

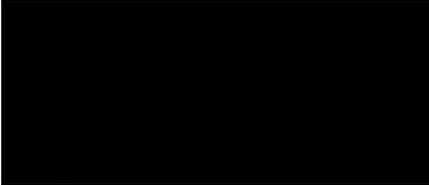
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U.S. Citizenship
and Immigration
Services

B6



FILE: WAC 96 164 50781 Office: CALIFORNIA SERVICE CENTER

Date: **JUL 13 2005**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO then granted the petitioner's motion to reopen, withdrew the previous decisions, and remanded the case to the director to reinvestigate and conduct further inquiry. The matter is now before the AAO on certification. The director's decision will be affirmed, and the petition will be denied.

The petitioner is a restaurant. It sought to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

Upon review of the results of an overseas investigation conducted by the U.S. consulate in Shanghai, China, the director denied the petition on February 20, 1997. She determined that the petitioner had failed to establish that the beneficiary had the requisite two years of work experience as required by the terms of the approved labor certification.

The petitioner appealed the director's decision. The AAO dismissed the appeal on March 18, 1998, following a review of the petitioner's additional photographic evidence and the documentation contained in the record. The petitioner filed a motion to reopen and reconsider the AAO's dismissal of the appeal. The petitioner submitted sufficient additional evidence to persuade the AAO to grant the petitioner's motion, withdraw the previous decisions of the director and the AAO, and remand the case to the director for reinvestigation and further inquiry. The AAO noted that the original consulate investigation failed to sufficiently reveal how the investigation was conducted.

On remand, the director requested a reinvestigation of the beneficiary's employment experience through the immigration office in Beijing, China. The director also requested the petitioner to submit additional evidence of its continuing ability to pay the proffered wage. Upon receipt of the petitioner's response, as well as the report from the overseas investigation, dated December 3, 2002, the director concluded that the evidence failed to corroborate either the beneficiary's claimed work experience or the petitioner's continuing ability to pay the proffered wage. The director denied the petition on June 10, 2003 and certified the case for review to the AAO.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

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 regulation at 8 C.F.R. § 204.5(l)(3) also provides in relevant part:

(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 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 year of training or experience.

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. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date was August 8, 1995. The proffered wage as set forth on the ETA 750A is \$1,800 per month or \$21,600 per year.

The certified job offer is that for a cook who can cook all kinds of Mandarin and Szechuan dishes. As set forth in Item 14 of the ETA 750A, no formal education is required, only two years in the job offered as a cook.

Part B of the ETA-750, signed by the beneficiary on July 28, 1995, does not reflect that the petitioner employed the beneficiary. The beneficiary lists three previous jobs on the ETA 750B:

- (1) From May 1994 until the present, he claims that he worked as a full-time cook at the Shanghai City [REDACTED] Restaurant, located at [REDACTED] Shanghai, China, where he prepared Mandarin and Szechuan dishes.
- (2) From March 1993 until May 1994, the beneficiary claims that he worked as a full-time cook at the [REDACTED], located in Shanghai, China. No specific street address is stated. His job duties are listed as identical to those given under the [REDACTED] Restaurant.
- (3) From September 1991 until February 1993, the beneficiary states that he worked as a full-time cook at the [REDACTED] located at [REDACTED] China. His duties are identically listed as in the first two jobs.

The report of the first overseas investigation, dated September 11, 1996, indicated that in an attempt to verify the alien's employment at the [REDACTED] Restaurant from May 1994 until the present, the investigator contacted the restaurant and learned that the beneficiary had not worked there in 1995, but that he may have worked there in 1994. The restaurant's manager had changed and no one currently recognized the beneficiary's name. The investigator was unable to verify the existence of the Fei Ge Restaurant or verify the existence of the beneficiary's employment. Relying upon this investigation, the director denied the petition.

The petitioner filed an appeal, contending that the consulate investigation had been incomplete and submitted copies of photographs that were claimed to be of the Fei Ge Restaurant. The petitioner also submitted a copy of a letter, dated February 20, 1997, from "[REDACTED]" who identified himself as the current manager of [REDACTED] located at [REDACTED] Zhabei District, Shanghai, China." Mr. [REDACTED] stated that the former director of the restaurant "is my friend" and authorized Mr. [REDACTED] to verify the beneficiary's

employment as a cook between March 1993 and May 1994. Mr. [REDACTED] did not identify the former director of the restaurant but stated that he (Mr. [REDACTED]) began to manage the restaurant on November 16, 1996. The petitioner offered another letter, also dated February 20, 1997, from an individual named [REDACTED] claiming to be the former controller of the cooking department of the [REDACTED] Restaurant." He states that the beneficiary was hired as a cook between March 1993 and May 1994. This letter gives Mr. [REDACTED] address as [REDACTED], Hongkou District, Shanghai.¹

Regarding the investigation's findings relating to the [REDACTED] Restaurant, the petitioner claimed that it was inaccurate and submitted a copy of a "certificate" from [REDACTED] whose address is [REDACTED] Shanghai, China. This certificate, dated February 25, 1997, states that the [REDACTED] Restaurant is a state-owned enterprise, which is managed by the [REDACTED] Economical & Trade Company. Mr. [REDACTED] states that he has managed the restaurant since May 1994 and that the beneficiary worked there as a cook between May 1994 and January 1996. He disclaims knowledge of any inquiries about the beneficiary's work history.

Noting that the photographs of the Fei Ge Restaurant submitted with the appeal were unreadable, and giving considerable weight to the consular investigation, the AAO dismissed the petitioner's appeal on March 18, 1998.

With the petitioner's motion to reopen and reconsider the AAO's dismissal of the appeal, the petitioner submitted original photographs purporting to be the Feige Restaurant at [REDACTED], in Shanghai, China. The petitioner also submitted copies of income tax declaration forms and a copy of corporate business license for this restaurant, dated December 30, 1996. The petitioner further provided another certificate from Mr. [REDACTED] dated April 9, 1998. His current address was given as No. 6, [REDACTED], Shanghai. In this certificate, he states that he managed the Feige Hotel from January 1996 until October 1997 and claimed that the beneficiary was once a Chinese cook there from March 1993 until May 1994. A similar letter from "Caiqing," a former cashier at the Feige Hotel from April 1993 until June 1995 also states that she was aware that the beneficiary worked there as a cook during the time claimed.

Although finding that the photographs were not sufficiently probative of the existence and location of the Feige Restaurant due to the lack of certified English translations and other corroborative documentation indicating that the photographs actually depicted the restaurant, the AAO found sufficient other evidence to suggest that a reinvestigation of the beneficiary's employment history would be appropriate. The AAO noted that the first investigation failed to provide any information as to how the investigation was conducted and what efforts were made to verify the information claimed in the petition. On April 2, 2001, the AAO withdrew the previous decisions denying the petition and remanded the case to the director, instructing him to request another investigation through Beijing of the beneficiary's alleged employment. The director and petitioner were advised that any additional evidence may be requested or submitted and that upon receipt of all the evidence, the director would enter a new decision based upon the entire record.

Pursuant to these instructions, the director notified the overseas immigration office that a reinvestigation of the beneficiary's employment history was requested. According to the documents in the record, this request was made in July and November 2002.

In response to the director's request, the Beijing immigration investigator's report, dated December 3, 2002, indicates that she and the Assistant Officer-in-Charge conducted a field investigation on November 20, 2002. Their report states:

¹ In support of the beneficiary's employment with the Xiong Du Hotel, a copy of one letter appears in the record. It appears to be written on the hotel's letterhead, but no author is identified. It merely states that the beneficiary was employed as a cook in the hotel's restaurant from September 1991 until February 1993.

AOIC and Writer arrived Tang Shan Road, Shanghai, but did not locate No., 588. No. 580 is Bank of Shanghai, No. 604 is a lane composed of residence. Between No. 604 and No. 580, it is Shanghai XIA HAI Temple. Writer asked several people working for shops nearby, however, no one ever heard of [REDACTED] Restaurant or [REDACTED] Company.

Writer also visited [REDACTED] Road, but found No. 2800 is [REDACTED] Preliminary School." Writer talked to receptionist of this School and he confirmed Fei Ge Restaurant was located here, however in 1996 it was closed. He does not know where it moved to.

Writer called 021-5677-1800, contact number of [REDACTED] who allegedly signed and issued certificate of employment on behalf of Subject. The lady answering the call stated that she never heard of [REDACTED] or Fei Ge Restaurant, and this number is her home number.

Writer further called 021-5603-8730, number of [REDACTED] who allegedly signed and issued certificate of employment on behalf of Subject. The lady answering the call claimed she is wife of Sun Qin Hai. She stated that she does not know if her husband or Subject ever worked for [REDACTED] Restaurant, then she hung up.

Writer also called 021-6537-1479, office number of [REDACTED] Economical & Trade Company but was told it is a home number.

Based upon the above-disclosed information, Subject's claimed work experience could not be verified.

Relying upon the results of this investigation, the director determined that the petitioner had failed to demonstrate that the beneficiary possessed the required minimum two years of experience as a cook. The AAO cannot conclude that the director's conclusion is erroneous, given the investigator's findings. Although the investigator appeared to go to the residence address listed for Mr. [REDACTED] rather than the address of the [REDACTED] restaurant, it is noted that his residence address at No. 588 Tangshan Road could not even be verified to exist, in order to corroborate the beneficiary's employment.

It is further observed that the suggested contradictions appearing between the copies of income tax declarations for the [REDACTED] at [REDACTED], dated December 1997 and January 1998, respectively, do not comport with the closing of the restaurant in 1996, as determined by the investigator when she found a school located at [REDACTED]. As the evidence fails to resolve the discrepancies elicited by the findings of this investigation, it cannot be concluded that the investigation persuasively corroborates that the beneficiary had accrued the required two years of experience as a cook as required by the terms of the labor certification. It remains the petitioner's burden to address inconsistencies in the record through independent objective evidence, *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In reference to the petitioner's continuing ability to pay the proffered wage of \$21,600 per year, the director requested additional evidence from the petitioner on remand from the AAO. In response to the director's request for evidence issued on December 9, 2002, the petitioner provided copies of its federal tax returns from 1995 to 2001. They indicate that the petitioner files its corporate tax returns under the corporate name of [REDACTED]. The tax returns for the years 1995-2001 contain the following information:

	1995	1996	1997	1998	1999
Net income ²	\$32,469	-\$ 29,116	-\$ 60,647	\$ 1,763	\$34,828
Current Assets (Sched. L)	\$67,367	\$161,356	\$147,567	\$31,147	\$45,385
Current Liabilities (Sched. L)	\$86,652	\$ 78,116	\$ 76,987	\$59,439	\$56,170
Net current assets	-\$19,285	\$83,240	\$70,580	-\$28,292	-\$10,785

For the 2000 tax year, the petitioner reported net income of -\$6,038. Its current assets as shown on Schedule L of the tax return were \$16,370. Its current liabilities were \$61,233, yielding -\$44,863 in net current assets.

In 2001, the petitioner reported net income of \$9,135. Schedule L reveals that the petitioner had \$23,468 in current assets and \$60,194 in current liabilities, resulting in -\$36,726 in net current assets. Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of a petitioner's liquidity and a possible resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of the corporate tax return. If a petitioner'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.

It is noted that in reviewing a petitioner's ability to pay the proffered wage, CIS will 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. 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. 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.

In the seven years examined above, neither the petitioner's net income nor its net current assets were sufficient to pay the proposed wage offer of \$21,600 per year in 1998, 2000, or 2001. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the proffered salary beginning at the priority date and continuing until the beneficiary obtains permanent resident status. It cannot be concluded that the figures presented in the corporate federal tax returns convincingly demonstrate that the petitioner has maintained a continuing ability to pay the proposed wage offer.

Counsel's submission of copies of the petitioner's bank statements from July to December 2002 in response to the director's request for evidence suggest a healthy cash flow for this period, but do not overcome the evidence as

² For purposes of this review, the petitioner's net income represents his reported ordinary income (line 21) on the corporate tax returns. (Form 1120S)

³ According 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.

shown above, as the continuing ability to pay the proposed wage offer must be met as of the visa priority date of August 8, 1995. Bank statements are also not among the three fundamental 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 regulation also specifies annual reports, audited financial statements or federal tax returns as the regulatory requirement. Bank statements generally reveal only a portion of a petitioner's financial status and do not reflect other encumbrances that may affect its ability to pay the proffered salary.

Upon review of the record, the evidence fails to sufficiently establish that the petitioner has demonstrated that the beneficiary attained the requisite work experience required by the approved labor certification or that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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 director's decision to deny the petition is affirmed.