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FILE: WAC-03-031-51175 Office: CALIFORNIA SERVICE CENTER Date: APR 13 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

CC: [Redacted]

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel submits a brief.

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 first issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 1, 1996. The proffered wage as stated on the Form ETA 750 is \$1,957 per month, which amounts to \$23,484 annually. On the Form ETA 750B, signed by the substituted beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$700,000, and to currently employ twelve workers. In support of the petition, the petitioner submitted a letter from counsel stating that petitioner purchased the business "with all its assets, liabilities, goodwill, etc." from the initial employer who filed the ETA 750 on April 1, 1997. Counsel stated that the petitioner retained its name of "Taste of India." Counsel also conceded that the petitioner failed to generate enough positive cash flow in 1996 and 1997 to establish its ability to pay the proffered wage in those years. To overcome that deficiency, counsel submitted bank statements and stated that "Employer, as an individual owner, is permitted to rely on his/her personal assets to meet the new business obligations" without citation to legal authority. Additionally, counsel stated that the petitioner opened another restaurant located in Woodland Hills, CA, and the petitioner's corporation, Gurukirpa, Inc., files tax returns for both the petitioning entity and the entity located at [REDACTED]. Counsel also said that it "is well known that any new business takes time to generate profits particularly in

the restaurant industry,” and stated that after suffering losses, the petitioner was starting to post profits. Counsel asserted that “by adding the deductions taken by [the petitioner] for [d]epreciation and [a]mortization,” there was available cash to pay the proffered wage. Counsel also notified the director that the petitioner filed another petition (WAC-01-205-52546) on behalf of the same beneficiary that was also denied for failure to establish the ability to pay the proffered wage and is currently pending on appeal.

With the initial petition, the petitioner submitted Schedules C, Profit or Loss from Business (Sole Proprietorship) statements, for the petitioning entity when it was owned by [REDACTED] and assigned an employer identification number (EIN) of 95-4523322, for 1996 and 1997. The Schedules C were unaccompanied by the remainder of the tax return filed by the then sole proprietor of the petitioning entity. The petitioner also submitted Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 1997, 1998, 1999, 2000, and 2001, for Gurukirpa, Inc. [REDACTED] with an EIN of 95-4624814. [REDACTED] shows an incorporation date in 1997 and ownership by Surjit Multani (10%) and Surinder Singh (90%). The petition was filed in 2002 in Taste of India’s name with an EIN of 95-4624814.

The tax returns reflect the following information for the following years:

	<u>1996</u>	<u>1997</u>
Proprietor’s adjusted gross income (Form 1040)	\$n/a	\$n/a
Petitioner’s gross receipts or sales (Schedule C)	\$157,930	\$45,483
Petitioner’s wages paid (Schedule C)	\$19,895	\$6,436
Petitioner’s net profit from business (Schedule C)	-\$5,027	-\$885

  

	<u>1997<sup>1</sup></u>	<u>1998</u>	<u>1999</u>
Net income <sup>2</sup>	\$9,417	-\$16,410	\$1,393
Current Assets	\$7,363	-\$21,417	\$8,359
Current Liabilities	\$1,458	\$2,763	\$3,663
Net current assets	\$5,905	-\$24,180	\$4,696

  

	<u>2000</u>	<u>2001</u>
Net income <sup>3</sup>	\$12,800	\$21,697
Current Assets	\$15,213	\$18,909
Current Liabilities	\$5,002	\$73,608
Net current assets	\$10,211	-\$54,699

In addition, counsel submitted copies of what he claimed to be the petitioner’s checking account statements issued to Sunita Verma for a Tarzana, California address; and Gurukirpa’s quarterly wage reports for the first three quarters in 2002, Gurukirpa’s quarterly federal tax returns and W-3 form for 2001, and W-2 forms issued to Gurukirpa’s employees. The quarterly wage reports and Forms W-2 do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. The petitioner also submitted unaudited financial statements for the period ending March 31, 2002, and a “summary of profits” from S. Arora &

<sup>1</sup> For the period March 3, 1997 through December 31, 1997.

<sup>2</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>3</sup> See note 2, *supra*.

Associates, Inc., an income tax and bookkeeping service, that added back non-cash deductions to the petitioner's profit or loss for every year from 1996 to 2000. The "summary of profits" letter ended by stating that the petitioner's second location, started in 1998, "performed very poorly at first and has been showing improvement in subsequent years." A second letter does the same for the period 1998 through 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 9, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically sought IRS-certified or signed tax returns.

In response, the petitioner submitted IRS-generated tax returns for each year it previously submitted copies of tax returns. Those reports corroborate the figures presented in the previously submitted returns. The new returns also add the adjusted gross income reported by the sole proprietor in 1996 and 1997, of \$2,959 and \$2,382, respectively, for a family of four. The petitioner also submitted an unaudited financial statement for the period ended December 31, 2002, evidence that it sought an extension to file its 2002 tax return, and previously submitted evidence.

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 December 5, 2003, denied the petition.

On appeal, counsel stated that a brief would be forthcoming within thirty (30) days. Counsel filed the appeal on December 23, 2003. The record of proceeding does not contain any additional brief or evidence from that counsel. However, a brief was received by [REDACTED] unaccompanied by any Form G-28, Notice of Entry of Appearance as Attorney or Representative. For that failure to enter an appearance, [REDACTED] will not be substituted as counsel according to 8 C.F.R. § 292.4. [REDACTED] brief provides a brief description of the facts of the case and adds little to the substantive merits of the case by reiterating past assertions made by counsel. The AAO notes that since [REDACTED] is not a recognized representative, and counsel failed to provide any substantive brief or additional evidence in this matter, the appeal will be summarily dismissed<sup>4</sup>. The petitioner submits no additional evidence. However, the AAO will discuss the merits of the petition.

The unaudited financial statements that have been submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the balances in [REDACTED] bank account is misplaced. Even if [REDACTED] was verified as the petitioner, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's

<sup>4</sup> As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Finally, the AAO concurs with the director that [REDACTED] is neither the petitioner nor the owner of the petitioner. Counsel's reliance on the assets of [REDACTED] or anyone other than the petitioner is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

Additionally, while counsel asserts that Gurukirpa acquired all "assets, liabilities, [and] goodwill" from Taste of India, no evidence was presented to corroborate that. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Gurukirpa is not firmly established as a successor-in-interest to the initial petitioning entity in this case despite its use of the same address and name. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1996, 1997, 1998, 1999, 2000, or 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, contrary to counsel's assertions. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner, while it was incorporated as Gurukirpa, has not demonstrated that it paid any wages to the beneficiary during 1997, 1998, 1999, 2000, or 2001. In each year, its net income and net current assets are less than the proffered wage, and thus, it has not demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage and it has conceded factually that its business has struggled. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1997, 1998, 1999, 2000, or 2001.

Assuming, *arguendo*, that the petitioner could establish that it is a successor-in-interest to Taste of India, during 1996 and 1997, the hypothetical predecessor entity was structured as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

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<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

In the instant case, the sole proprietor supported a family of four. In 1996 and 1997, the sole proprietorship's modest adjusted gross incomes cannot cover the proffered wage. It is impossible that the sole proprietor could support himself and his family and pay the proffered wage in those years. The petitioner failed to provide any other evidence or source of income with respect to the sole proprietor's unencumbered and easily liquefiable personal assets. Thus, the petitioner has failed to establish, even if it could make a showing that it is a predecessor to the initial petitioning entity of Taste of India, that it had the continuing ability to pay the proffered wage beginning on the priority date in 1996 and 1997.

In addition to its poor financial showing, the AAO notes that the petitioner filed other petitions, for which it would be obligated to pay a proffered wage presumably similar to the one in this case. The AAO has accessed an internal CIS database that indicates that the petitioner filed four other petitions in addition to the two filings in made on behalf of this beneficiary<sup>6</sup>. Two of those were approved and another petition's appeal was denied. The petitioner would have to show that it could pay three wages, the wages of the two petitions that were approved, one in 1999 and the other in 2000, as well as the proffered wage in the instant petition, which it has failed to do. The AAO also notes that the petitioner's prior use of the ETA 750A underlying the current petition resulted in a petition approved that was subsequently revoked for fraud.

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

The second issue to be discussed in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is February 1, 1996. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Not related
	Major Field of Study	Blank

<sup>6</sup> The AAO notes that the appeal was dismissed for the same petitioner and beneficiary for WAC-01-205-52546 for failure to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and discourages the petitioner from filing more than one petition concurrently for the same beneficiary.

The applicant must also have three years of experience in the job offered in order to perform the job duties listed in Item 13, which states "Will prepare lamb, chicken, and seafood in TANDOOR (Indian Clay Oven); will cook vegetarian and non-vegetarian curries; Will prepare, Naan, Kulcha, Paratha, Roti, (various types of Indian breads) in TANDOOR." Item 15 indicates that the proffered position has the special requirement of experience "in TANDOORI cooking."

This is a substitution case. The substituted beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he listed the following:

- a. TANDOORI GRILL in Santa Clarita, CA as a cook from May 1993 through the date of filing, for which he did the following: "Prepare all types of traditional Indian cuisine, such as vegetarian and non-vegetarian curries; chicken meat and seafood in Tandoor (Indian Clay Oven); prepare all types of Indian breads in Tandoor."
- b. India's Tandoori in Tarzana, CA as a cook from December 1991 to May 1993, for which he did the following: "Prepared and cooked vegetarian and non-vegetarian curry dishes; prepared chicken, lamb, shrimp, etc.; prepared various types of breads in Tandoor."

With the initial petition, the petitioner submitted two letters corroborating the beneficiary's prior employment experience. Both letters were written by the owners of Tandoori Grill and India's Tandoori, respectively, and both letters provided contact information, stated the dates the beneficiary was employed at their restaurants, and the duties performed by the beneficiary, which parallel the representations made by him on the Form ETA 750B.

Because the director determined that the evidence was insufficient, he requested additional evidence concerning the evidence of the beneficiary's qualifications on April 9, 2003. The director requested proof of the beneficiary's prior employment experience in the forms of "letters, pay statements and or cancelled checks, and IRS Forms W-2 showing the beneficiary worked for the listed employer(s)."

In response to the director's request for evidence, the petitioner submitted W-2 forms issued to the beneficiary from Tandoori Grill for 2000, 2001, and 2002, along with his tax returns; two paystubs issued to the beneficiary from Tandoori Grill in 1995 and 1996; printed data sheets from the Social Security Administration (SSA) showing the beneficiary's employment at Tandoori Grill in 1995 and 1998; and a statement from counsel that the owner of India's Tandoori sold the business but provided his new contact information.

The director denied the petition on December 5, 2003, determining that the evidence contained in the record of proceeding illuminated many discrepancies in the representations made concerning the beneficiary's prior employment experience. The director noted that the evidence demonstrated that the beneficiary could not have worked 40 hours per week, or full-time, at Tandoori Grill, since, according to the W-2 forms and SSA records, he was only paid between \$500 and \$2,400 between 1995 and 1999, and only paid between \$10,000 and \$14,000 in 2000 and 2001. The director found the letter provided by Tandoori Grill lacking in credibility since the owner asserted that the beneficiary worked 40 hours since 1993, but the evidence showed that the beneficiary only received such modest compensation for many years.

On appeal, counsel does not address the issue of the beneficiary's qualifications, so this issue, too, will be

summarily dismissed on appeal as noted above<sup>7</sup>. [REDACTED] brief states that the beneficiary has the requisite experience and the W-2 forms "do not reflect the entire period that the [b]eneficiary was employed" because he was paid in cash as an independent contractor. Even if we were to accept [REDACTED] assertions as counsel in this matter, which the AAO will not since he has not formally entered an appearance as noted above<sup>8</sup>, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, the beneficiary's tax returns were submitted into the record of proceeding, showing the beneficiary's reported earnings, which match the W-2 forms, and how much tax the beneficiary paid on those earnings to the IRS. If the beneficiary earned more than he reported and paid taxes on, then he misrepresented his earnings to the IRS. Either way, there is discrepant information being represented to different federal agencies.

Thus, the AAO concurs with the director's application of *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which 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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also 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."

The regulation at 8 C.F.R. § 204.5(I)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision.

Additionally, the regulation at 8 C.F.R. § 204.5(I)(3) 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 workers*. If the petition is for a skilled worker, the petition must be

<sup>7</sup> See note 4, *supra*.

<sup>8</sup> For that failure to enter an appearance, [REDACTED] will not be substituted as counsel according to 8 C.F.R. § 292.4

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 evidence provided to establish the beneficiary's qualifications to perform the duties of the proffered position is deemed inconsistent and laden with discrepancies, and thus is incompetent and lacking in probative value. The AAO concurs with the director's determination that the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

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.

