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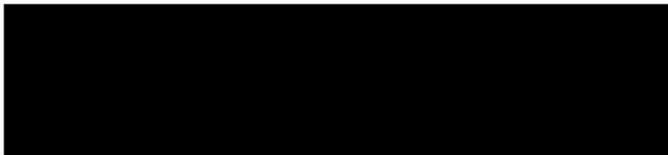
FILE: [Redacted]
SRC 03 257 51688

Office: TEXAS SERVICE CENTER Date: **NOV 19 2007**

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, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a South Indian cuisine restaurant. It seeks to employ the beneficiary permanently in the United States as a Indian specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's January 15, 2005 denial, 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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, 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 U.S. Department of Labor. See 8 C.F.R. § 204.5(d). 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 February 19, 2002. The proffered wage as stated on the Form ETA 750 is \$25,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job or two years of experience in the related occupation of South Indian cuisine cook.¹

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

¹ The AAO notes the job title of the proffered position and the job title for the related occupation are identical.

decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.²

Relevant evidence submitted on appeal includes counsel's brief, and the petitioner's owner's Form 1040, U.S. Individual Income Tax Return for tax years 2002 and 2003. The petitioner also submits Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2002 and 2003 for the following restaurants: Woodland Indian Restaurant, Inc. Fairfax, Virginia, Employer Identification Number (EIN) [REDACTED] Udipi Café, Inc. 18216 Contour Road, Gaithersberg, Maryland, EIN [REDACTED] Udipi, Inc., 8046 New Hampshire Avenue, Langley Park, Maryland, EIN [REDACTED] and Udipi, Café, Inc., 1850 Lawrenceville Highway, #700, Decatur, Georgia, EIN [REDACTED]

The petitioner also submits a letter from [REDACTED] P.A., New York, New York, dated March 9, 2005. In his letter [REDACTED] states that he was the accountant for Udipi Café, Inc. (Georgia) and for [REDACTED] and had handled accounting matters for Udipi Café, Inc.(Texas).³ [REDACTED] further states that, based on the information provided by [REDACTED], President for both Udipi Café, Inc. of Georgia and Texas, expenses in the amount of \$132,217.27 were paid by Udipi Café Inc.(Georgia) on behalf of Udipi Café, Inc.(Texas) during January 1, 2001 to December 31, 2004 and that the same was reported on the respective tax returns of both corporations during that period. [REDACTED] also submitted a document he describes as "Ledger A/C in the books of Udipi, Café, Inc., (Georgia)." The one-page document is entitled "Udipi Café, Inc. Transactions by Account, As of December 31, 2004." With the initial petition, the petitioner submitted its Forms 1120S for tax years 2001, 2002, and 2003. The petitioner also submitted copies of articles of incorporation for the petitioner that indicated [REDACTED] was the petitioner's agent and sole officer/director.⁴ In response to the director's request for further evidence, dated September 11, 2004, the petitioner submitted Forms 1120S for tax years 2002 and 2003 for Udipi, Inc., 2121 Richmond Avenue, Houston, Texas, EIN [REDACTED]. The record contains no other further evidence with regard to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on December 28, 2000, to have a gross annual income of \$274,638, a net annual income of \$154,986, and to currently have three employees. On the Form ETA 750, signed by the beneficiary on November 12, 2001, the beneficiary claimed to have worked for the petitioner from May 2001 to the date he signed the Form ETA 750, Part B, on November 11, 2001.

On the I-290B submitted on appeal, counsel states that the company that owns the petitioner is profitable and able to pay the proffered wage, as it owns several restaurants. Counsel states that all the income of the entire company should be considered when evaluating the petitioner's ability to pay the proffered wage.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO notes that neither corporation identified by the accountant is the petitioner. On the I-140 petition, the petitioner is identified as [REDACTED]

⁴ The petitioner's Forms 1120S identify [REDACTED] as the petitioner's sole shareholder.

In the brief submitted on appeal, counsel states that the petitioner's owner owns four other restaurants in addition to having substantial other assets including valuable real estate. Counsel notes that at the time the petitioner had financial problems, the petitioner's owner transferred funds to the petitioner.

Counsel states that CIS should look at the totality of the petitioner's circumstances and not just the financial troubles of one restaurant in a chain of restaurants during a single year. Counsel states that the petitioner had sufficient resources with which to pay the proffered wage in 2002, and in 2003 was legally able to use other resources to meet its financial obligations.

Counsel references a memorandum⁵ written by _____ Citizenship and Immigration Services (CIS) Associate Director for Operations with regard to the petitioner's ability to pay, and also refers to the minutes of a liaison meeting between the Vermont Service Center and the American Immigration Lawyers Association (AILA), that was posted on the AILA Infonet on January 10, 2001. In these minutes, the Vermont Service Director, among other comments, stated that the posting of a loss of a corporate income tax return does not automatically make the petition deniable. Counsel states that the Vermont Service Center director's comments were based on the principle of considering the totality of circumstances in examining a petitioner's ability to pay the proffered wage.

Counsel then cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), for the proposition that the petitioner's entire performance history should be considered. Counsel states that the petitioner in the instant petition showed its ability to pay the proffered wage in tax years 2001 and 2002, and then had a poor financial year in tax year 2003. Counsel also refers to an unpublished AAO decision,⁶ one in which the AAO found that, although the petitioner had had financial losses during the period of time in question, the petitioner had been in business over ten years, paid wages exceeding \$500,000 during the priority date year, and that its gross receipts were more than \$1.6 million. Counsel also cites Board of Alien Labor Certification Appeals (BALCA) decisions, including *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), *Oriental Pearl Restaurant*, 1992-INA-59 (1993 BALCA), and *Ohsawa America*, 1988-INA-240 (BALCA 1988) for the proposition that the petitioner had the ability to pay the proffered wage despite the petitioner's negative financial resources.

Counsel also cites other unpublished AAO decisions and to an earlier guidance provided by the Vermont Service Center in November 16, 1994 AILA Liaison Teleconference, for the proposition that the petitioner's depreciation may be added back to the petitioner's total assets in considering the petitioner's ability to pay the proffered wage. Counsel states that in the instant petition, if depreciation in assets were added back in, the petitioner shows sufficient net assets to pay the proffered wage in 2001 and 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning

⁵ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

⁶ *Matter of X*, WAC01-275-57690 (AAO February 27, 2003.)

business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel submits tax returns for other Udipi restaurants in the states of Maryland, Virginia and Georgia that allegedly are owned by the petitioner's owner, [REDACTED]. Counsel asserts that during the time the petitioner has had financial troubles, [REDACTED] has transferred funds to the petitioner to meet payroll and other liabilities. Counsel asserts that the petitioner can pierce the corporate veil, and states that the courts allow plaintiffs to receive compensation from officers or directors for damages rather than limiting recovery to corporate resources. Counsel states that the petitioner's owner, whom she describes as the owner of the restaurant chain, provided funds from one of his other restaurants, Udipi Café in Georgia, to ensure that the petitioner was sufficiently funded at all times. Because the petitioner's owner pierced the corporate veil, counsel asserts that the funds of his other companies and possibly his own personal funds may be considered available to fund the petitioner's payroll.

Counsel's assertions with regard to the consideration of the petitioner's owner's assets in determining the petitioner's ability to pay the proffered wage are not persuasive. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel cites 2002-INA-104 (2004 BALCA), for the premise that the overall fiscal circumstances should be considered when assessing an employer's ability to pay. Counsel does not state how this Department of Labor's (DOL) BALCA precedent decision, or any other BALCA precedent decision is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA 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). Moreover, [REDACTED] involved entities in an agricultural business that regularly fail to show profits and typically rely upon individual or family assets. The decision also deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with an S corporation.

With regard to counsel's reference to *Oriental Pearl Restaurant*, this BALCA decision concerns a Chinese restaurant in Atlanta, Georgia, that submitted a first year tax return that showed operating losses of \$29,406. Nevertheless, the petitioner in *Oriental Pearl Restaurant* provided documentation from the petitioner's accountant and banker, and demonstrated substantial assets tied up in the business, minimal debt, and high equity investment. The petitioner also submitted magazine restaurant reviews that spoke highly of the quality of the petitioner's restaurant operation. In contrast, the petitioner had been in operation for less than three years when it filed the instant petition, and its employment record indicates a small staff and limited financial documentation for the documented two years of operations. The AAO also notes that the petitioner's tax return for tax year 2003 reflects no wages paid or compensation to officers, and no end of year assets or liabilities, which raises a question of whether the petitioner was in operation by the end of tax year 2003.⁷

⁷ The AAO notes that the state of Texas website for Franchise Tax Certification indicates that Udipi, Inc., a business incorporated in the state of Texas, with company location identified as Decatur, Georgia was not in good standing as of November 12, 2007. *See* <http://ecpa.cpa.state.tx.us/coa> for the database of corporate tax certifications. (available as of November 12, 2007.)

With regard to counsel's reference to *Ohsawa America*, the primary finding in the decision concerned whether a bona fide position existed for the beneficiary. With regard to whether the petitioner was able to pay the proffered wage, an accounting firm that prepared three of the petitioners' quarterly financial statements that covered approximately one year of business operations in 1986 and 1987, the period during which the priority date was established, indicated that the company had increased sales and reduced operating losses, and that the major shareholder, who had indicated a willingness to continue to fund the company, was personally worth in excess of \$4,000,000. The court decided favorably on this issue but remanded the case for further consideration of whether a bona fide position existed. The petitioner has not demonstrated any increased sales or reduced operating losses in tax year 2003. Furthermore the petitioner's owner's Form 1040 for 2002 reflects wages of \$89,665, and adjusted gross income of \$70,906, while the accompanying Schedule C-EZ indicated commission income of \$20,000, with net profit of \$20,000. In tax year 2003, the petitioner's owner's Form 1040 indicates the petitioner's owner received wages of \$39,954, and had an adjusted gross income of -\$61,330, while the accompanying Schedule C indicates the petitioner's owner received \$35,000 in commission income, with net profit of \$7,710.

On appeal, counsel also refers to unpublished AAO decisions and earlier guidance from the Vermont Service Center that stated depreciation could generally be considered with taxable income in evaluating the petitioner's ability to pay the proffered wage. Counsel does not provide any published citations for the AAO decisions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its 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). In addition, the AAO does not examine depreciation when calculating the petitioner's net income. This issue will be discussed more fully further in these proceedings. With regard to the 1994 policy guidance provided by the Vermont Service Center, such policy guidance is not binding on the AAO.

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 director in his request for further evidence dated September 11, 2004 requested that the petitioner submit W-2 Forms for the beneficiary, if the beneficiary worked for the petitioner. The petitioner responded on November 14, 2004 that the beneficiary did not work for it currently. However, the beneficiary's statements on the Form ETA 750, Part B appear to support the beneficiary's employment with the petitioner prior to and possibly after the 2002 priority date year. The evidence in the record thus contains a discrepancy with regard to the beneficiary's employment with the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Based on the record as presently constituted, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2002 or subsequently. Thus the petitioner has to establish its ability to pay the entire proffered wage as of the 2002 priority date and until the beneficiary obtains lawful permanent residence.

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, contrary to counsel's assertion on appeal, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay

the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. [REDACTED] F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner submitted its tax return for tax year 2001. Since 2001 is prior to the 2002 priority date, the petitioner's 2001 tax return is not dispositive in these proceedings. Thus, the AAO will only examine the petitioner's 2002 and 2003 net income.⁸ The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$25,000 per year from the priority date:

- In 2002, the Form 1120S stated a net income⁹ of -\$71,009.

⁸ The AAO will examine the Forms 1120S for [REDACTED] in Houston, Texas, submitted to the record in response to the director's request for further evidence.

⁹Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional loss shown on its Schedule K for tax year 2003, the petitioner's net income is found on Schedule K of its tax return. With regard to priority year 2002, the petitioner did not submit the second page of its Schedule K in the 2002 tax return. Therefore the AAO cannot determine whether line 21 or Schedule K would establish the petitioner's net income for the priority year. For purposes of these proceedings, the AAO will use the petitioner's net income identified on line 21. However, if the petitioner pursues this matter further, it should provide a complete copy of its 2002 tax return, with Schedule K.

- In 2003, the Form 1120S stated a net income of -\$98,250.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the 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, including real property that counsel asserts should be considered. 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.¹⁰ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As stated previously, the petitioner's tax return for tax year 2001 is not dispositive in these proceedings. The AAO will only examine the petitioner's net current assets for tax years 2002 and 2003:

- The petitioner's net current assets during 2002 were -\$67,883.¹¹
- The petitioner's net current assets during 2003 were \$0.¹²

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.¹³

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as

¹⁰According 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.

¹¹ The director included line 19, loans from shareholders, in Schedule L in his calculation of the petitioner's current liabilities. However, the AAO does not include loans from shareholder in current liabilities, and thus identifies the petitioner's current liabilities as -\$73,156, and as a result, the petitioner's net current assets as -\$67,883.

¹² The petitioner did not fill out Column D, end of tax year assets and liabilities on Schedule L in its 2003 tax return. The record contains no explanation for the petitioner's lack of information.

¹³ On appeal, counsel asserts that the petitioner has sufficient net assets in 2002 and 2003 to pay the proffered wage. As stated previously, the petitioner's tax return for tax year 2001 is not dispositive in these proceedings. As illustrated above, the petitioner did not have sufficient net current assets to pay the proffered wage in 2002 or 2003.

of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for 1999.

Counsel asserts in her brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. As previously stated, the BALCA decisions to which counsel refers are neither binding nor analogous to the present petition. Counsel also cites *Matter of Sonogawa* for the proposition that the petitioner's overall financial circumstances should be considered when the petitioner has not demonstrated sufficient net income to pay the proffered wage.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included [REDACTED] movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the 2002 priority year was an uncharacteristically unprofitable year for the petitioner. Both tax years 2002 and 2003 were unprofitable years for the petitioner.¹⁴ Furthermore the petitioner provided no further information as to the reputation of the petitioner within the Indian restaurant industry, among other factors examined in *Sonogawa*.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner identified on the instant I-140 petition had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the

¹⁴ The AAO notes that the petitioner's net income and net current assets in tax year 2001 were -\$64,468 (taken off of Schedule K of the Form 1120S return), and -\$4,585, respectively. Thus, the petitioner's year prior to the 2002 priority date was also unprofitable.

grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petitioner must 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).

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

(ii) Other documentation—

- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
- (B) *Skilled worker*. If the petitioner 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 The minimum requirements for this classification are at least the two years of training or experience.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the Form ETA 750 was accepted on February 19, 2002. As stated previously, the position requires two years of work experience as a Indian specialty cook, as stipulated by the Form ETA 750. In addition, Item 15., Other Special Requirement states that the job applicant "must have knowledge of Mysore and Kanchipuram style dosai." Although the beneficiary indicated on the Form ETA 750, Part B, that he had worked for the petitioner from May 2001 to November 12, 2001 (prior to the 2002 priority date), the petitioner stated in its response to the director's request for the beneficiary's W-2 Forms, that the beneficiary was not currently working for it. Therefore the record does not establish that any work experience with the petitioner prior to the February priority date can be applied toward the requisite two years of previous work experience.

With the initial petition, the petitioner submitted two letters of work experience. One letter is dated February 23, 2001, and is written by [REDACTED] Banquet Manager, Hotel [REDACTED]. The letterhead indicates the hotel is located in Bombay, while an address on the bottom of the letter appears to indicate a New Delhi address. While [REDACTED] states that the beneficiary worked at the hotel as a South Indian cook, and notes the

beneficiary's expertise in [REDACTED] cooking, he provides no specific period of time that the beneficiary worked at [REDACTED] j. Thus, this letter is given no weight in these proceedings.

The second letter of work experience dated February 19, 2001 is written by [REDACTED] General Manager, [REDACTED] Restaurant, Mumbai, India. In his letter, [REDACTED] states that the beneficiary worked as a South Indian chef at the [REDACTED] Restaurant from October 1998 to January 2001. The AAO notes that this period of time would include the time period beginning in May 2000 in which the beneficiary, on the Form ETA 750, Part B, claimed he was working for the petitioner in Texas.

The AAO also notes that the record of proceeding also contains a Form G-325, Biographic Information, submitted in connection with the beneficiary's I-485, Application to Register Permanent Residence or Adjust Status. On the G-325 form in the section eliciting information about the beneficiary's last occupation abroad, the beneficiary did not note any employment for the past five years as of the date he signed the G-325 on August 16, 2004. This discrepancy in previous employment information raises doubts with regard to the beneficiary's actual previous employment in India.

Further, the beneficiary also submitted a copy of his Indian passport when he submitted his I-485 Adjustment of Status application. The pages of the beneficiary's passport indicated that he traveled to Paris, France, entering France on November 1999, with visas also for travel to Australia and Germany, and possible travel to the United Arab Emirates in February 2000. Such travel documentation raises further questions as to the beneficiary's actual employment in India from October 1998 to January 2001 as a South Indian specialty cook. The petitioner has submitted letters of work experience that either lack detail or conflict with other evidence submitted to the record. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.