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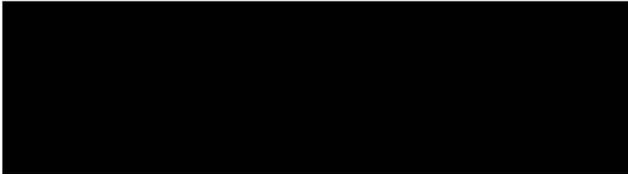
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship and Immigration Services

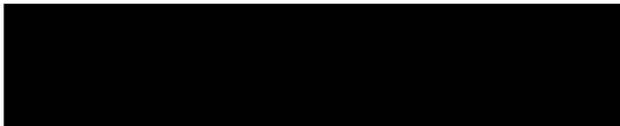
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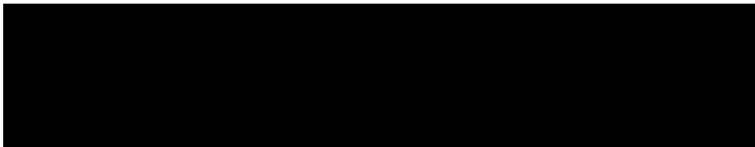
FILE: LIN 04 240 51359 Office: NEBRASKA SERVICE CENTER Date: DEC 29 2006

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting 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 food service manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The acting 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The acting director 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 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also

demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$19.75 per hour, which equals \$41,080 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

The Form I-140 visa petition in this matter was submitted on September 15, 2004. On the petition, the petitioner stated that it was established during 1996 and that it employs seven workers. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Schaumburg, Illinois.

The Form ETA 750B instructs the beneficiary to,

List all jobs held during the last three (3) years [and] any other jobs related to the occupation for which the alien is seeking certification . . . .

On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked 40 hours per week for the petitioner since May 2000. The beneficiary also claimed to have worked as an assistant manager at the Sahib Restaurant in New York, New York from May 1979 to December 1980 and as an assistant manager at the Gandhara Restaurant in Chicago, Illinois from November 1983 to May 1984.

The beneficiary listed no other employment.

With the petition the petitioner submitted, as evidence of its continuing ability to pay the proffered wage beginning on the priority date, (1) the 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Return for an S Corporation of [REDACTED] Incorporated of Chicago Illinois, (2) 2002 and 2003 W-2 Wage and Tax Statements, and (3) monthly statements pertinent to the petitioner's checking account.

The tax returns submitted show that [REDACTED] is a corporation, that it is owned by [REDACTED] and [REDACTED] that it incorporated on July 15, 1996, and that it reports taxes pursuant to accrual convention and the calendar year.

During 2001 [REDACTED] declared a loss of \$70,467 as its ordinary income. The corresponding Schedule L shows that at the end of that year the corporation's current liabilities exceeded its current assets. During that year the petitioner paid total salaries and wages of \$264,162.

During 2002 [REDACTED] declared a loss of \$112,332 as its ordinary income. The corresponding Schedule L shows that at the end of that year the corporation's current liabilities exceeded its current assets. During that year the petitioner paid total salaries and wages of \$274,765.

During 2003 [REDACTED] declared a loss of \$175,761 as its ordinary income. The corresponding Schedule L shows that at the end of that year the corporation's current liabilities exceeded its current assets. During that year the petitioner paid total salaries and wages of \$325,742.

The W-2 forms submitted show that [REDACTED] Incorporated dba [REDACTED] India Restaurant paid the beneficiary \$16,067 during 2002 and \$18,000 during 2003. This office gathers from those forms that [REDACTED] Incorporated is the petitioner in this matter.<sup>1</sup>

As evidence of the beneficiary's qualifying employment experience the petitioner submitted an affidavit dated August 3, 2004 from a person who states that he was the head chef at the Gandhara Restaurant in Chicago until it went out of business in December 1985. That affidavit further states that the beneficiary worked as assistant manager at that restaurant from November 1983 to May 1984.

The petitioner also submitted an affidavit dated July 16, 2004 from a person who states that he was the head chef at the Sahib Restaurant in New York. The affiant states that the beneficiary worked as assistant manager at that restaurant from May 1979 to December 1980.

Finally the petitioner also submitted an affidavit from another person who claimed to have been employed at the Sahib Restaurant in New York. That affidavit states that the restaurant closed during January of 1985.

The acting director denied the petition on May 3, 2005, finding 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 that the evidence submitted did not demonstrate, in accordance with the requirements of 8 C.F.R. § 204.5(i)(3)(ii), that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel cited the petitioner's gross receipts and total wage and salary expense as evidence of the petitioner's ability to pay the proffered wage during the salient years. Counsel asserted that the proffered position is not a new position, and that the salaries of employees who have left or intend to leave the petitioner's employ would be used to pay the proffered wage. Counsel also asserted that the evidence previously submitted demonstrates that the beneficiary has the requisite employment experience.

Subsequently, to supplement the appeal, counsel submitted (1) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the first, second, third, and fourth quarters of 2004 and the first quarter of 2005, (2) Illinois Employer's Contribution and Wage Reports for the first, second, and third quarters of 2004, and (3) a brief.

The petitioner's Illinois wage reports show that it employed between 25 and 27 workers<sup>2</sup> during the first three quarters of 2004 including the beneficiary. That report shows that the petitioner paid the beneficiary \$4,500 during each of those three quarters.

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<sup>1</sup> This office also notes that the taxpayer identification number shown on the Form I-140 as that of the petitioner is the same as that shown on the tax returns of [REDACTED] further corroborating that they are the same entity.

<sup>2</sup> Although this information differs markedly from the information provided on the Form I-140 petition, that the petitioner employs seven employees, this office does not find this discrepancy to be relevant to any material issue in this case.

In the brief counsel reiterated his arguments pertinent to the wages paid to recent and current employees, the petitioner's gross receipts and its total annual salary expense. Counsel also asserted that the petitioner's bank statements demonstrate its ability to pay the proffered wage.

Still further, counsel asserted that the W-2 forms submitted show that the petitioner paid the beneficiary less than the full amount of the proffered wage because the beneficiary was working only part-time during the years covered by those W-2 forms.<sup>3</sup>

As to the beneficiary's qualifying employment experience counsel stated that the beneficiary was unable to obtain employment verifications from his previous employers because both have gone out of business.

Counsel also provided an additional employment letter. That letter, dated May 2, 1979, is on the letterhead of the [REDACTED] Restaurant in Karachi, Pakistan. That letter states that the beneficiary worked as an assistant manager for that restaurant from March 1977 to April 1979. Counsel stated that this additional employment verification letter also demonstrates that the beneficiary has the requisite qualifying employment experience.

Initially, this office notes that the beneficiary was requested, on the Form ETA 750B, to list all of the jobs he had ever held that were related to the proffered position, food service manager or assistant manager at a restaurant. In response he listed employment as assistant manager at two restaurants in the United States. Because both of those restaurants are no longer in operation, demonstrating that the beneficiary did, or did not, work at those restaurants is difficult.

In response to a challenge to the sufficiency of his employment verification documents the beneficiary submitted, on appeal, a third employment verification letter. That third letter states that the beneficiary worked for almost precisely two years as the assistant manager of a restaurant in Pakistan, notwithstanding that the beneficiary indicated, on the Form ETA 750B, that he had held no such position.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The acting director found the beneficiary's previous employment verification letter unpersuasive because the previous employers did not issue them as required by 8 C.F.R. § 204.5(l)(3)(ii). In an effort to overcome that insufficiency the petitioner has provided evidence of a third assistant manager/food service manager position. The petitioner did so after it had already submitted the beneficiary's statement, signed under penalty of perjury,

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<sup>3</sup> In the brief counsel stated that the decision of denial was based, in part, on the petitioner's failure to pay the beneficiary the full amount of the proffered wage. Counsel apparently misunderstands the acting director's reference to the W-2 forms provided. Wages the petitioner paid to the beneficiary during a given year show the petitioner's ability to pay that amount during that year. They do not, in themselves, demonstrate that the petitioner was able to pay any additional wages during that year nor that it was not able to do so. Further, they do not demonstrate that the petitioner was able to pay any portion of the proffered wage during previous or subsequent years.

which specifies that the beneficiary had held two, and only two, previous positions as an assistant manager/food manager. In view of this inconsistency, this office does not find the beneficiary's claims of qualifying employment to be persuasive. The petition was correctly denied on that basis and that basis for denial has not been overcome on appeal.

The remaining issue is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date in accordance with 8 C.F.R. § 204.5(g)(2).

Counsel's citation of the petitioner's total wage and salary expense as an index of its ability to pay the proffered wage is unpersuasive. The regulation at 8 C.F.R. § 204.5(g)(2) makes an exception to the necessity of a petitioner demonstrating, with copies of annual reports, federal tax returns, or audited financial statements, its ability to pay the proffered wage, if the petitioner is able to demonstrate that it employs 100 or more workers. No such exception is included in that regulation for companies with an annual payroll expense of approximately \$300,000 annually and none will be construed. That the petitioner was able to pay its expenses during the salient years does not demonstrate the ability to pay any additional wages.

Counsel stated that the proffered position is not a new position, but has previously existed. Counsel also states that the petitioner is able to pay the proffered wage with the wages of previous or current employees.

The purpose of asking whether the proffered position is a new position is, in fact, to determine whether the wages currently paid to the incumbent in that position might be used to pay the proffered wage. In this case, the beneficiary appears to be employed in the proffered position, at least part-time.<sup>4</sup>

Counsel's argument is unconvincing. If the petitioner had paid wages during a given year to an employee that it proposed to replace with the beneficiary as soon as he became available, then those wages might be shown to have been available to pay the proffered wage. That is, at any point the petitioner would have replaced the incumbent with the beneficiary and paid the incumbent's wages to the beneficiary.

In the instant case the petitioner does not assert that it would have replaced an identified employee or employees who perform the proffered position with the beneficiary. Rather, the petitioner appears to argue that because it was previously paying wages to various employees in various positions, some of whom have or will leave the petitioner's employ, their wages are, or will soon be, at its disposal. That the petitioner has a periodic turnover of employees in its business does not demonstrate that it has funds at its disposal to pay additional wages toward the proffered position.

The assertion that the petitioner could have replaced one or more unidentified employees is especially unconvincing in the instant case, where the petitioner has employed the beneficiary since 2000. Because the petitioner is already employing the beneficiary it is unable to demonstrate that, if it were able to employ the beneficiary, it would replace its current assistant manager and his wages would be available to pay the proffered wage.

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<sup>4</sup> In the brief counsel stated that the beneficiary only worked for the petitioner part-time. On the Form ETA 750B, however, the beneficiary indicated that he worked full-time for the petitioner from May 2000 until at least April 25, 2001.

Even if the petitioner had demonstrated that it wished to replace a specific, identified employee who worked as its assistant manager with the beneficiary, that would be insufficient absent some explanation of that other employee's reason for leaving. The purpose of the instant visa category is to provide workers for positions for which U.S. workers are unavailable. If the petitioner is replacing a U.S. worker with the beneficiary, the petitioner is obliged to demonstrate the reason the incumbent employee is leaving the position. The petitioner must demonstrate that it is not replacing a U.S. worker merely out of its preference for a foreign worker.

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.<sup>5</sup> 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.

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 established that it paid the beneficiary \$16,067 during 2002 and \$18,000 during 2003.

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, 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. 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).

Counsel's citation of the petitioner's gross receipts as an index of its ability to pay the proffered wage is unpersuasive. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, as was explained above, 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

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<sup>5</sup> 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 during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>6</sup> shown on lines 16(d) through 18(d). 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.

The proffered wage is \$41,080 per year. The priority date is April 26, 2001.

The petitioner did not establish that it paid any wages to the beneficiary during 2001 and must demonstrate the ability to pay the entire amount of the proffered wage during that year. During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. 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 demonstrated the ability to pay the proffered wage during 2001.

The petitioner established that it paid any the beneficiary \$16,067 during 2002 and must demonstrate the ability to pay the \$26,013 balance of the proffered wage during that year. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds

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<sup>6</sup> The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner established that it paid any the beneficiary \$18,000 during 2003 and must demonstrate the ability to pay the \$23,080 balance of the proffered wage during that year. During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner demonstrated that it paid the beneficiary \$13,500<sup>7</sup> during 2004. Ordinarily the petitioner would be obliged to demonstrate that it was able to pay the \$27,580 balance of the proffered wage. The petition in this matter, however, was submitted on September 15, 2004. On that date the petitioner's 2004 tax return was unavailable. The service center requested no additional evidence. Under these circumstances the petitioner is not obliged to show its ability to pay the proffered wage during 2004.

The petitioner has not demonstrated that it was able to pay the proffered wage during 2001, 2002, or 2003. Therefore the petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2). Further, the evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience in the proffered position. For both reasons the petition may not be approved.

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.

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<sup>7</sup> The petitioner's Illinois wage reports show that it paid the beneficiary \$4,500 during each of the first three quarters of 2004.