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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 13 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The 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/Bangladeshi restaurant. It seeks to employ the beneficiary permanently in the United States as a curry 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 had not established that the beneficiary had the experience required on the ETA 750 as of the priority date. The director denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 5, 2001. The proffered wage as stated on the Form ETA 750 is $905.25 per week, which amounts to $47,073.00 annually. On the Form ETA 750B, signed by the beneficiary on February 24, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on August 13, 2003. On the petition, the petitioner claimed to have been established on August 1, 1978, to currently have four employees, to have a gross annual income of $221,627.00, and to have a net annual income of $144,883.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated December 23, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also noted that CIS records indicated that the petitioner had filed at least two I-140 petitions and the director requested evidence of the petitioner's ability to pay the proffered wages to the beneficiaries of all immigrant petitions filed by the petitioner. The director also requested additional evidence relevant to the beneficiary's

experience. Finally, the director requested evidence to establish the legal status in the United States of the petitioner's owner.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on March 9, 2004.

In a decision dated March 19, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and that the evidence did not establish that the beneficiary had the experience required on the ETA 750 as of the priority date. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. The evidence submitted on appeal consists of copies of bank statements for an account of the petitioner. Counsel states on appeal that bank statements submitted in evidence establish the petitioner's ability to pay the proffered wage during the relevant period. Counsel also states that apparent inconsistencies in the evidence cited by the director concerning the ending date of the beneficiary's claimed experience in Bangladesh and the date of the beneficiary's entry into the United States are explained by the fact that the beneficiary submitted his letter of resignation to his Bangladeshi employer several months after the beneficiary had arrived in the United States on vacation.

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). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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 first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on February 24, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th 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 the owner, his spouse and five dependents on a gross income of slightly more than $20,000.00 where the beneficiary's proposed salary was $6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 35, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife for 2002. That return shows $49,567.00 on line 35 for Adjusted Gross Income. That Form 1040 list no dependents, therefore the household of the petitioner's owner and his wife consists of two persons. The petitioner submitted an undated statement of monthly household expenses of the petitioner's owner showing expenses of $250.00 per month for food, $300.00 per month for "other," and $300.00 per month for "misc," for total expenses of $850.00 per month. Food expenses are stated as "Restaurant." House and car expenses are each stated as "Paid Off," and insurance expenses are stated as "Medi-cal." A amount of $850.00 per month in household expenses would total $10,200.00 per year.

The statement of monthly expenses lacks sufficient detail necessary to establish the actual monthly household expenses of the petitioner's owner and his wife. Of a total of $850.00 in monthly expenses, expenses totaling $600.00 are stated to be either for "other" or for "misc." Moreover, the information on the statement is inconsistent with information attached to the Form 1040 tax return for 2002 in the record. On the Schedule A attached to the Form 1040 return, medical and dental expenses are stated as $9,716.00, of which the amount of $5,998 is claimed as a deduction. Also, a deduction is claimed in the amount of $8,976.00 for home mortgage interest and points. Medical and dental expenses of $9,716.00 plus home mortgage interest and points of $8,976.00 would total an additional $18,692.00 in annual expenses. Adding that amount to the $10,200.00 in annual household expenses calculated from the statement submitted by the petitioner would

result in a figure of $28,892.00 in annual household expenses. Based on an adjusted gross income of $49,567.00 and annual household expenses of $28,892.00, only $20,675.00 would be available to pay the proffered wage. The amount of $20,675.00 is less than the proffered wage of $47,073.00.

It may be noted, that even if the petitioner's claimed annual household expenses of $10,200.00 is correct, deducting that amount from the adjusted gross income figure of $49,567.00 would leave only $39,367.00 available to pay the proffered wage, an amount which also is less than the proffered wage of $47,073.00.

For the foregoing reasons, the information on the Form 1040 tax return of the petitioner's owner and his wife for 2002 is insufficient to establish the petitioner's ability to pay the proffered wage in the year 2002.

The record before the director closed on March 9, 2004 with the petitioner's submissions in response to the RFE. As of that date, the tax return of the petitioner's owner and his wife for 2003 was not yet due. Therefore their return for 2002 was the most recent return available.

No copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife for 2001 was submitted for the record. Since the priority date is March 5, 2001, the petitioner must establish its ability to pay the proffered wage beginning in the year 2001. No copy of the federal tax return of the petitioner's owner and his wife was submitted for 2001. Therefore, even if the information on the Form 1040 for 2002 were sufficient to establish the petitioner's ability to pay the proffered wage in 2002, in the absence of a copy of any tax return for 2001 or other acceptable evidence, such as an audited financial statement for 2001, the evidence would fail to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record also contains copies of bank statements for an account of the petitioner. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In his decision, the director correctly analyzed the information on the Form 1040 tax return for 2002 of the petitioner's owner and his wife and the information on the statement of monthly household expenses of the petitioner's owner and his wife. The director correctly determined that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period.

In the RFE, the director sought information about another I-140 petition filed by the petitioner, though in his decision the director made no reference to any other petition filed by the petitioner.

CIS electronic records indicate that the petitioner has filed two other I-140 petitions[1] which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition

[1] WAC-02-127-52224 & WAC-05-018-50436.

filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the other petitions submitted by the petitioner were each denied by CIS, one on March 18, 2004 and the other on May 20, 2005.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from [redacted] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* [redacted] & [redacted] *Immigration Law and Procedure*, vol. 4, § 43.04 [redacted] 2004) (available at [redacted] Online). Therefore the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year. Similarly, for any petitions which have been denied, the underlying approved ETA 750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for same beneficiary, or for a substituted beneficiary.

The record in the instant case contains no information about the proffered wages for the beneficiaries of the other two petitions submitted by the petitioner, nor about the current immigration status of those beneficiaries, whether those beneficiary have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to those beneficiaries. Furthermore, no information is provided about the current employment status of those beneficiaries, the date of any hirings and any current wages of those beneficiary.

Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

The other issue raised by the evidence and discussed in the director's decision is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As noted above, the priority date in the instant petition is March 5, 2001.

The Form ETA 750 states that the position of curry chef requires two years of experience in the offered position.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

On the ETA 750B, the beneficiary states his only relevant experience as to be employment as a chef in a hotel in Dhaka, Bangladesh, from March 1994 to September 1999. The duties performed by the beneficiary are stated as "able to cook all kind of curry's [sic] like chicken curry, mutton curry, etc. experienced in Muglahi dishes." (ETA 750B, block 15).

The only other evidence of the beneficiary's experience is a written statement dated February 25, 2004 signed by the beneficiary. In that document, the beneficiary states in pertinent part: "In Bangladesh I was a Bangladeshi Indian curry chef employed full time at the Hotel the capital a[redacted] run by [redacted] I was employed from march [sic] 1994 to September 1999 and have extensive experience in preparation of food and curry." (Statement dated February 25, 2004 of the beneficiary, at 1).

The written statement of the beneficiary fails to satisfy the requirements of the regulation at 8 C.F.R. § 204.5(g)(1). It is not a letter from his former employer or trainer, as required by that regulation. The petitioner submitted no explanation for the absence of evidence in the form required by the regulation. Moreover, the information on the ETA 750B and on the beneficiary's statement concerning the ending date of the beneficiary's claimed employment is inconsistent with other evidence in the record. The I-140 petition and an I-485 Application to Register Permanent Resident or Adjust States of the beneficiary state that the beneficiary entered the United States on July 24, 1999. That date of entry into the United States is inconsistent with a claim by the beneficiary to have worked as a chef in Bangladesh until September 1999.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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."

In his decision, the director correctly noted the absence of an acceptable form of evidence concerning the beneficiary's claimed experience as a chef in Bangladesh. The director also correctly noted the inconsistencies in the record concerning the ending date of the beneficiary's claimed experience in Bangladesh and his date of entry into the United States. The director's finding that the evidence failed to establish that the beneficiary had the experience required by the ETA 750 was correct.

In an addendum to the notice of appeal, counsel states that the beneficiary entered the United States during a vacation in June 1999, and that at that time he was still employed by a hotel in Bangladesh. Counsel states that the beneficiary mailed a letter of resignation to the hotel on October 1, 1999 and that therefore the beneficiary still considered himself to be employed by the hotel until that date. Counsel states that for that reason the month of September 1999 was stated as the final month of the beneficiary's experience on the ETA 750B. In his brief, counsel makes statements on this point similar to those in the addendum to the notice of appeal.

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). In the addendum to the notice of appeal, counsel states that a copy of the beneficiary's resignation letter will be submitted later with the petitioner's brief. The record now contains the petitioner's brief, along with supporting evidence. But that evidence does not include a copy of the beneficiary's resignation letter, nor any other evidence relevant to the beneficiary's experience. The assertions of counsel on appeal fail to overcome the decision of the director.

In summary, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The evidence also fails to establish that the beneficiary had two years of experience as a curry chef as of the priority date, as required by the ETA 750.

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.