

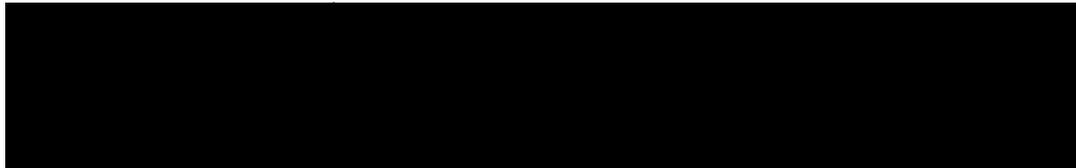


U.S. Citizenship
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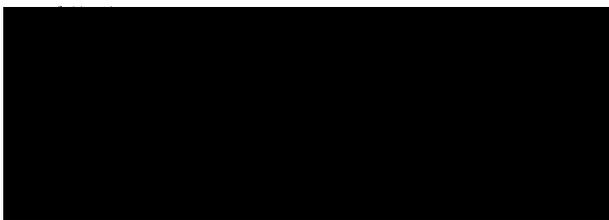
Date: **NOV 22 2005**

IN RE: Petitioner:
Beneficiary:



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 Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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.

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 granting 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 April 5, 1999. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which equals \$20,800 per year.

On the petition, the petitioner stated that it was established on October 24, 2001¹ and that it employs six workers. The petition states that the petitioner's gross annual income is \$270,000 and that its net annual income is \$25,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The Form ETA 750 identifies the petitioner and prospective employer as Veena's Investment Incorporated dba Sindhu Indian Cuisine of ██████████ East Lansing, Michigan. The Form ETA 750 identifies the petitioner and prospective employer as Sindhu Indian Cuisine, also of ██████████ Road. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in East Lansing, Michigan.

¹ That statement conflicts with the petitioner's submission of the Form ETA 750 on April 5, 1999.

In support of the petition, the petitioner submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the Director, Nebraska Service Center, on January 26, 2004, requested evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted a Schedule C from the 2000 Form 1040 U.S. Individual Income Tax Return of Dhruba Shrestha. The petitioner also submitted portions of the 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation of Veena's Investments, Incorporated, of [REDACTED] Michigan.²

The 2000 Schedule C shows that a restaurant at [REDACTED] in Saginaw, Michigan called Sindhu Indian Cuisine was then owned by [REDACTED] LC, which was owned, at least in part, by Dhruba Shrestha.³ That Schedule C shows that the restaurant passed ordinary income of \$15,120 to Dhruba Shrestha during that year.

The 2001 tax return shows that during that year Veena's Investments, Incorporated of Okemos, Michigan declared a loss of \$40,180.60. The corresponding Schedule L shows that at the end of that year that company's current liabilities exceeded its current assets.

The 2002 tax return shows that during that year Veena's Investments, Incorporated of Okemos, Michigan declared ordinary income of \$28,201.74. The corresponding Schedule L shows that at the end of that year that company's current liabilities exceeded its current assets.

The 2003 tax return shows that during that year Veena's Investments, Incorporated of Okemos, Michigan declared ordinary income of \$30,119.49. The corresponding Schedule L shows that at the end of that year that company's current liabilities exceeded its current assets.

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 May 14, 2004, denied the petition.

On appeal, counsel submits (1) the 1998 and 1999 Form 1065, U.S. Returns of Partnership Income of Shindhu India Cuisine, LLC, of 4790 S. Hagadorn Road, Suite 132, East Lansing, Michigan, (2) the complete 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation of Veena's Investments, Incorporated of 2083 Sheldrake Avenue in Okemos, Michigan, (3) the 2000 and 2001 bank statements of

² This address is not the address given on the Form I-140 petition and the ETA 750 for the instant petitioner. It is listed as the beneficiary's home address on the Form I-140 petition.

³ In fact, use of the Schedule C suggests that the restaurant was solely owned. It also, suggests, however, that the restaurant was owned as a sole proprietorship, rather than an LLC. Although reporting the results of operations of an ostensible LLC on a Schedule C was apparently incorrect, this office does not find that discrepancy material to the instant case, as the restaurant that reported on that Schedule C has not been shown to be the petitioner in this case, as shall be discussed below.

██████████ LLC of ██████████ in Saginaw, Michigan, (4) a Schedule C from the 2001 Form 1040 U.S. Individual Income Tax Return of Dhruba Shrestha. That Schedule C shows that Shrestha Investments LLC dba Sindhu Indian Cuisine, of 3845 Morningside Lane in Saginaw, Michigan declared a loss of \$68,647 as its net profit during that year.

The partnership returns show that during 1998 and 1999, ██████████ and ██████████ held the petitioning restaurant as a limited liability company and that the business was started on January 12, 1996.⁴ During those years the petitioner reported taxes pursuant to the calendar year and accrual accounting.

During 1998 the restaurant returned ordinary income of \$19,810. At the end of that year the restaurant's current liabilities exceeded its current assets.

During 1999 the restaurant returned ordinary income of \$23,784. At the end of that year the restaurant had current assets of \$18,960 and current liabilities of \$12,118, which yields net current assets of \$6,842.

In the brief, counsel argues that the petitioner's net income, depreciation deductions, and its bank balances demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner in this case is Veena's Investment Incorporated dba Sindhu Indian Cuisine of ██████████, Michigan. That is the entity that submitted the Form I-140 petition on April 28, 2003, and that is the address where the petitioner indicated, on the Form I-140 and the Form ETA 750, that it intends to employ the beneficiary.

Both the petitioner's name and its tax returns demonstrate that it is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner and the other corporations for which data was submitted shall not be considered in determining the ability of the petitioner to pay the proffered wage.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and

⁴ If the petitioner is asserting that the petitioner is the same company as Shindhu India Cuisine, LLC, then the statement that the business was started on January 12, 1996 appears to conflict with the statement, on the Form I-140 petition, that the petitioner was established on October 24, 2001.

buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.⁵

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁶ 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 reported on its tax returns. Finally, in the instant case, the bank statements submitted are not those of the petitioner, Veena's Investment Incorporated dba Sindhu Indian Cuisine of [REDACTED], Suite [REDACTED], Michigan.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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.

⁵ Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the very real and, in some instances, very large cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Even if this office were inclined to accept counsel's argument pertinent to the depreciation schedule, that scenario would be unacceptable.

⁶ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 total 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$20,800 per year. The priority date is April 5, 1999.

The petitioner submitted no reliable evidence pertinent to the finances of Veena's Investment Incorporated dba Sindhu Indian Cuisine of [REDACTED] Suite [REDACTED]g, Michigan, the petitioner in this case, during 1999. During that year a restaurant at the petitioner's present location was owned as a limited liability company. Today's decision will consider the income of that restaurant in the determination of the petitioner's ability to pay the proffered wage, and will address below issues suggested by the change in ownership.

During 1999 Sindhu India Cuisine, LLC reported ordinary income of \$23,784. That amount is greater than the annual amount of the proffered wage. Assuming that Sindhu India Cuisine, LLC, of Okemos, Michigan, filed the Form ETA 750 in this matter, and that the petitioner is the true successor of Sindhu India Cuisine, LLC, as will be discussed below, the petitioner has demonstrated the ability to pay the proffered wage during 1999.

The petitioner submitted a 2000 Schedule C showing income and expenses of Shrestha Investments, LLC, dba Sindhu Indian Cuisine, at [REDACTED] in Saginaw, Michigan, belonging, at least in part, to Dhruva Shrestha. The evidence in the record is insufficient to suggest that that this other Sindhu Indian Cuisine, with the same dba name but at a different address and under different ownership, is the same entity as the petitioner.⁷ The petitioner submitted no evidence relevant to its ability to pay the proffered wage during 2000. Therefore, the petitioner has not demonstrated its ability to pay the proffered wage during 2000.

⁷ Even if they had sequentially operated at the same address and had more similar names, the fact that Shrestha

The petitioner submitted the 2001, 2002, and 2003 tax returns of Veena's Investments, Incorporated, of Okemos, Michigan. Notwithstanding the name and address discrepancies, for the purposes of today's decision this office finds that company to be identical with the petitioner, Veena's Investment Incorporated dba Sindhu Indian Cuisine of [REDACTED] Road, Suite [REDACTED], East Lansing, Michigan.⁸ The amounts from those tax returns will be considered in determining the petitioner's ability to pay the proffered wage.

During 2001 Veena's Investments, Incorporated of Okemos, Michigan declared a loss of \$40,180.60. The petitioner is unable to show the ability to pay any portion of the proffered wage out of that loss. At the end of that year Veena's Investments, Incorporated of Okemos, Michigan had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of those negative net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

During 2002 Veena's Investments, Incorporated of Okemos, Michigan declared ordinary income of \$28,201.74. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 Veena's Investments, Incorporated of Okemos, Michigan declared ordinary income of \$30,119.49. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis.

The record suggests additional issues, however, that were not addressed in the decision of denial. The Form ETA 750 in this matter was submitted on April 5, 1999, although the petitioner stated on the Form I-140 petition and on the 2001, 2002, and 2003 tax returns in the record that it incorporated on October 24, 2001. Clearly, the petitioner has changed since the priority date.

When a petitioner is substituted for the original petitioner, the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

Investments, LLC is a limited liability company and the petitioner is a corporation would clear that a change in ownership had occurred. In that event, the petitioner would be obliged to demonstrate that the petitioner is the true successor of Shrestha Investments pursuant to the meaning of that phrase in *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981), discussed below.

⁸ If the petitioner seeks to overcome today's decision on motion, it should address the name and address discrepancies.

Because the decision of denial was not based, even in part, on the issue of successorship, the petitioner has not been accorded an opportunity to address that issue. Today's decision will not be based, therefore, in whole or in part, on that issue. If the petitioner attempts to overcome today's decision on motion, however, the petitioner is instructed to address the issue of successorship and the discrepancies in the addresses provided.

As to the various addresses of the various entities for which financial information was provided, if the petitioner is maintaining that those entities are synonymous with the instant petitioner, or that the instant petitioner is their successor-at-interest, it should explain how that can be, in view of the various addresses at which the evidence purports to show that they do business. If any of those other entities is neither identical with or the predecessor of the instant petitioner, the petitioner should explain why financial data pertinent to unrelated companies was submitted in this case.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.