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U.S. Citizenship  
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Services

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MAR 08 2005



FILE: WAC-99-216-51534 Office: CALIFORNIA SERVICE CENTER Date:

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

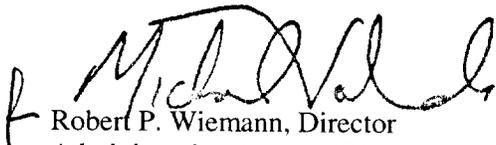
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a restaurant and Indian grocery store. It seeks to employ the beneficiary permanently in the United States as a cook, South Indian dishes. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the 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 instant appeal has a complex procedural history.

The ETA 750 was submitted on December 3, 1996, and was approved by the Department of Labor on June 29, 1999.

The I-140 petition was received by CIS on August 3, 1999. In support of the petition the petitioner submitted a summary for the petitioner's S corporation tax returns for 1997 and 1998; copies of the petitioner's California Form 100-ES Corporation Estimated Tax for 1999; a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1998; a letter dated August 14, 1996 from S.C.P. Pillai, proprietor of the Hotel Rajadhani, Angadi-Ranni, Kerala, India, stating the beneficiary's employment as a cook from August 1985 to April 1989; copies of high school records of the beneficiary; a copy of a job notice for the offered position; and copies of newspaper advertisements for the offered position.

On August 15, 2000 the director issued a request for evidence (RFE) noting that the petitioner's address as shown on the I-140 petition was different from its address as shown on the Form ETA 750 labor certification. The director requested evidence that petitioner's new location was within the same metropolitan statistical area as the original location shown on the labor certification. On that same day, August 15, 2000, the director also prepared a memorandum to the INS Anti-Fraud Unit at the American Embassy in New Delhi, India, requesting an investigation of the beneficiary's claimed experience at a restaurant in India. The director noted that India was one of the countries identified in an Operations Instruction, number OI 204.4(e), and that the memorandum was being written consistent with that Operations Instruction. That instruction set forth procedures for requesting overseas investigations of work experience claimed by beneficiaries of certain employment-based petitions for work in Bangladesh, Hong Kong, India, Pakistan, the People's Republic of China, and Taiwan. *See* Operations Instructions, OI 204.4(e).

Counsel responded to the RFE with a letter dated August 23, 2000 stating that the petitioner's change of address from Saugus, California, to Northridge, California, was within the same metropolitan statistical area and that the driving distance between the two locations was 24.2 miles, and the actual distance was approximately 22 miles. Counsel's assertions were supported by a copy of a map generated on an Internet map service showing the petitioner's two locations and driving directions between the two locations. The petitioner's response to the RFE was received by CIS on August 25, 2000.

On September 16, 2000 an INS investigator with the American Embassy in New Delhi wrote a report of an investigation made during a site visit on September 13, 2000 to the restaurant of the beneficiary's former

claimed employment in the state of Kerala, India. The report concluded that a letter previously submitted by the restaurant's owner was fraudulent and that the beneficiary's claim of employment experience with that restaurant was false.

On March 29, 2001 the director issued a Notice of Intent to Deny (ITD) informing the petitioner of the derogatory information in the report from the INS investigator in India. The ITD afforded the petitioner 30 days to submit additional information, evidence or arguments to support the petition.

In a decision dated October 19, 2001, the director stated that Service records showed no response to the ITD and the director accordingly denied the petition.

On November 9, 2001 counsel submitted a Motion to Reopen and Reconsider, alleging that a response to the ITD had been submitted on April 24, 2001, within the 30-day period permitted by the ITD. The motion was supported by a United States Postal Service receipt showing a delivery to the director's office on April 24, 2001 of an item sent from counsel's office; a copy of a letter from counsel dated April 23, 2001 responding to the ITD; a copy of an affidavit dated April 16, 2001 of [REDACTED], the owner of the Hotel [REDACTED] the restaurant of the beneficiary's claimed employment; a copy of an affidavit dated April 16, 2001 of Samuel Thomas, a customer of the Hotel [REDACTED]; a copy of an affidavit dated April 16, 2001 of John Baby, a customer of the Hotel [REDACTED]; and a copy of a photograph of the Hotel [REDACTED]. Also submitted by counsel at the same time as the Motion to Reopen and Reconsider was a Form I-290B notice of appeal, appealing the October 19, 2001 decision of the director to deny the petition. Counsel's cover letter to the motion stated that the I-290B was being submitted concurrently with the motion, in the event that the motion was not the proper manner to respond to the ITD.

The director made no ruling on the Motion to Reopen and Reconsider, and the file was transmitted to the AAO. On July 22, 2002 the AAO issued a decision stating that the director's decision to deny the petition because of the petitioner's failure to respond to the ITD was a denial due to abandonment and that such a decision may not be appealed. The AAO then remanded the petition to the director for a decision pursuant to the regulations governing motions to reopen.

On August 21, 2002 counsel submitted a second Motion to Reopen and Reconsider, supported by duplicate copies of the affidavits and of other documents submitted in support of the earlier motion, including a copy of the earlier motion. In addition, counsel submitted a copy of an affidavit dated April 16, 2001 [REDACTED] the owner of a restaurant on the same street as the Hotel [REDACTED]; a color photograph showing the Hotel [REDACTED], an abutting building and [REDACTED] restaurant; and a copy of an affidavit dated April 16, 2001 of [REDACTED] the son of [REDACTED].

On October 1, 2002 the director issued a decision captioned Service Motion to Reopen, in which the director stated that after considering the petitioner's materials submitted on November 9, 2001 the Service had determined that reopening of the case was warranted. The director found that the evidence was not sufficient to establish eligibility for the benefit sought, and gave the petitioner 84 days to submit evidence. The director also issued a second request for evidence (RFE) dated October 1, 2002 giving the petitioner until December 24, 2002 to submit information relevant to the petitioner's ability to pay the proffered wage.

In response to the second RFE, counsel submitted a letter dated October 30, 2002 and the following evidence: copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for the years 1999, 2000 and 2001; and a copy of the petitioner's Form 100S, California S Corporation Franchise or Income Tax Return for 2001.

On April 3, 2003 the director issued a decision captioned Motion to Reopen/Reconsider, stating that the petitioner's motion to reopen filed on August 21, 2002 was granted and that the application was reopened or reconsidered. The director stated that the evidence submitted did not overcome results of the investigation by the American Embassy in India. On that same day, April 3, 2003, the director also issued a new decision on the I-140 petition. In that decision, the director stated language from the investigative report from the American embassy and found that the evidence in the record did not establish that the beneficiary had the three years of work experience as required by the ETA 750. The director therefore denied the petition. The director then went on to say, "Furthermore, 'the evidence as described indicates that the that [sic] beneficiary or applicant willfully misrepresented a material fact in order to procure a benefit under the Act and is subject to section 212(a)(6)(c)(i) of the Act.'" The director did not cite the source of his quoted language.

On appeal, counsel presents legal arguments in two pages of continuation sheets to the I-290B and submits the following documents: copies of portions of the petitioner's Register of Wages monthly records dated August 1985 through March 1990, with certified English translations.

On appeal, counsel asserts that the evidence submitted in response to the ITD is sufficient to overcome the derogatory information in the report from the American embassy investigator.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The petitioner must establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). In this instance, it is December 3, 1996.

One issue raised by the evidence concerns whether the change in location of the petitioner's business address from Saugus, California, to Northridge, California, rendered invalid the prevailing wage determination in the Department of Labor's labor certification. In the first RFE, the director requested evidence on the two addresses, and counsel responded with evidence showing that the two addresses were within the same metropolitan statistical area. Both the director and counsel apparently believed that the petitioner's business address, shown as Saugus, California, on the ETA 750, and shown as Northridge, California, on the I-140 petition, was relevant to the prevailing wage determination. However, both on the ETA 750 and on the I-140 petition, the address where the beneficiary will work differed from the petitioner's business address. On both the ETA 750, item number 7, and the I-140, Part 6, the address where the beneficiary will work is shown as [REDACTED]. For prevailing wage determinations, the relevant address is not the petitioner's business address, but the address where the beneficiary will work. See 8 C.F.R. § 656.40(a). Therefore, in the instant petition, the change in the petitioner's business address had no effect on the validity of the prevailing wage determination made as part of the Department of Labor's labor certification.

Another issue raised by the evidence concerns the beneficiary's qualifications for the offered position.

The Form ETA 750 indicated that the position of cook, South Indian dishes, requires a grade school education and three years of experience in the job offered. The only relevant experience claimed by the beneficiary was employment from August 1985 until April 1989 at the Hotel [REDACTED] in [REDACTED] India. The documentation submitted in support of the employment is the letter dated August 14, 1996 from [REDACTED].

which is mentioned above. The letter states that the beneficiary worked as a cook from August 1985 to April 1989 specializing in preparing South Indian dishes.

The investigative report in the record from the American Embassy describes a visit on September 13, 2000 to the Hotel [REDACTED] by three persons from the American Embassy: an INS Investigator who wrote the report, an INS Examiner, and the Acting Officer in Charge. The report states that the investigators interviewed [REDACTED] who is the owner of the business and the author of the August 14, 1996 letter described above. According to the report, [REDACTED] made a statement under oath that the Hotel [REDACTED] a family-run business which has no employees. [REDACTED] also is reported as stating that the beneficiary never worked with the Hotel [REDACTED] from August 1985 to April 1989 in any capacity and that the beneficiary had taken training for only two to three months as a helper to the cook without any salary or stipend. Finally, [REDACTED] is reported as stating that he gave the beneficiary a certificate of work experience only to help the beneficiary's father, who is a friend of [REDACTED]. Accompanying the report is a copy of the August 14, 1996 letter from [REDACTED] with handwritten notations at the bottom. One notation says, in English, "[The beneficiary] was not a employee [sic] with this Hotel." The second notation is in an unidentified language, apparently the local language of the area. Following each notation is a signature, each of which appears to match the signature of [REDACTED] on the letter. Also accompanying the report are seven color photographs showing exterior and interior scenes of the business. The exterior scenes show a one-story building and the interior scenes show a storage area for bottles, a washing area, the kitchen, a portion of another room and the proprietor's desk. Shown in the photographs are the proprietor, the INS investigator, and apparent employees and customers of the restaurant. None of the interior photographs are identified as the customer seating area of the restaurant, and the report does not state the seating capacity of the restaurant, other than to state that the Hotel [REDACTED] is "a very small restaurant."

The report concludes, "In sum, the investigation revealed that the document submitted by the SUBJECT in support of her work experience claim was fraudulently obtained due to friendly relation of SUBJECT'S father with [REDACTED] and not by actually working for Hotel [REDACTED]" (Report of Investigation, page 2).

The petitioner's responses to the derogatory information in the investigative report consist of a total of five affidavits plus one exterior color photograph of the Hotel [REDACTED] and one black and white photocopy of an exterior photograph of the Hotel [REDACTED]. The affidavits from [REDACTED] and from his son [REDACTED] state that in India the word "hotel" is used for a restaurant, and that, unlike in the United States, the word "hotel" does not refer to a lodging facility.

In his affidavit, the owner [REDACTED] states that the restaurant has a seating capacity of 50 people and serves about 150 to 200 persons daily. He states that the business is open seven days a week, and employs about ten people working in the kitchen and ten people working as waiter and dishwasher. [REDACTED] states that the investigating officer came to his restaurant with a taxi driver and with two other persons from the American consulate. He states that he was pressured by the officer to state that the beneficiary did not work in the restaurant at all, and was threatened by the officer and told that the officer would call the police and that Mr. [REDACTED] could go to jail. [REDACTED] also states that he knows hardly any English and that the taxi driver was interpreting, but that the taxi driver spoke little English. [REDACTED] states that about 17 customers were present at the restaurant during the visit by the investigating officer and his companions.

Another affidavit is from [REDACTED] who states that he was a customer of the Hotel [REDACTED] on September 13, 2000 at about 11:30 a.m. when the investigating officer came to that restaurant. [REDACTED] states that the taxi driver who was translating had only a basic knowledge of English and that his translation was not accurate. [REDACTED] states that the investigating officer threatened [REDACTED] that he would call the police and that [REDACTED] would go to jail on the presupposed conclusion that the beneficiary had not worked at the

restaurant. [REDACTED] states that [REDACTED] told the investigating officer that the beneficiary had worked at the restaurant from August 1985 to April 1989.

A third affidavit is from [REDACTED] who states that he was a customer of the Hotel [REDACTED] on September 13, 2000 at about 11:30 a.m. when the investigating officer came to that restaurant. [REDACTED] account of the incident is nearly identical to that in the affidavit of [REDACTED]. [REDACTED] states that [REDACTED] told the investigator that the beneficiary worked in the restaurant from August 1985 to April 1989.

A fourth affidavit is from [REDACTED], who states that he is the owner of the [REDACTED] Hotel, a restaurant which is just opposite to the Hotel [REDACTED]. [REDACTED] states that he knows the owner of the Hotel [REDACTED] and that he knows the beneficiary since he has seen her working at the Hotel [REDACTED]. [REDACTED] states that he has seen the kitchen of the Hotel [REDACTED] and had seen the [REDACTED] working there as a cook, since August 1985.

A fifth affidavit is from [REDACTED] who states that he is the son of S.C.P. Pillai and that he has helped his father in operating the business, which is a family business. [REDACTED] states that the restaurant caters South Indian style food. [REDACTED] states that the beneficiary worked in the restaurant as a cook from August 1985 to April 1989, Monday through Saturday, fifty hours per week. [REDACTED] states that the contents of the investigative report are not accurate.

The color photograph submitted by the petitioner shows an exterior view of several buildings. A one-story building on the left of the photograph is marked as the Hotel [REDACTED]. Abutting that building in the center of the photograph is a two-story building which is not identified. Beside that building, across a small street, is another one-story building which is identified as [REDACTED] Hotel. The lettering on the signs on the buildings is not in English. Another photographic image submitted by the petitioner is a black and white photocopy of a photograph which appears to show the Hotel [REDACTED] but the photocopy is of poor quality.

One question raised by the evidence is whether the letter from S.C.P. Pillai on the letterhead of the Hotel [REDACTED] falsely implies that [REDACTED] business is an overnight lodging facility, as the word "hotel" means in the United States, or whether the letter indicates that [REDACTED] business is simply a restaurant. As noted above, the report by the INS investigator states that the business is a restaurant.

The August 14, 1996 letter from [REDACTED] is in English, on letterhead which purports to be that of the Hotel [REDACTED]. The contents and appearance of the letter seem to suggest that the proprietor is claiming that the beneficiary worked in a restaurant which is part of a hotel. Nonetheless, such an inference would appear to be incorrect. The petitioner's evidence includes affidavits from [REDACTED] and from his son which state that the word "hotel" in Indian usage refers to a restaurant and not to a place of lodging.

According to several Internet web sites, the word "hotel" as used in India may often refer to a restaurant, especially in South India. According to one web site, "In India, the word [hotel] may also refer to a restaurant, since earlier the best restaurants were always situated next to a good hotel." [REDACTED] Hotel, <http://en.wikipedia.org/wiki/Hotel> (accessed January 12, 2005). Similarly, an Internet web site entitled [REDACTED] states, "In south of India 'Hotel' means a local restaurant serving south Indian food, mostly Thali and prepared meals." WikiTravel, *India*, <http://wikitravel.org/en/article/India> (accessed January 12, 2005). Each of the two web sites just mentioned identifies itself as an open source site, in which any user has the ability to edit pages. Therefore, the reliability of the content of those sites is uncertain. But a travel article on the Los Angeles Times Internet web site also states in a parenthetical remark "The word 'hotel' in India can mean a place to eat, not stay the night." [REDACTED] *Wealth of dishes for a pittance*, <http://www.latimes.com/travel/>

la-tr-chennai28nov28,1,4601261.story?ctrack=1&csset=true. (accessed January 12, 2005) Also, an Internet website on vegetarian restaurants, in a page on India says, "Many times the word 'hotel' is used for a restaurant." Spiritual Guides, *India, Practical Information*, <http://www.vegetarian-restaurants.net/India-Guide/IndianStates/Practical/practical.htm>. (accessed January 12, 2005).

The foregoing sources are sufficient to corroborate the statements in the affidavits submitted by the petitioner that the word "hotel" in India often refers to a restaurant.

In the August 14, 1996 letter from [REDACTED] the upper right corner of the letterhead shows telephone numbers as "Res: 515256" and "Hotel: 515086." In light of the above discussion on the usage of the word "hotel" in India, the abbreviation "Res" on the letterhead apparently refers to the owner's residence number, and is not an abbreviation for the word "restaurant." Similarly, an exterior photograph of the business attached to the Report of Investigation includes the signboard for the business, which has the words at the bottom of the sign, in English, "PHONE - SHOP - 515576, RES - 515256," apparently showing the owner's business and residence telephone numbers. The telephone number shown for the owner's residence is the same on the 1996 letter and in the photograph of the sign taken in 2000. The telephone number shown on the 1996 letter for "Hotel" of 515086 is different from that shown for "SHOP" of 515576 on the sign, but that information is not necessarily inconsistent, since the photograph of the sign was taken four years after the date of the letter.

The foregoing analysis indicates that the August 14, 1996 letter from [REDACTED] containing the word "hotel" as part of the business name makes no misrepresentation to CIS about the nature of [REDACTED] business, which is simply a restaurant, and not an overnight lodging establishment. Nonetheless, the evidence in the record conflicts on a key question concerning what Mr. S.C.P. Pillai told the investigating officials from the American Embassy during their visit to the Hotel Rajadhani on September 13, 2000.

The Report of Investigation does not indicate the language in which the statements from [REDACTED] were made. The official language of the state of Kerala, in which Hotel [REDACTED] is located, is [REDACTED] a language related to Tamil. Kerala Hub, *Kerala Language*, <http://www.kerala-hub.com/gods-own-country/language.html> (accessed January 13, 2005).

The only written statements purportedly from S.C.P. Pillai attached to the report are the handwritten notations on the bottom of the copy of the letter of August 14, 1996 from [REDACTED]. The signatures after each notation appear to match the signature of [REDACTED] on the letter. One notation is in English and says "[The beneficiary] was not a employee [sic] with this Hotel," and the other notation is apparently in a local Indian language, presumably Malayalam. Malayalam is also presumably is the language of the words on the building sign of the Hotel [REDACTED] appearing in some of the photographs in the record.

The fact that the notations on the August 14, 1996 letter appear in two languages suggests that the INS Investigator did not consider [REDACTED] to be sufficiently fluent in English to rely only on English in his communications with the officers and in his written statement. The Report of Investigation does not identify the language in which the officer conversed with [REDACTED] nor does the report state whether anyone served as interpreter. The Report of Investigation makes no reference to the presence of a taxi driver, a fact which is asserted in four of the affidavits submitted by the petitioner. In those four affidavits the affiants state that a taxi driver accompanying the officers served as an interpreter, and each affiant states that the taxi driver appeared to have limited ability in English.

The seven photographs submitted along with the Report of Investigation show exterior and interior scenes of the Hotel [REDACTED]. Some of the photographs show men who are apparently either employees or customers of the

business. But the photographs fail to show the seating area for customers. Therefore the photographs do not contain information inconsistent with the claim of [REDACTED] in his affidavit that his restaurant has seating for 50 customers.

The affidavits submitted by the petitioner in response to the derogatory information in the report, summarized in the ITD, do not address the handwritten notations on the letter discussed above. But nothing in the ITD informs the petitioner of those notations. The ITD merely quotes the section of the report which purports to summarize the statements given by [REDACTED] the Embassy officers.

The evidence in the record on each side of the issue contains omissions which render difficult an evaluation of the accuracy of the evidence. The lack of information in the Report of Investigation about the language used during the interview of [REDACTED] and about the presence of any interpreter are significant omissions. On the other hand, the petitioner's evidence submitted in rebuttal to the ITD also fails to state the language used during that investigative visit, and fails to clarify the English language ability of [REDACTED]. Furthermore, each of the five affidavits submitted by the petitioner in response to the ITD is in English, a fact which suggests that each of the affiants had a sufficient command of English to understand the contents of his affidavit. The affidavit from [REDACTED] fails to address the fact that his signature was apparently affixed to two handwritten notations at the bottom of a photocopy of his letter of August 14, 1996, nor does it offer an explanation for his alleged statement that the experience letter was given to the beneficiary because [REDACTED] was a friend to the beneficiary's father. The director failed to inform the petitioner of the handwritten notations in his ITD, although those notations would appear to be "derogatory information" covered by the regulation at 8 C.F.R. § 103.2(b)(16)(i), though the director did inform the petitioner of the contents of Mr. [REDACTED] statements. Furthermore, as an evidentiary matter, no certified English translation of the second handwritten notation, apparently written in Malayalam, was provided by the INS Investigator, therefore the English notation cannot be assumed to be an accurate translation of the Malayalam notation.

The Report of Investigation is also supported by seven photographs of the Hotel [REDACTED] but no other evidentiary documents are submitted, such as a copy of any written sworn statement signed by [REDACTED] or a copy of an investigator's notes of any verbal statements made by him.

Concerning [REDACTED] alleged statement that the beneficiary worked as an unpaid trainee as a cook for several months in the restaurant, the report indicates no explanation or inquiries about why the beneficiary, a woman who was born in Ranni, Kerala, India and, based on her high school records, was apparently raised there, would need or would desire unpaid training in South Indian cooking.

For the foregoing reasons, the record before the director, even though voluminous, lacked evidence on certain points. If no further evidence had been submitted on appeal, the case might be appropriate for a second remand to the director for the purpose of requesting supporting evidentiary documentation from the American Embassy in India and for the purpose of informing the petitioner about the derogatory information contained in the handwritten notations on the August 14, 1996 letter apparently made during the September 13, 2000 visit of the investigators to the Hotel [REDACTED]. However, further evidence submitted by counsel on appeal appears sufficient to support a decision on the instant petition.

On appeal, counsel submits copies of the petitioner's Register of Wages dated from August 1985 through March 1990, with certified English translations. 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 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 had adequate notice of the general issue concerning the beneficiary's qualifications, including notice that the Report of Investigation found that the August 14, 1996 letter from [REDACTED] fraudulently stated that the beneficiary had worked for more than three years with the Hotel [REDACTED]. The petitioner submitted five affidavits responding to the points stated in that report, as quoted in the ITD. One of the central points raised in rebuttal in the affidavits is an alleged inadequate interpretation by a taxi driver accompanying the investigators from the American Embassy. Even though the ITD restated portions of the Report of Investigation, the ITD failed to disclose important evidence supporting the report, namely that fact that two handwritten notations apparently signed by [REDACTED] were made on the copy of the August 14, 1996 letter, apparently during the investigators' visit, and that fact that one of those notations was apparently in Malayalam. The latter fact could undercut [REDACTED] claim that he was the victim of a poor interpretation by a taxi driver accompanying the investigators. If that fact had been disclosed to the petitioner, the petitioner might reasonably have sought a more detailed affidavit from [REDACTED] in rebuttal, and sought further corroborative documentation. Since the petitioner was not given adequate notice of the derogatory information against the petitioner during the proceedings before the director, the petitioner is not precluded by *Matter of Soriano*, 19 I & N Dec. 764, from submitting further relevant evidence on appeal. The copies of the Register of Wages monthly records submitted by counsel on appeal will therefore be considered.

The Register of Wages records show entries for the name of each employee, position designation, minimum rate of wages payable, total attendance units of work done, gross wages payable, total deductions, wages, date of payment and signature or thumb impression of employees. Certain other columns on the register form, including overtime work and deductions, are blank on the copies submitted in evidence. In appearance, the copies indicate that the original register of wages is an accounting book, photocopied when opened to show two pages, with employee names in the second column from the left, and other category columns covering the rest of that page and the facing page. Entries for each employee are made in the row corresponding to that employee. Each month's copy shows information for either seven or eight employees, and the appearance of the photocopies suggests that only the top portion of each set of register pages was photocopied.

The copies in evidence show the category headings on the account book form in English, with handwritten entries of words, such as employee names, in Malayalam, and with handwritten entries of numbers in Arabic numerals. A certified English translation of the copies consists of a second set of the records, with English translations handwritten above or below each Malayalam word, including the English spelling of each employee's name and the employee's job title.

The table on the following page shows information from the register of wages copies in the record. For each month in which a figure for "Total attendance" is recorded for the beneficiary, that figure is shown in the column so labeled.

		“Total attendance units of work done” (figures for beneficiary)			“Total attendance units of work done” (figures for beneficiary)
1985	August	18	1987	December	30
	September	30	1988	January	28
	October	31		February	27
	November	30		March	30
	December	29		April	30
1986	January	30		May	28
	February	29		June	24
	March	30		July	28
	April	25		August	29
	May	31		September	27
	June	28		October	29
	July	31		November	27
	August	28		December	29
	September	30	1989	January	27
	October	31		February	26
	November	30		March	27
	December	31		April*	16
1987	January	30		May	
	February	28		June	
	March	31		July	
	April	28		August	
	May	31		September	
	June	30		October	
	July	31		November	
	August	27		December	
	September	30	1990	January	
	October	31		February	
	November	30		March (two copies)	

\*April is the last month in the records with any information on the beneficiary.

The phrase “total attendance units of work done” is not explained in the register of wages copies in the record. But an Internet search by that exact phrase using the Google search engine produces links to several Indian government documents, which show the phrase in two parts: “Total Attendance/ Units of work done.” See Department of Labour, Government of Kerala, *Forms*, [www.kerala.gov.in/dept\\_labour/formwage.pdf](http://www.kerala.gov.in/dept_labour/formwage.pdf); [www.kerala.gov.in/dept\\_labour/formslip.pdf](http://www.kerala.gov.in/dept_labour/formslip.pdf) (accessed January 13, 2005). Also, a form from the website of an Indian company providing online forms indicates that “attendance” on the wage register form refers to “daily attendance.” See House of Forms, *Forms Available*, <http://www.houseofforms.com/CLS-14.pdf> (accessed January 13, 2005).

The total attendance figures shown in the Register of Wages copies in the record therefore apparently indicate the number of days worked by each employee in the given month. The records for the beneficiary therefore appear to indicate that the beneficiary worked about 28 to 30 days per month during the period indicated, except for the beginning month of August 1986, when she worked 18 days and the ending month of April 1989, when she worked 16 days.

The information on the Register of Wages copies in the record appears to be internally consistent and to be generally consistent with other evidence in the record.

For the foregoing reasons, the evidence submitted by the petitioner on appeal is found sufficient to overcome the finding of the director that the beneficiary lacked the required three years of experience as of the priority date.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has established that the beneficiary had three years of experience in the job offered as of December 3, 1996. Therefore, the petitioner has overcome this portion of the director's decision.

The director did not discuss in his decision the issue of the petitioner's ability to pay the proffered wage. But the financial evidence in the record is sufficient 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 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 December 3, 1996. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024.00 annually. On the Form ETA 750B, signed by the beneficiary on November 21, 1996, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on November 22, 1989, to have a gross annual income of \$2.2 million, to have net annual income of \$44,000.00, and to currently have eleven full-time employees.

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)].

As a means of determining the petitioner's ability to pay the proffered wage, 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 (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.*, 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 structured as an S corporation. For an S corporation, 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. The summary of the petitioner's S corporation tax returns for 1997 and 1998 shows the following amounts for ordinary income: \$50,517.00 for 1997 and \$43,403.00 for 1998. The copies of the petitioner's tax returns show the following amounts for ordinary income: \$43,403.00 for 1998, \$22,701.00 for 1999; \$41,213.00 for 2000; and \$32,452.00 for 2001. Although no tax return for 1997 was submitted in evidence, the figures for 1998 on the summary of the petitioner's returns for 1997 and 1998 are consistent with those shown on the 1998 return, therefore the figures shown on the summary for 1997 are deemed to be accurate representations of the petitioner's 1997 tax figures.

For 1997, 1998, 2000 and 2001 the petitioner's ordinary's income figures are greater than the proffered wage. Although no tax information for 1996 was submitted, the petitioner's ordinary income in 1997 of \$50,517.00 was more than double the proffered wage of \$24,024.00. Therefore that amount is considered sufficient to establish the petitioner's ability to pay the proffered wage during 1997, as well as for the final 28 days of 1996, beginning with the December 3, 1996 priority date. In 1999 the petitioner's ordinary income was \$1,323.00 less than the proffered wage, while the petitioner's ordinary income figures for the prior year of 1998 and for the succeeding year of 2000 were substantially higher than the proffered wage. The overall figures for the petitioner's ordinary income from 1997 through 2001 are sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

In addition, 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.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: \$177,126.00 for the beginning of 1998; \$246,219.00 for the end of 1998; \$375,929.00 for the end of 1999; \$207,789.00 for the end of 2000; and \$108,555.00 for the end of 2001. No tax returns for 1996 or 1997 were submitted in evidence. Nonetheless, for 1997, the net current assets for the beginning of the year 1998 are equivalent in accounting terms to the net current assets for the end of the year 1997. The amount of \$177,126.00 in net current assets for the end of 1997 is approximately seven times the amount of the proffered wage. That figure is considered sufficient to establish the petitioner's ability to pay the proffered wage during 1997, as well as during the final 28 days of 1996, beginning on the priority date of December 3, 1997. The petitioner's year-end net current assets for 1998, 1999, 2000 and 2001 are all multiples of the proffered wage, and they therefore establish the petitioner's ability to pay the proffered wage during those years. The return for 2001 was the most current return as of the petitioner's response to the

Director's request for evidence on that issue dated October 1, 2002. The petitioner's response to that RFE was received by CIS on November 5, 2002.

After a review of the petitioner's tax return evidence, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

In summary, the petitioner's evidence is sufficient to establish that the beneficiary had the required three years of experience as of the priority date, and the evidence is also sufficient 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained. The petition is approved.