



U.S. Citizenship  
and Immigration  
Services

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FILE:

[REDACTED]  
LIN-03-063-50955

Office: NEBRASKA SERVICE CENTER

Date:

04/11/2008

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

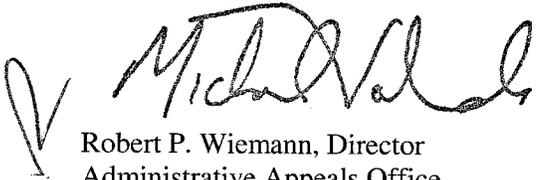
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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 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 denied 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 July 9, 2001. 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 June 1, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on December 19, 2002. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$1,233,014.00, to have a net annual income of \$148,562.99, and to currently have eleven employees. With the petition, counsel submitted supporting evidence.

In a request for evidence (RFE) dated April 18, 2003, the director requested evidence relevant to the petitioner's ability to pay the proffered wage. The director specifically requested financial information about the petitioner for the year 2002, including its income tax return. The director also noted that the petitioner

had filed other petitions, and requested evidence of the petitioner's ability to pay the proffered wages to the beneficiaries of the other petitions filed by the petitioner, in addition to the proffered wage to the beneficiary of the instant petition.

In response, counsel submitted additional evidence, including the petitioner's 2002 income tax return and other financial evidence about the petitioner relevant to 2002, as requested in the RFE.

In a decision dated August 14, 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 denied the petition accordingly.

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). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. 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 now in the record consists of the following documents: a copy of work experience certificate dated July 27, 1999 from a restaurant in Delhi, India, stating the beneficiary's experience as a cook of Indian vegetarian dishes March 3, 1996 to March 23, 2000; a letter dated September 10, 2003 from the petitioner's general manager describing the petitioner's other immigrant petitions; copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001 and 2002; copies of Form 941 Employer's Quarterly Federal Tax Returns, Illinois quarterly wage reports, and statements of quarterly deposits of the petitioner dated in 2001, 2002 and 2003; a copy of letter dated August 24, 2003 from the petitioner's accountant; copies of unaudited profit and loss statements of the petitioner dated July 1, 2002 and August 27, 2003; copies of bank statements for accounts of the petitioner for the years 2001 through 2003; copies of pay statements dated August 29, 2003 for twelve employees of the petitioner; a copy of a capacity certificate for the petitioner's premises issued by the Village of Schaumburg; color copies of photographs of the petitioner's place of business; copies of seven letters of reference from business associates of the petitioner; and a copy of a letter dated August 21, 2003 from one of the petitioner's shareholders, with attached copies of personal financial statements by himself and two other shareholders of the petitioner. The record also contains duplicate copies of many of the evidentiary documents listed above.

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.

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

In determining the petitioner's ability to pay the proffered wage, 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 June 1, 2001, the beneficiary did not claim to have worked for the petitioner. No evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next 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 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 August 14, 2003 date of the director's denial, the petitioner's tax return for 2002 was the most recent return available. Therefore the financial analysis on appeal will be from 2001, 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)
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 all beneficiaries 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).

In the instant case, the petitioner initially submitted no information on the other petitions submitted by the petitioner. In his RFE, the director informed the petitioner that CIS records showed multiple petitions filed under the petitioner's name. Similarly, in his decision denying the petition, 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.

A letter dated September 10, 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 letters. Although several 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 Obaighena*, 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] petitions filed under the name [REDACTED] and 32 petitions filed under the name [REDACTED] 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 April 27, 2001 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 September 10, 2003 from the petitioner's general manager states that the proffered wage for each of the petitioner's pending and approved petitions is \$23,000.00 and that each of those petitions is for the position of Indian specialty cook. However, a review of case files on appeal to the AAO reveals that the proffered wage in one case is \$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 petitioner for the years which is the year at issue in the instant petition, the record does not establish the petitioner's total proffered wages for

each of those years. Therefore, no calculations can be made of whether the petitioner's tax return shows net income or net current assets sufficient to pay all of the petitioner's proffered wage commitments for 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 income tax return evidence 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 several quarterly state tax reports and of several quarterly federal tax returns of the petitioner. However, the information on those reports and returns 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 of the instant petition and to the beneficiaries of other relevant petitions.

The record also contains copies of personal financial statements from three of the petitioner's shareholders. However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation at 8 C.F.R. § 204.5 allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at \*3 (D. Mass. Sept. 18, 2003).

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 decision of August 14, 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 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 what number 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 for 2002, the director added depreciation expenses to the petitioner's net income for the year. The resulting figure was less than the director's figure for petitioner's total proffered wage commitments for that 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 the year at issue in the instant petition. The evidence submitted on appeal and the assertions of counsel fail to overcome the decision of the director.

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.