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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **SEP 26 2006**  
WAC 04 154 53447

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 that it failed to demonstrate that the beneficiary is qualified for the proffered position. The director denied the petition accordingly.

On appeal counsel submitted 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.

8 C.F.R. § 204.5(g)(2) states:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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. See 8 C.F.R. § 204.5(d) and 8 C.F.R. § 204.5(g)(2). 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 for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$14 per hour, which equals \$29,120 per year. The Form ETA 750 states that the proffered position requires two years of experience in the job offered.

On the petition, the petitioner stated that it was established during 1997 and that it employs four workers. The petition states that the petitioner's gross annual income is \$104,323 and that its net annual income is \$24,132. On the Form ETA 750, Part B, signed by the beneficiary on July 2, 2003, the beneficiary claimed to have worked for the petitioner as a chef since November 1997. The beneficiary did not claim any other qualifying experience. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Van Nuys, California.

In support of the petition, counsel submitted (1) a copy of the petitioner's owner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, (2) a statement pertinent to a credit line held by the petitioner, and (3) documents pertinent to ownership of real estate. The documents submitted with the petition did not include any evidence pertinent to the beneficiary's qualifications for the proffered position.

The tax returns submitted show that during 2001 and 2002 Mohammed S. Rahman owned the petitioner as a sole proprietorship.

The Schedule C included with the petitioner's owner's 2001 tax return shows that the petitioner paid no wages during that year and returned net income of \$12,429. The petitioner's owner declared adjusted gross income of \$12,725, including all of the petitioner's profit. During that year the petitioner's household had five members.

The Schedule C included with the petitioner's owner's 2002 tax return shows that the petitioner paid no wages during that year and returned net income of \$24,132. The petitioner's owner declared adjusted gross income of \$24,838, including all of the petitioner's profit. During that year the petitioner's household had four members.

The credit line statement is dated April 18, 2002 and shows that the petitioner then had a \$20,000 credit line with a \$17,222 balance.

The real estate documents include 2001 and 2002 mortgage interest statements, and a 2002 tax statement. Those documents show that the petitioner's owner owns at least one real property of an unidentified type and location. The 2002 mortgage interest statement shows a principal balance of \$243,101.10.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification, the California Service Center, on January 10, 2005, requested, *inter alia*, additional evidence pertinent to that ability. The service center noted that the petitioner had submitted evidence pertinent to 2001 and 2002, but should submit evidence for 2003 and 2004. The service center also specifically requested a statement of the petitioner's owner's family's recurring monthly expenses.

In addition the service center requested evidence that the beneficiary has the requisite employment experience as stated on the Form ETA 750. Finally, the service center requested that the petitioner state whether the beneficiary was currently working for it. If so, it was instructed to state the date upon which he began to work for the petitioner and to provide Form W-2 Wage and Tax Statements for each year it had employed the beneficiary.

In response, counsel submitted (1) a copy of the petitioner's owner's 2003 Form 1040 U.S. Individual Income Tax Return, (2) a budget statement of the petitioner's owner's recurring monthly expenses, a 2004 W-2 form, (3) copies of the petitioner's California Form DE-6 quarterly wage reports, and (5) a letter dated February 7, 2005 from the petitioner's owner.

The Schedule C attached to the 2003 return shows that the petitioner paid no wages during that year but returned a net profit of \$24,372. The Form 1040 U.S. Individual Income Tax Return indicates that during that year the petitioner's owner declared adjusted gross income of \$25,050 including all of the petitioner's profit. The petitioner's household consisted of four people during that year.

The budget submitted shows that the petitioner's owner requires \$2,386 to pay his family's recurring monthly expenses, or a total of \$28,632 per year. The 2004 W-2 form shows that the petitioner paid wages of \$8,960 to the beneficiary during that year.

The petitioner's Form DE-6 wage reports submitted cover the third and fourth quarters of 2004 and show that the petitioner employed four workers during each of those quarters including the petitioner. The petitioner paid the beneficiary \$2,240 and \$6,720 during those two quarters, respectively, for total of \$8,960, as was shown on the 2004 W-2 form.

In his February 7, 2005 letter the petitioner's owner stated that the petitioner's 2004 tax return was incomplete, but that it would be submitted when ready. The petitioner's owner also stated that the beneficiary had commenced working for the petitioner during September 2004. The petitioner's owner stated that the petitioner has additional experience in Bangladesh but misplaced the employment verification letter and required additional time to produce it. The petitioner's owner provided no W-2 forms and no other evidence that the beneficiary has qualifying employment experience.

The Form ETA 750B asks that the beneficiary report all jobs held during the last three years and, in addition, all jobs related to the occupation for which the beneficiary is seeking certification. On the ETA 750B submitted in this case, as was noted above, the beneficiary stated that he had been working for the petitioner since November 1997, but did not report any other employment experience.

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 March 3, 2005, denied the petition. The director also found that the evidence did not demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification. In addition the director noted the discrepancy between the beneficiary's statement on the Form ETA 750 B that he had worked for the petitioner since November 1997 and the statement of the petitioner's owner, in his February 7, 2005 letter, that the beneficiary began working for the petitioner during September 2004. The director also noted that the petitioner claimed, on Schedule C of its income tax returns, not to have paid any wages during the salient years, although it claimed on the Form I-140 petition to employ four workers.<sup>1</sup>

On appeal, counsel stated that a proposed change to 8 C.F.R. § 204.5(g)(2) would not require a petitioner to establish its ability to pay the proffered wage, but merely that it is a *bona fide* employer. Counsel further stated that the beneficiary continued to expect to receive an employment verification letter pertinent to his previous employment in Bangladesh.

Subsequently counsel submitted (1) copies of monthly statements pertinent to the petitioner's owner's bank account, (2) California Form DE-6 quarterly wage reports, (3) photocopies of two checks drawn on the petitioner's bank account and payable to the beneficiary, (4) a copy of an additional California Form DE-6 quarterly report, (5) a revised Form ETA 750B, (6) a new employment verification letter, (7) a letter from the petitioner's owner and manager, (8) additional evidence pertinent to the petitioner's owner's ownership of real estate, and (9) a brief.

Although the additional submission to supplement the appeal is dated August 21, 2006 and was received on August 23, 2006, it did not include a copy of the petitioner's owner's 2004 tax return, which CIS previously requested and which counsel stated would be provided when it was complete, which should have been during April of 2005. Further, counsel did not address the observation that, although it claimed to employ four workers at all salient times, the petitioner's tax returns indicate that it paid no wages during 2001, 2002, or 2003.

The two checks show that the petitioner paid the beneficiary \$890.22 on both July 30, 2005 and August 16, 2006.

The additional Form DE-6 report submitted is for the first quarter of 2005. The petitioner employed four people, including the beneficiary, during that quarter. The petitioner paid the beneficiary \$6,720 during that quarter.

The new employment verification letter states that the beneficiary worked as a chef from January 1998 through December 2001 at the [REDACTED] in Los Angeles, California and purports to be from the then owner of the restaurant. The letter further states that because the beneficiary was an illegal worker

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<sup>1</sup> In that decision the director misstated the annual amount of the proffered wage as \$37,440. That misapprehension on the director's part, however, was insufficient to affect his conclusion in this case.

and had no social security number he was paid in cash and the owner requested that he not reveal that experience on the Form ETA 750B. The letter implies that no contemporaneous evidence of that employment exists.

The revised Form ETA 750B states that the beneficiary worked from January 1, 1998 to April 4, 2005 at the [REDACTED] in Los Angeles, California as a chef.

The petitioner's owner's letter is dated August 21, 2006 and states that the petitioner's business suffered as a result of the events of September 11, 2001. The petitioner's owner further requests that the petitioner's finances during 2001, 2002, and 2003 be ignored in favor of its subsequent finances.

The additional evidence pertinent to the petitioner's owner's ownership of real estate includes (1) a Grant Deed, (2) one page of a Deed of Trust, (3) a Buyer Final Closing Statement, (4) an escrow sheet, (5) a Borrower Estimated Closing Statement, (6) a Borrower Final Closing Statement, (7) Closing Instructions, (8) a Fixed Adjustable Rate Note, (9) a letter from a commercial lender, and (10) one page of a FNMA Form 1004 Universal Residential Appraisal Report (URAR).

The grant deed states that on January 25, 1999 a property transferred to the petitioner's owner. The deed states that the property is in Los Angeles and identifies it by lot, tract number, map book and page. The street address of that property is unknown to this office. That deed does not identify the sales price or value of that property except to state the amount of tax paid on the transfer. Although that tax is based on the sale price or value of the property, the ratio of that tax to the total value or sales price of the property is unknown to this office.

The closing statement provided appears to show that on February 1, 1999 the beneficiary purchased a property for \$268,500 against which he placed a first mortgage of \$214,800 and a second mortgage of \$26,850, for a total indebtedness of \$241,650.

The single page provided of a Deed of Trust shows that the petitioner, on March 28, 2003, borrowed an unidentified amount secured by an unidentified property.<sup>2</sup> That instrument identifies the petitioner's owner's home address as [REDACTED] in Van Nuys, California. The escrow sheet provided confirms the information given on the closing statement. The closing instructions are dated March 28, 2003 and confirm the terms of the mortgage of on [REDACTED]

The Borrower Estimated Closing Statement is dated March 31, 2003 and shows that the petitioner then intended to pay off the existing indebtedness on his property at [REDACTED] in Van Nuys and borrow \$400,000 against that property.

The Borrower Final Closing statement show that on April 4, 2003 the petitioner paid off his previous mortgages on the property at [REDACTED] and borrowed \$400,000 secured by that property. The Fixed/Adjustable Rate Note is dated March 28, 2003 states terms of that same loan.

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<sup>2</sup> Additional evidence submitted appears to show that the Deed of Trust pertains to the petitioner's home address, at [REDACTED] in Van Nuys.

The commercial lenders letter is dated August 12, 2004 and indicates that the petitioner's owner had applied for an additional loan. The terms of that loan and whether it settled are unknown to this office.

The URAR estimates the value, on March 14, 2005, of the property at [REDACTED] in Van Nuys, California at \$800,000.<sup>3</sup> Because only one page was submitted, the Statement of Limiting Conditions, which should always accompany that report whenever it is presented for any purpose, is unavailable to this office. Further, no information is provided pertinent to the appraiser's qualifications, other than a state license number.

In the brief counsel cites the 2004 Form DE-6 quarterly reports as evidence that the petitioner has employed the beneficiary since September 2004. Counsel notes that a May 4, 2004 memorandum from the Associate Director of CIS stated that CIS should find the petitioner able to pay the proffered wage if its net income was sufficient to cover the proffered wage, if its net current assets were sufficient to cover it, or if it employed the beneficiary and paid him or her the proffered wage. Counsel asserts that the petitioner's bank account statements show that its net income is sufficient, that the petitioner's owner's ownership in real estate demonstrates that the petitioner has sufficient net current assets to cover the proffered wage, and that the evidence shows that the petitioner has employed the beneficiary and paid him the proffered wage.

Counsel again asserts that the petitioner's poor performance during 2001, 2002, and 2003 was the result of the events of September 11, 2001.

As of the date of this decision, the regulation at 8 C.F.R. § 204.5(g)(2), set out above, is unchanged and requires the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. That a change to that regulation is proposed is of no relevance to the instant visa petition.

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>4</sup>

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<sup>3</sup> That the petitioner's owner, or someone on his behalf, commissioned that appraisal suggests that he continued to seek a refinance of the property. Whether he eventually did refinance, and the amount and terms of the new mortgage, are unknown to this office.

<sup>4</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.

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.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage. Further, the petitioner's credit line is for \$20,000 and had a balance of \$17,222 on the only date for which a statement was submitted. The \$2,778 remaining on that credit line, even if it belonged to the petitioner outright, would be of little effect in showing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The evidence provided pertinent to the petitioner's owner's interest in real estate is evidence that the petitioner's owner owns, or recently owned, at least one parcel of real estate. Although the contingencies and limiting conditions pursuant to which the appraisal, one page of which was submitted, was prepared, and the record contains scant evidence pertinent to the appraiser's qualifications, this office accepts, on the balance, that it shows that the petitioner's owner's property has greatly appreciated.

This office notes, however, that no evidence is in the record to demonstrate whether the property is currently mortgaged or otherwise encumbered, or the extent of that possible encumbrance. The evidence suggests that the petitioner's owner initially encumbered that property with a purchase money mortgage, then refinanced for a greater amount, and then applied to refinance some property, apparently the same one, another time. Whether that last refinance transpired and the amount by which it may have encumbered the property is not in evidence. Without that information this office cannot determine the value of the petitioner's owner's equity in that property.

Further, even if the petitioner's owner's equity were sufficiently evidenced, that would not demonstrate the petitioner's ability to pay the proffered wage. The petitioner's owner's equity in real estate is not a current asset. Current assets, or short-term assets, are those assets that are expected to be converted to cash or cash equivalent within a short period, generally one year. The petitioner's owner's home is not expected, in the short term, to be converted into cash. It is not the kind of liquid asset readily available to pay wages. For all of the reasons listed, the petitioner's owner's alleged equity in real estate will not be considered.

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 employed during at least part of 2004, at least part of 2005, and at least part of 2006, and that it paid him \$8,960,<sup>5</sup> \$6,720,<sup>6</sup> and \$1,780.44<sup>7</sup> during those years, respectively.

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<sup>5</sup> That amount is shown on the 2004 W-2 form.

<sup>6</sup> That amount is shown on the Form DE-6 report for the first quarter of 2005.

<sup>7</sup> That amount is the total of the two photocopied checks provided that purport to show wages the petitioner paid to the beneficiary during 2006.

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. 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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The proffered wage is \$29,120 per year. The priority date is April 24, 2001.

The petitioner is obliged to show the ability to pay the entire proffered wage during 2001. During that year the petitioner's owner declared adjusted gross income of \$12,725. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage out of his income during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2001. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

The petitioner is obliged to show the ability to pay the entire proffered wage during 2002. During that year the petitioner's owner declared adjusted gross income of \$24,838. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage out of his income during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2002. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

The petitioner is obliged to show the ability to pay the entire proffered wage during 2003. During that year the petitioner's owner declared adjusted gross income of \$24,372. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage out of his income during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2003. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

The petitioner has established that it paid the beneficiary wages of \$8,960 during 2004 and is obliged to show the ability to pay the \$20,160 balance of the proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to demonstrate that ability with copies of annual reports, federal tax returns, or audited financial statements. In the January 10, 2005 request for evidence the service center requested the petitioner's 2004 return and counsel stated that it would be provided when it was available. Nevertheless, the record does not contain copies of the petitioner's annual reports, copies of its federal tax returns, or audited financial statements for 2004, or any other reliable evidence of the petitioner's ability to pay the balance of the proffered wage during that year. The petitioner has failed to show the ability to pay the proffered wage during 2004.

As was noted above a sole proprietor petitioner is obliged to show, in addition to its ability to pay the proffered wage, his ability to pay his personal expenses with the balance. In the instant case the petitioner indicated that his family's recurring monthly expenses are \$28,632 per year. Because the petitioner was unable to show the ability to pay the proffered wage alone, however, this office need not belabor its inability to pay that amount plus the petitioner's owner's personal expenses.

The petitioner established that it paid the beneficiary \$6,720 during 2005 and would ordinarily be obliged to show the ability to pay the balance of the proffered wage. The petitioner's 2005 tax return, however, was not available when the petition in this matter was submitted and has never been requested or promised. The petitioner is excused from showing its ability to pay the proffered wage during 2005 or subsequent years.

Similarly, the petitioner only demonstrated that it paid the beneficiary \$1,780.44 during 2006, but is not obliged to show the ability to pay the balance of the proffered wage during that year.

The petitioner's owner urges, however, that the petitioner's poor performance during 2001, 2002, and 2003 was a result of the events of September 11, 2001. The petitioner urged that its poor performance during those years should be ignored, concentrating instead on its performance during 2004 and 2004. There is no evidence in the record, however, that the economy in California suffered from the incidents of September 11, 2001. More concretely, there is no evidence that restaurants in California, or more particularly in the Los Angeles area, lost business as a result of those incidents. More specifically still, there is no indication that Indian restaurants in Los Angeles suffered a setback after those attacks. Finally, and most to the point, other than the owner's conclusory assertion, nothing in the record suggests that the petitioner's poor performance during 2001, 2002, and 2003 was the result of the events of September 11, 2001. This office further notes that it cannot rely on the petitioner's performance during 2004 and 2005 to show its ability to pay the proffered wage, as the petitioner did not demonstrate its ability to pay the proffered wage during those years either.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. 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 this basis.

The beneficiary's claim of qualifying experience has assumed several forms. Initially the beneficiary stated, on the original Form ETA 750B, that he had worked for the petitioner since November 1997. In response to a request for W-2 forms documenting the beneficiary's claim of employment with the petitioner, the

petitioner's owner did not produce the requested evidence; W-2 forms, but stated in his February 7, 2005 letter that the beneficiary had worked for the petitioner since September 2004.

The petitioner's owner also stated that the petitioner had misplaced an employment verification letter pertinent to additional experience in Bangladesh, but still hoped to submit it. This office notes that despite the fact that the Form ETA 750B requires the beneficiary to describe all related previous experience, the beneficiary did not mention his Bangladeshi experience until his initial claim was under investigation. That claim of experience in Bangladesh has never been documented, nor has the beneficiary ever stated the time period during which it allegedly occurred.

Having stated one version of the beneficiary's history of qualifying employment and then, when it was challenged, withdrawn it and replaced it with another, diminishes the credibility of both of those employment claims, as well as subsequent claims.

Further, 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).

On appeal counsel, the petitioner, and the beneficiary provided a third version of the beneficiary's employment experience. A new employment verification letter states that the beneficiary worked from January 1998 through December 2001 at the [REDACTED] an alleged employer never previously mentioned to CIS.

On a revised Form ETA 750B, however, the beneficiary gave yet another version of his employment history. On that form the beneficiary stated that he worked for [REDACTED] beginning in January of 1998 and continuing until, not December 2001, but until April 2005.

The dates of the newly claimed employment as stated on the employment verification letter conflict with at least two of the beneficiary's previous versions of his history of qualifying employment.

The dates of employment for [REDACTED] as stated on the revised Form ETA 750B conflict with the original claim of employment with the petitioner and, in addition, the claim of the petitioner's owner that the beneficiary began to work for the petitioner during September 2004. This office notes, further, that the DE-6 forms for the last two quarters of 2004, if genuine, appear to support that the petitioner employed the beneficiary during part of the third quarter of 2004 and all of the fourth quarter.

The most recent claim, that of employment for [REDACTED] is the fourth employment claim presented in this case, and conflicts with others.

Although, with that employment history, the beneficiary provided a story that might feasibly explain his shifting claims, it is not supported by competent objective evidence sufficient to demonstrate where the truth lies and is insufficient to meet the burden of proof, therefore, pursuant to *Matter of Ho, supra*. Under these

circumstances this office cannot find this final version of the beneficiary's employment history to be credible. This office further notes that none of the previous versions of the beneficiary's claim of qualifying employment have been sufficiently documented.

The petitioner has failed to demonstrate that the beneficiary is qualified for the proffered position. The petition was correctly denied on this additional ground.

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.