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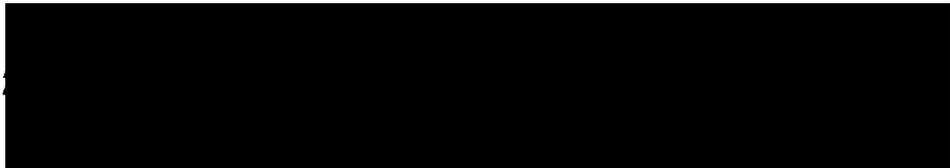
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAY 18 2005**
WAC-03-129-53161

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

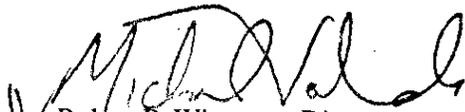
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 dismissed. The petition will be denied. The director's decision will be withdrawn in part and sustained in part.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 and denied the petition accordingly. The director also determined that the petitioner failed to prove the beneficiary is qualified for the proffered position.

On appeal, counsel submits a brief and additional evidence.

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 nature, for which qualified workers are not available in the United States.

The first issue to be discussed in this case is whether or not the petitioner established its continuing ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 21, 2001. The proffered wage as stated on the Form ETA 750 is \$10.42 per hour, which amounts to \$21,673.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to work for the petitioner since July 1994.

On the petition, the petitioner claimed to have been established in April 1982 and to currently employ 12 workers. In support of the petition, the petitioner submitted its U.S. Corporation Income Tax Return on Form 1120 for its fiscal year 1999, which covers the timeframe October 1, 1999 through September 30, 2000, with proof that it sought an extension to file its subsequent fiscal year's corporate tax return, which would cover the timeframe October 1, 2000 through September 30, 2001.¹ The petitioner also submitted a W-2 form showing the total amount of wages paid to all of its employees, internally generated payroll records highlighting the beneficiary's name and wages received while employed by the petitioner; its state quarterly wage reports for all four quarters in

¹ As the priority date of the petition is in 2001, the financial information contained in the petitioner's 1999 tax return is not necessarily dispositive of the petitioner's ability to pay the proffered wage.

2001 showing wages paid by the petitioner in the aggregate amount of \$13,871.25 to the beneficiary for that year; and its state quarterly wage reports for the first two quarters in 2002 showing wages paid by the petitioner in the aggregate amount of \$7,305.52 to the beneficiary for that year.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 30, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested signed and IRS-certified tax returns or other forms of regulatory-proscribed evidence pertaining to the petitioner's 2000 and 2001 fiscal years as well as clarification concerning the petitioning entity's identity and informational discrepancies contained in the petition and supporting documents.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the year 2000 with a letter from its certified public accountant (CPA) explaining that the employer identification number (EIN) used on the tax forms was the number assigned after its incorporation in 1994, but the EIN used on the visa petition and on W-2 forms issued to the beneficiary was the number assigned to it when it was structured as a sole proprietorship prior to 1994 that remains valid². The CPA stated that both numbers "are the representation of the [petitioner]." In a separate letter, the petitioner stated that it was a partnership prior to 1994. The petitioner also submitted IRS-generated computer print outs of its corporate tax returns that contain the same financial information as the copies it provided.

The tax return for 2000 reflects the following information:

	<u>2000</u>
Net income ³	\$7,627
Current Assets	\$32,490
Current Liabilities	\$4,844
Net current assets	\$27,646

In addition, counsel submitted copies of Form W-2, Wage and Earnings Summary, issued by the petitioner to the beneficiary in 2001 and 2002, reflecting total wages paid to the beneficiary of \$13,871.25 and \$14,413.94, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 22, 2003, denied the petition. The director stated that no corroborating evidence was provided to prove that the petitioner could utilize the different EIN numbers and that the W-2 form correlates to the petitioning entity. Additionally, the petitioner noted the discrepant information provided by the petitioner and the CPA concerning the petitioner's structure prior to 1994.

² On the visa petition, the petitioner is called Clementine's Steakhouse (Clementine's Enterprises, LTD) with an EIN [REDACTED]. The petitioner's tax returns are filed as Clementine's Enterprises Ltd. with an EIN of [REDACTED]. W-2 forms issued by the petitioner to the beneficiary utilize an EIN of [REDACTED].

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

On appeal, counsel asserts that the CPA letter adequately explained the petitioner's structure history and use of EIN numbers, but provides computer print outs from the IRS showing that both numbers have been used for the petitioning entity. Counsel also provides copies of the petitioner's articles of incorporation, bill of sale and agreement, and board resolutions, which demonstrate the evolution of the petitioner's structure. Upon review of these documents, the AAO is satisfied that both EIN numbers are representative of the petitioning entity⁴. The petitioner submits its 2001 fiscal year corporate tax return, which reflects net income of \$3,502 and net current assets of \$30,976.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002, but instead demonstrated that it paid the beneficiary \$13,871.25 and \$14,413.94 in each year, respectively. This leaves a remaining proffered wage of \$7,802.35 and \$7,259.66, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

⁴ The record of proceeding contains no derogatory information from the director.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner demonstrated that it paid wages to the beneficiary during 2001 and 2002 of \$13,871.25 and \$14,413.94 in each year, respectively, leaving it obligated to demonstrate it can pay the remaining proffered wages of \$7,802.35 and \$7,259.66 in each year, respectively⁶. In the petitioner's fiscal year 2000, the petitioner shows a net income of \$7,627 and net current assets of \$27,646, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets since its net current assets are greater than the remaining proffered wage in that year. In the petitioner's fiscal year 2001, the petitioner shows \$3,502 and net current assets of \$30,976, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets since its net current assets are greater than the remaining proffered wage in that year. The petitioner has, therefore, shown the ability to pay the proffered wage during its fiscal years 2000 and 2001, which correspond to its priority date in 2001 and subsequent year.

The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date. Thus, the portion of the director's decision pertaining to the petitioner's continuing ability to pay the proffered wage will be withdrawn.

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is May 21, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|---|
| 14. | Education | |
| | Grade School | X |
| | High School | X |
| | College | X |
| | College Degree Required | X |
| | Major Field of Study | X |

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ Since the W-2 forms are issued on a calendar basis but the petitioner's corporate taxes are filed on a fiscal year basis, the numbers cannot be precisely matched; however, the amounts suggest the figures cited.

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states "Prepare a wide variety of dishes, sauces, vegetables, meats, fish and desserts. Season and cook according to recipes and prescribed methods." Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he worked for the petitioner since July 1994. Prior to that, he indicated that he was employed as a Cook for Restaurant Bar Bogabante in Mexico from January 1987 through February 1994. The description of his work for Restaurant Bar Bogabante shows general cooking skills akin to the duties of the proffered position.

With the initial petition, the petitioner submitted a translated experience letter on letterhead for Restaurant Xicotencatl. The letter, dated October 21, 2002, is signed by Sr. [REDACTED] who states he was director of logistics for Restaurant Bar El Bogabante while the beneficiary worked there as a cook from January 1987 through June 1994.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on July 30, 2003. The director specifically requested a letter on the prior employer's letterhead showing the name and title of the person providing the information, as well as stating the beneficiary's title, duties, dates of employment experience, and hours worked per week. The director also stated that the record of proceeding contained discrepancies about the dates of the beneficiary's employment at Restaurant Bar Bogabante and requested clarification about a conflict concerning the date of the beneficiary's entry into the United States in 1992 and how it would be possible for the beneficiary to also work in Mexico until 1994.

In response to the director's request for evidence, counsel asserted that the beneficiary entered the United States on several occasions without inspection but his last entry and commencement of employment was in June 1994. Counsel stated that the date for the beneficiary's last entry into the United States should be June 1994 rather than June 1992.

The petitioner submitted additional evidence in response to the director's request for evidence, such as a translated experience letter, dated August 8, 2003, on Restaurant Bar Bogabante letterhead and signed by Mr. [REDACTED] as Manager, who states that the beneficiary was employed as a full-time cook from January 1987 through February 1994, and a translated letter, dated October 14, 2003, from a medical clinic stating that the beneficiary was treated for a hernia at the clinic in Mexico in May 1993.

The director's decision determining that the beneficiary was not qualified for the proffered position cited the contradictory evidence contained in the record of proceeding.

On appeal, counsel states that since the events being recalled in the evidence occurred over ten years ago, the "[s]light discrepancies in the dates are normal and to be expected," and that the two letters are not contradictory since the beneficiary initially "left on vacation in February 1994 expecting to return some time later," but advised his employer in late May 1994 that he was not returning. The petitioner submits a translated letter from the beneficiary's prior landlord stating that he always paid his rent on time and demonstrated capability and trustworthiness, as well as a declaration from the beneficiary that the visa petition contained an uncorrected date, and that the date of "January 1992 is incorrect and a typographical error." He also states that he once entered the United States in 1987 but returned to Mexico shortly thereafter. The beneficiary reiterates what counsel explained about the termination of his employment with Restaurant Bar El Bogabante.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO concurs with the director's determination that there are too many inconsistencies and discrepancies clouding the evidence pertaining to the beneficiary's qualifications for the proffered position. Two letters submitted by [REDACTED] are inconsistent. One letter states that he was a director of logistics for Restaurant Bar El Bogabante while the other states that he was a manager, and while the titles are similar, no explanation was provided as to why two different titles were used. One is on letterhead for a different restaurant while another is on Restaurant Bar El Bogabante letterhead. The dates referenced are also different, and while counsel and the beneficiary's plausible explanations about it being a long time ago and actual notice of employment termination clouded the ending date of employment, the remainder of the evidence contributes doubt to the totality of evidence pertaining to this issue. For example, the beneficiary's declaration submitted on appeal states that he entered the United States only once in 1987, but counsel's accompanying responsive cover letter to the director's request for additional evidence stated that the beneficiary entered the United States several times without inspection. Because the beneficiary entered the United States without inspection, no corroborating evidence was provided concerning his actual entry date(s) into the United States.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Because of the number of inconsistencies and discrepancies in the information and evidence provided, the AAO concurs with the director's determination that the totality of the petitioner's evidentiary submissions fail to establish that the beneficiary has two years of qualifying employment experience proving that he is qualified to perform the duties of the proffered position. Thus, the portion of the director's decision pertaining to the issue of the beneficiary's qualifications is affirmed.

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.