sufficient to calculate the total proffered wage commitments of the petitioner for each relevant year. In his letter, the general manager states that the positions to be filled by many of the beneficiaries of the petitioner's petitions are not new positions, and that the intended beneficiaries are to replace other employees who have left the petitioner's employment. However, the general manager gives no specific information about the positions for

which employees are being replaced, nor about the former employees whose positions are to be taken by the beneficiaries of the petitioner's immigrant petitions. No names, or alien registration numbers are given in the letter. Although two I-140 receipt numbers are mentioned in the letter, the letter does not explain the connection between those numbers and the positions which are allegedly replacement positions. Therefore the letter fails to identify which of the petitioner's petitions should be considered to be for replacement of other employees.

Counsel lists the I-140 receipt numbers for many petitions in his brief, but counsel's analysis is unclear, and in any event, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

CIS electronic records show multiple I-140 petitions filed under the petitioner's name and under its trade name, the earliest filed in 1995. Those records show nine petitions filed under the name [redacted] six petitions filed under the name [redacted], Inc., and 32 petitions filed under the name [redacted] Restaurant, for a total of 47 cases.

Some of the petitions were filed with addresses which are not the same as the address listed on the instant petition. But some of the petitions with different addresses appear to be those of the petitioner, since the electronic records for those petitions either show the same Internal Revenue Service taxpayer identification number or show addresses in the same state as shown in the address on the instant petition. Moreover, even petitions with addresses in other states may be petitions filed by the same petitioner or by affiliated corporations.

Not all of the cases described above were pending during the years directly relevant to the instant petition, namely from the priority date of January 14, 1998 to the present. But some cases approved in prior years may still be relevant to the instant petition, since a beneficiary of a previously-approved petition who did not immigrate to the United States immediately, may choose to do so later. Approved employment-based immigrant petitions are valid indefinitely, unless revoked under section 203(e) or 205 of the Act. 8 C.F.R. § 204(n)(2). Therefore any beneficiary of a previously-approved petition who has not yet immigrated could do so in the future and then be hired by the petitioner, adding to the petitioner's proffered wage commitments for the year in which the person is hired.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. *See* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year.

Although CIS records contain some information on each of the 47 petitions filed in the petitioner's name or in its trade name, those records do not contain information sufficient to determine the petitioner's total proffered wage commitments for each of the years which are relevant to the instant petition.

The evidence in the instant case does not identify each of the petitioner's petitions by receipt number and by the name of each beneficiary. Therefore for many of the 47 petitions mentioned above it is not possible to ascertain

whether they were filed by the petitioner in the instant case or by some other petitioner or petitioners with the same name or with a similar name.

The evidence in the instant case does not state the proffered wage for each individual beneficiary of the petitioner's other petitions. The letter dated November 12, 2003 from the petitioner's general manager states that the proffered wage for each of the petitioner's other pending and approved petitions is $23,000.00 and that each of those petitions is for the position of Indian specialty cook. But a review of case files on appeal to the AAO reveals that at least one of the other pending petitions is for a proffered wage of $24,000.00, and that two petitions are for the position of banquet hall manager, each of those at a proffered wage of $35,000.00. The record contains no explanation for these inconsistencies. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence does not state the current immigration status of each of the beneficiaries of the petitioner's other petitions. Moreover, the evidence fails to identify which beneficiaries have already been hired by the petitioner, the dates of their hirings and their current wages. Finally, the evidence fails to identify any beneficiaries who have withdrawn from the visa petition process or for whom the petitioner has withdrawn its job offers.

For the foregoing reasons, the record fails to establish the petitioner's total proffered wage commitments for each of the years which are relevant to the instant petition.

Even though the petitioner's tax returns show significant financial resources of the petition for most of the years at issue in the instant petition, the record does not establish the petitioner's total proffered wages for each of the relevant years, therefore no calculations can be made of whether the petitioner's tax returns show net income or net current assets sufficient to pay all of the petitioner's proffered wage commitments for each of the years at issue.

As noted above, CIS looks first to the petitioner's tax returns when evaluating the petitioner's ability to pay the proffered wage. CIS also considers annual reports and audited financial reports as acceptable evidence. 8 C.F.R. § 204.5(g)(2). In the instant case, however, no annual reports or audited financial reports have been submitted.

The petitioner's evidence in the record other than its tax returns is extensive, but it provides no significant additional support to help establish the petitioner's ability to pay the proffered wage during the relevant period.

The record contains copies of one state income tax return, of several quarterly state tax reports and of several quarterly federal tax returns of the petitioner. However, the information on those returns and reports adds nothing significant to the information on the petitioner's annual federal income tax returns which are analyzed above.

The record contains copies of unaudited financial statements and a letter from the petitioner's accountant stating his opinion that the petitioner has the ability to pay the proffered wages to the beneficiaries of all pending and approved petitions. Those documents, however, are not among the types of documents specified as acceptable evidence in the regulation at 8 C.F.R. § 204.5(g)(2). According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

The record contains letters from seven business associates of the petitioner. Those letters provide further corroboration that the petitioner is a stable and responsible business. But the letters contain no specific financial information which would help to establish the petitioner's ability to pay the proffered wage to the beneficiary and to the beneficiaries of other relevant petitions.

None of the financial evidence summarized above addresses the issue of the petitioner's total proffered wage commitments for each of the years relevant to the instant petition. As discussed above, without evidence of the total proffered wage commitments, no calculations can be made as to whether the petitioner's financial resources are sufficient to pay the proffered wage to the beneficiary while also paying its proffered wage commitments to the beneficiaries of its other petitions.

In his revocation decision of October 17, 2003, the director found that a total of eighteen petitions were relevant when evaluating the petitioner's ability to pay the proffered wage in 2001 and that twenty petitions were relevant to the petitioner's ability to pay the proffered wage in 2002. The director's numbers appear to include the instant petition. In calculating the petitioner's proffered wage commitments for each year the director used the figure of $23,000.00 for each beneficiary. The director calculated that the petitioner would need to show its ability to pay a total of $414,000.00 in 2001 (18 times $23,000.00) and a total of $460,000.00 in 2002 (20 times $23,000.00).

The director's decision does not indicate how he determined the number of other relevant petitions of the petitioner in 2001 and 2002. As discussed above, the record in the instant case contains a total of forty seven I-140 petitions filed under the petitioner's name or under its trade name since 1995. But the record fails to establish how many of those petitions were filed by the petitioner in the instant case, as opposed to petitions filed by other legal entities with the same name or a name similar to that of the petitioner. Therefore the record provides insufficient basis for calculating the total number of relevant petitions. As noted above, the record also lacks information on the other individual beneficiaries and the current immigration and employment status of each such beneficiary.

In calculating the petitioner's available income each year, the director added depreciation expenses to the petitioner's net income for each year. The resulting figures were less than the director's figures for petitioner's total proffered wage commitments for each year. The director erred in considering depreciation expenses as additional financial resources of the petitioner. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The director also erred in failing to evaluate the petitioner's net current assets.

Although the director erred in his analysis in the manners mentioned above, the director's decision to revoke the instant petition was correct since the record lacked evidence essential to an evaluation of the petitioner's

total proffered wage commitments for each of the years at issue in the instant petition. The evidence submitted on appeal and the assertions of counsel fail to overcome the decision of the director.

Counsel asserts that the provisions of the American Competitiveness in the 21st Century Act (AC21) are relevant to the instant petition. AC21 § 106(c) added a new subsection (j) to section 204 of the INA, which states:

> Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence - A petition under subsection (a)(1)(D)for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

INA § 204(j) (*added by The American Competitiveness in the 21st Century Act (AC21)*, Pub.L.No. 106-313, § 106(c), 114 Stat. 1251 (2000))

In the instant case, the only evidence of a new job offer to the beneficiary is a copy of a letter dated November 10, 2003 from the manager of [redacted], Inc., d/b/a [redacted] Restaurant and Banquets, of Fort Lauderdale, Florida, stating a job offer to the beneficiary as an Indian Specialty Cook at an annual salary of $23,000.00. The description in the letter of the duties of that position indicates that the job offer from [redacted], Inc. is for the same job category as that offered by the petitioner in the ETA 750 supporting the instant I-140 petition. However, the date of the letter from the manager of [redacted], Inc., is after the October 17, 2003 decision of the director to deny the beneficiary's I-485 application to adjust status to permanent residence. Therefore no evidence in the record suggests any continued validity of the instant I-140 petition under INA § 204(j).

Counsel asserts that the I-485 application and the beneficiary's I-765 work permit application, which was also denied by the director, should be "reinstated" to afford the petitioner the opportunity to provide evidence that the beneficiary has a new job offer which qualifies for the portability provisions of AC 21. (Brief, at 10.) Those matters are in the jurisdiction of the director, not the AAO, as is the determination, in the context of an I-485 adjudication, as to whether or not the beneficiary qualifies for benefits under AC21. Counsel's assertions concerning AC21 suggest that counsel views the instant appeal as made on behalf of the beneficiary, rather than on behalf of the petitioner, since the petitioner would have little interest in a subsequent job offer to the beneficiary by a new employer.

The decision of the director to deny the beneficiary's I-485 application is not now before the AAO on appeal, and in any event, the AAO would lack jurisdiction for any administrative appeal of the director's decision of the beneficiary's I-485 application. The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

In summary, the petitioner's evidence fails to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition, while also paying the proffered wages to the beneficiaries of the petitioner's other petitions which are relevant to the time period at issue in the instant petition.

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.