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U.S. Citizenship
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Services

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FILE: [Redacted]
LIN-03-063-51702

Office: NEBRASKA SERVICE CENTER

Date: MAY 18 2005

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 employment-based preference visa petition was initially approved on March 28, 2003 by the Director, Nebraska Service Center, who subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on August 14, 2003. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) on October 29, 2003. The matter 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 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 revoked the petition accordingly.

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 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 7, 2002. The proffered wage as stated on the Form ETA 750 is \$21,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. On a Form G-325, Biographic Information, also signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner¹.

On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$1,233,014 (as of July 2002), and to currently employ 11 workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2001, unaudited profit and loss statements for the first half of 2002, quarterly tax statements demonstrating total wages paid by the petitioner for the second and third quarters in 2002, and a statement of deposits and filings indicating wages paid for the first quarter in 2002.

¹ The beneficiary indicated he worked as a chef at the [REDACTED] at [REDACTED]. The ETA 750A does not indicate that the proffered position's work location would be anywhere other than at the petitioner's address.

The petition was approved on March 28, 2003. Upon further scrutiny and in accordance with 8 C.F.R. §§ 204.5(g)(2) and 205.2, the director issued a notice of intent to revoke the approved petition on August 14, 2003. The director noted the following:

[Citizenship and Immigration Services (CIS)] records show that the petitioner has filed a total of 26 immigrant petitions. Of these petitions six beneficiary [sic] have immigrated to the United States based on the petitions and one petition was rejected. The petitioner's 2001 income tax return shows an income of \$33,068. Clearly this amount is insufficient to pay 19 additional employees a salary of \$23,000 per year. The petitioner also shows that a total of \$195,169 was paid in 2001 for salaries and wages. In order to pay the additional 19 immigrants the petitioner needs to show \$437,000 available to pay wages. The petitioners [sic] available \$33,068 is clearly insufficient to meet the [sic] already committed to payroll.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 2001² and 2002. The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ³	\$33,068	\$76,905
Current Assets	\$193,919	\$304,653
Current Liabilities	\$7,024	\$0
Net current assets ⁴	\$186,895	\$304,653

In addition, counsel submitted copies of the petitioner's checking account statements for the period from 2001 through 2003 and the petitioner's quarterly wage reports for 2001, 2002, and the first two quarters of 2003. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. However, a paycheck made out to the beneficiary from the petitioner in the amount of \$1,926.35 in August 2003 also showed that he earned \$8,100 so far in that year.

The petitioner also submitted a letter from [redacted] the petitioner's certified public accountant, stating that depreciation is not a cash expense so the petitioner's tax returns "show lower profits but the actual profit (Cash Flow after taxes.) available for distribution or expenses is much higher..." [redacted] provided net profit information prior to depreciation for 2000, 2001, and 2002.

The petitioner also submitted copies of recommendation letters from various public and private sector entities stating that the petitioner's restaurant in Chicago is large and prestigious, along with photographs and an occupancy permit for its [redacted] building indicating it can hold over 1000 patrons.

Finally, the petitioner submitted a letter from [redacted] one of three shareholders of the petitioning entity, who states that he and his two partners have substantial personal assets and because their restaurant investment has done so well, they intend to open additional facilities. Attached to that letter are copies of personal financial statements of each shareholder.

² Evidence preceding the priority date in 2002 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁴ End of year net current assets.

In his response to the director's notice of intent to deny, counsel urged the director to consider the petitioner's resources prior to depreciation and the petitioner's reputation and standing in the community. Counsel asserted that the director's policy is to consider total wages paid, depreciation, and replacement of employees. Counsel also stated various numbers for petitions with priority dates and/or approvals in 2001 and 2002, stating at one point that 13 petitions were approved in 2001, two were approved in 2002, and eight had priority dates in 2001; and seven or eight approved petitions should be considered replacements because the immigrants left their jobs with the petitioner after acquiring lawful permanent resident status. Counsel's use of numbers of approved petitions changed from paragraph to paragraph and was difficult to follow. No specific employee was identified as terminated and replaced by the intended beneficiary.

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 October 29, 2003, revoked the petition. The director detailed 12 additional petitions with 2001 priority dates along with three additional beneficiaries who immigrated in 2001, 2002, and 2003 based upon previously approved petitions. The director also noted several petitions pending with 1998 and 2002 priority dates and two others filed but denied. Thus, the director determined that the petitioner was required to demonstrate a continuing ability to pay the proffered wage of 20 immigrants, premised upon the same proffered wage as the instant petition, but could not do so from its net income with depreciation added back for 2001 or 2002.

On appeal, counsel asserts that the portability provisions of the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, apply to this petition and that according to a memorandum issued by [REDACTED] Acting Associate Director for Operations of CIS, dated August 4, 2003, titled "Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of [AC21]," the petition is still approvable since the beneficiary was entitled to change jobs after the pendency of his application to adjust status to lawful permanent resident on Form I-485 for over 180 days. He submits a copy of the [REDACTED] memo along with a letter from [REDACTED] Manager of [REDACTED] located in Rockford, IL and dated November 14, 2003, offering the beneficiary employment as a cook in its Indian restaurant at an annual salary of \$23,000 with the same duties as those listed on the petitioner's ETA 750A, Item #13.

In a brief submitted on appeal, counsel asserts that the director misstated the number of approved petitions because some immigrants were denied entry by overseas consulates. Also, counsel states that the director erred in not considering all wages paid to other employees since the majority of revoked petitions are not new positions but would replace existing positions, and that the beneficiary has actually been paid wages since 2003 when he received employment authorization. Counsel states that CIS should not have revoked multiple petitions since the director noted that the petitioner had funds to pay multiple salaries with its net income plus depreciation. Counsel prepares a list of receipt numbers and factual details asserted about the beneficiaries of petitions referenced by the director stating that a total of eleven petitions are at issue that were pending and had a priority date of 2002 or before. Later in his brief, counsel states that in the year 2001, the petitioner only had responsibility for eight petitions, and in 2002, eleven petitions, and none should have been revoked by CIS. Counsel states that every immigrant approved by CIS has been paid wages which is established by the petitioner's quarterly wage reports.

The petitioner resubmits previously submitted evidence and a paystub and a quarterly wage report for the first quarter in 2003 highlighting the name, [REDACTED]. The petitioner also submits an unaudited profit and loss statement for the period January 1 through August 27, 2003 and the petitioner's current bank statements. A copy of a letter from the petitioner's representative paraphrasing counsel's brief was also submitted on appeal.

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

At the outset, counsel misconstrues the application of AC21 to the instant petition. AC21 amended the Act enabling qualified beneficiaries to retain eligibility for an employment-based preference visa if they met certain eligibility requirements in the instance of lengthy adjudications and changed circumstances during a petition's pendency. Those eligibility requirements under section 106(c) of AC21 are that (a) the I-485, Application for Adjustment of Status, must be pending (unadjudicated) for 180 days or more; and (b) the new job must be the same as, or similar to, the job described in the labor certification and I-140 petition. The crux of a portability analysis is the length of adjudication of an I-485. However, the pendency timeframe of the beneficiary's I-485 is irrelevant since to utilize the portability provisions, a beneficiary needs an approved employment-based visa. The petition was revoked on October 29, 2003, and the beneficiary received a new offer of employment on November 14, 2003. Thus, in this case, there was no approved employment-based visa at the time of the beneficiary's new job offer and thus the portability provisions do not apply.

The unaudited financial statements that counsel submitted with the petition and on appeal are not persuasive evidence. 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.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's reliance on the assets of the petitioner's three shareholders is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 2002. The petitioner highlighted the name, [REDACTED], and claimed to be paying wages to that individual in 2003; however, nothing in the record of proceeding indicates that [REDACTED] is the same person as the beneficiary. Additionally, the amount of wages paid to [REDACTED] was only \$2,100, which is too nominal to change the outcome of this decision. On the Form G-325, Biographic Information, the beneficiary does not indicate that he uses the name [REDACTED]. The beneficiary claims to have the social security number of 003-92-8423 assigned to him, which is also used by the petitioner to correlate to [REDACTED]. However, absent corroborating evidence explaining the use of the surname [REDACTED] for the beneficiary, the AAO will not determine that [REDACTED] and the beneficiary are the same person. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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, contrary to both the director's erroneous reasoning stated in his decision and counsel's assertions⁵. 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.

⁵ Counsel asserts in response to the director's notice of intent to deny that the director's policy is to consider wages, depreciation, and replacement of employees without citation to a published decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Additionally, even if the director set forth an erroneous policy, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. The AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner's net income in 2002 was \$76,905, which is greater than the proffered wage of \$21,000, and would suffice to illustrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date if only one or a few petitions were filed or approved in 2002.

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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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's net current assets during the year in question, 2002, was \$304,653, which is greater than the proffered wage and could illustrate the petitioner's continuing ability to pay the proffered wage if not too many other petitions were pending or approved in that same year.

The petitioner's net current assets are greater than its net income, so the AAO will utilize the petitioner's net current assets in its analysis of the petitioner's continuing ability to pay the proffered wage in 2002. Presuming that the petitioner's other petitions involved proffered wages similar to the proffered wage in the instant petition, which is \$21,000, then the petitioner could support salaries of thirteen employees in 2002⁷. Counsel's discussion of petitions pending, approved, revoked, rejected, or otherwise disposed of is confusing and does not bring clarity to the issue. Also, while counsel suggests that some of those beneficiaries of approved petitions did not obtain permission to enter the country, the fact remains that the petitioner has valid employment-based visas to offer beneficiaries and is obligated to pay proffered wages premised upon them. The AAO has accessed an internal CIS database and determined that the petitioner has a total of fifteen pending or approved petitions, including the instant petition, in 2002. Thus, the petitioner must illustrate an ability to pay the proffered wages of fifteen intended beneficiaries of sponsored immigrant visas in 2002 in addition to the instant petition⁸. The petitioner

⁶ 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.

⁷ The AAO notes that the petitioner has offered wages up to \$35,000 in some of its other pending petitions.

⁸ While counsel disagrees with the number of pending petitions, the record of proceeding in the instant matter does not contain enough information to suggest that CIS records are incorrect. The petitioner also failed to 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

does not have the net income or net current assets to cover the salaries of fifteen pending or approved petitions in 2002. Fifteen times \$21,000 is \$315,000, which is greater than the petitioner's net income of \$76,905 or its net current assets of \$304,653 in 2002, and is based on a salary less than salaries actually being offered to other beneficiaries.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner's net income and net current assets are insufficient to demonstrate its ability to pay the proffered wage for its total pending and approved petitions. Thus, the petitioner has not shown the ability to pay the proffered wage during 2002.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2002. While counsel suggests that CIS should consider the petitioner's reputation, he has not provided any legal authority for how recommendation letters should be utilized to find that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. Likewise, counsel advised that the proffered position is not new and will replace workers who have left the petitioner. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that existing positions involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The assertions of counsel do not constitute evidence. *Matter of Obaignena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director had good and sufficient cause to revoke the petition under the circumstances at the time of his adjudication since the CIS internal database indicated that the petitioner had more petitions pending than it could afford to handle financially. Thus, the director's revocation decision was correct.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

visa petition process or for whom the petitioner has withdrawn its job offers.