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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 13 20

WAC 01 009 50986

IN RE: Petitioner:
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:

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DISCUSSION: The preference visa petition approval was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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

The petitioner [1]is a restaurant providing Indian specialty foods. It seeks to employ the beneficiary permanently in the United States as a specialty cook, foreign food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition, and, 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 revoked the petition approval accordingly.

On appeal, the counsel submits additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for 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 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Section 212(a)(6)(c)(i) the Act states:

"[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

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).

Here, the Form ETA 750 was accepted on June 5, 2000. The proffered wage as stated on the Form ETA 750 is $11.26 per hour ($23,420.80 per year). The Form ETA 750 states that the position requires two years experience.

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[1] The petitioner is incorporated as [redacted]

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The I-140 petition is filed October3, 2000. In response to a Request for Evidence, the petitioner submitted a verification of employment from a former manager of beneficiary. The petition was approved on July 2, 2002. On September 29, 2001, an agent investigator of the U.S. Embassy conducted an interview of beneficiary's former place of employment based upon beneficiary's sworn statements on Form 750 Part B that he had been previously employed there as a cook. After the investigator obtained statements from the owner of the business that beneficiary's work experience was false and fabricated, the director suspended the issuance of the immigrant visa according to 22 C.F.R. §42.43(a)(1). The director issued a Notice of Intent to Revoke the petition approval as a result of the adverse findings on March 1, 2004 in accordance with regulations at 8 C.F.R. § 205.2. On March 30, 2004, the petitioner submitted evidence in response to the notice. On April 19, 2004, the director issued his decision to revoke the approval of the petition for immigrant visa. On May 3, 2004, an appeal was filed of the director's decision. Counsel submitted a brief and additional evidence.

The first issue to be discussed below is whether or not the petitioner has established that the beneficiary has the requisite experience as stated on the labor certification petition.

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&19 I 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, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of specialty cook, foreign food.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Heading
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	None Required
	Major Field of Study	Blank
	Training	Blank
	Experience	Heading
	Years	Two Years
	Related Occupation	Heading
	Years	Blank
	Related Occupation (Specify)	Not Applicable

The beneficiary set forth his work experience on Form ETA-750B, in Item 15, dated the form on June 2, 2000, and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury for the position of specialty cook, foreign food:

15. WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER
Unemployed[2]
NAME OF JOB
Blank
DATE STARTED
Month – 10 [October] Year 1996
DATE LEFT
Month – Present
KIND OF BUSINESS
Blank
DESCRIBE IN DETAIL DUTIES...
Blank
NO. OF HOURS PER WEEK
Blank

(b)

NAME AND ADDRESS OF EMPLOYER
[redacted]
NAME OF JOB
Cook
DATE STARTED
Month – July Year 1993
DATE LEFT
Month – 10 [October] 1996
KIND OF BUSINESS
Indian Restaurant
DESCRIBE IN DETAIL DUTIES...
Prepare/cooked a wide variety of vegetarian and non-vegetarian dishes and sweets for a full service Indian Restaurant
NO. OF HOURS PER WEEK
50

The petitioner submitted two letters from the former manager of beneficiary to prove the beneficiary's work experience that was later impeached by the U.S. Embassy investigator. One letter was made October 29, 1996

[2] According to the records of CIS, the beneficiary arrived in the United States on March 12, 1997, on a P-3 visa admissible until May 15, 1997. The beneficiary declared that he was employed as a member of an Indian dance and entertainment group.

by the food and beverage manager of th[redacted]as written on its stationery. The undated letter is not notarized.[3] It states:

> This is to certify that [the beneficiary] was employed with us as a Cook from July 14, 1993 till October 31, 1996 ....

According to a second letter dated October 10, 1996, by the same food and beverage manager, the beneficiary was an 'Indian first cook" for the hotel restaurant.

The above undated experience letter was received as an attachment to a cover letter dated March 27, 2002. The I-140 petition is dated September 29, 2000, but petitioner did not submit the letter into evidence until March 27, 2002. There is no document, or other corroborating statements, co-workers' letters, or pay stubs contained in the record of proceeding, other than the beneficiary's statements and this letter, that establish that the beneficiary was employed for three years in an employment capacity with duties of the proffered position. The petitioner offers no photo of the beneficiary working at the restaurant, or, a former or current owner, employee or customer of [redacted](other than the food and beverage manager who remembers the beneficiary). Since the letter was not from an employer or trainer (there is no evidence that the food and beverage manager was a cook or kitchen manager with cooking skills) as required by regulation (and according to the record of proceedings the beneficiary had no other job experience as a cook), and, there is no signature verification or identity verification by notary seal, the letter has little probative value.

In contravention to the above letter's statements, an investigation conducted by an agent of the U.S. Embassy reported:

> WRITER AND SENIOR SPECIAL AGENT went to [redacted] and met [the present owner] of the Hotel. [The present owner] made a statement under oath ...[that] stated:
>
> - [The beneficiary] ... was never employed with [redacted]
> - [The beneficiary] ... has never worked as Chef as mentioned in his work experience certificate.
> - [The beneficiary] ... never worked with [redacted] in any capacity.

In rebuttal, petitioner contends that because the beneficiary asserts that the present owner of the hotel purchased the hotel some time in 2001, the present owner would not know anything about the beneficiary being employed as the chef in that location and business for those three years. The AAO finds this rebuttal not credible.

After leaving India, the beneficiary attempted entry into the United States as an entertainer.[4] There is no explanation given by petitioner why the beneficiary presented himself as an entertainer dancer in the employ of [redacted]on March 12, 1997 at Dulles International Airport, Dulles, Virginia since his experience according to petitioner is as a cook, or, why this employment was not mentioned in the subject Form ETA 750 prepared by the beneficiary. Other than the beneficiary's statements upon entry into the

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[3] On a copy in the record of proceedings, there is an obscured stamped notation on the letter which is illegible although the copy otherwise is clear.

[4] Upon arrival, the beneficiary was placed into detention for a time and then released into the United States on bond.

United States (and of course his declaration of intent given to the consular officer to secure his entertainer's entry visa), there is no evidence in the record of proceeding that the beneficiary ever worked as a dancer. A CIS Form G-235A prepared by the beneficiary states that he was unemployed after October 1996 as does beneficiary's Form ETA 750, Part B. The petitioner offers no explanation for this discrepancy.

The problem that arises in this case is the multiple inconsistencies in the averments of work experience either as a cook or a dancer, and information provided by the beneficiary, and his actions to gain entry into the United States reported above. *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." *Matter of Ho*, 19 I&N Dec. at 591-592 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."

Upon appeal, counsel submits the 3rd statement from the former food and beverage manager of [redacted] vouching for the beneficiary work experience. Since the manager's statements were impugned by the investigation mention above, his repetitive statements do not have probative value to show that the beneficiary was a cook in the hotel restaurant. Likewise, the self serving statement offered by the beneficiary on appeal explaining that the hotel owner's statements to the investigator were not correct is not credible since it is based on supposition that there is no one at his former place of business who remembers him.

Even if the record of proceeding did not contain multiple inconsistencies, the AAO concurs with the director's determination that no probative evidence establishes that the beneficiary has two years of experience as a cook. There is no evidence of probative value in the record of proceeding that establishes that the beneficiary was employed for two years in an employment capacity with duties similar to the duties of the proffered position, specialty cook, foreign food.

The AAO does not find the first mention of the beneficiary's work experience as a cook to be as a chef in a hotel restaurant in India to be credible without any evidence offered of prior experience or training as a cook.

The next issue presented in this case involves the petitioner's ability to pay the proffered wage. The Notice of Intent to Revoke the petition issued by the director on March 1, 2004, and sent to the petitioner, discussed this issue and placed petitioner on notice that it had not established to the satisfaction of the director its ability to pay the proffered wages of all beneficiaries for which the petitioner has filed employment based petitions. 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. Here, the Form ETA 750 was accepted on June 5, 2000. The proffered wage as stated on the Form ETA 750 is $11.26 per hour ($23,420.80 per year).

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.

Counsel submitted a copy of IRS Form 1120-A tax return for 2000, and a U.S. Partnership Income Tax Form 1065 return for 2000 (both returns constituted a 12 month period when taken together).

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $23,420.80 per year from the priority date. In 2000, the Form 1120-A stated taxable income[5] of $0.00. In 2000, the Form 1065 stated taxable income[6] of $80,655.00.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary since May 2003. The beneficiary received $10,080.00 in 2003.

Alternatively, in determining the 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.[7] *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*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did have taxable income to sufficient pay the proffered wage at any time for which petitioner's tax return is offered into evidence but not for multiple beneficiaries as will be discussed below.

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[5] IRS Form 1120-A, Line 24.

[6] IRS Form 1065, Line 22.

[7] All the "positive" income reported by the business in 2000 was reported as partnership income which raises the question of differentiating between that income necessary to pay the proffered wages above mentioned and that income necessary for the partners to pay their own and their families living expenses. The petitioner has not submitted any evidence concerning living expenses, or, whether, [redacted] the successor in interest to the partnership in this matter. Counsel also asserts that the petitioner has available cash flow for paying payroll and expenses. Cash flow alone cannot be the criteria to determine the ability to pay the proffered wage. Income must be balance by expenses.

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.[8] The petitioner's year-end current liabilities are shown on Part III of the return. 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.

Examining the Form 1120-A U.S. Income Tax Return submitted by petitioner indicates that in 2000, petitioner's Form 1120-A return stated current assets of $33,582.00 and $8,000.00 in current liabilities. Therefore, the petitioner had a $25,582.00 in net current assets for 2000. Since the proffered wage was $23,420.80 per year, this sum is more than the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing, June 5, 2000, by the U. S. Department of Labor, the petitioner had established[9] that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets but not for multiple beneficiaries as discussed below.

CIS electronic database records show that the petitioner filed an I-140 petition on behalf of one other beneficiary at about the same time as the instant petition was filed.[10] Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries from their priority dates and continuing forward. The record in the instant case contains no information about the proffered wage to be paid to the other potential beneficiary of I-140 petition filed by the petitioner (although it is reasonable in this case to assume that the proffered wage of the second beneficiary would be at least as much as the present beneficiary's proffered wage)[11]. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition. As of this date the petitioner has not withdrawn that other petition.

Counsel also contends that the totality of petitioner's financial picture that according to counsel includes " ... reasonable expectations of ... profits" demonstrates the ability to pay. *Matter of Sonegawa,* 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 *Sonegawa* 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

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[8] 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.

[9] The partnership return did not state end-of year balances on Schedule L.

[10] WAC 00 192 53842

[11] The director estimated the total wages of all beneficiaries to be $46,841.60.

whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unique or unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the year 2000 was an uncharacteristically unprofitable year for the petitioner.

The petitioner is incorporated as [redacted] There is no explanation submitted by the petitioner in the record of proceedings to show the relationship between the partnership and the corporation. In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer.

An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wages beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax return as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor to all beneficiaries. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for 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.