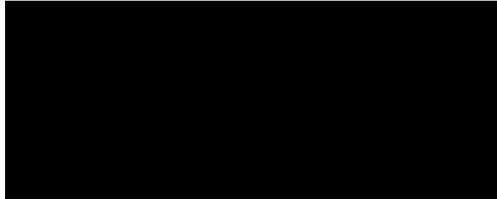


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FILE: [Redacted]
WAC 02 058 53947

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 21 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

DISCUSSION: The preference visa petition approval was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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 is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian cuisine cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The I-140 petition is dated December 1, 2001. A statement was included from the beneficiary's Indian employer stating his work experience as an assistant cook. Prior to approval of the petition, a request for evidence was issued to petitioner requesting additional evidence on July 11, 2002. The petitioner responded with copies of bank statements and transmitted to CIS information that it had requested a time extension to file its next tax return. The director requested an investigation be conducted by agents of the U.S. Embassy – New Delhi, and, on October 16, 2003, a visit was made to the beneficiary's Indian employer. The investigation report was in part negative indicating that the beneficiary did not have two years experience as assistant cook but in fact underwent a training period. A notice of the intent to revoke the petition was issued to petitioner on June 14, 2004. The purpose of the notice of the intent to revoke is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). A response to the notice of intent to deny the petition was made on August 12, 2004. On September 22, 2004, the director issued its decision to revoke the approval of the petition for immigrant visa. On October 8,

DATE STARTED
 Month - 07 [July] Year - 1999
 DATE LEFT
 Month Blank Year -- present [April 24, 2001]
 KIND OF BUSINESS
 N/A
 DESCRIBE IN DETAIL DUTIES...
 N/A
 NO. OF HOURS PER WEEK
 N/A

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER

NAME OF JOB
 Assistant Cook
 DATE STARTED
 Month/Year - 5/19/97
 DATE LEFT
 Month/Year 6/30/99
 KIND OF BUSINESS
 Restaurant

DESCRIBE IN DETAIL DUTIES...
 Responsibilities included selecting ingredients, chopping, marinating and preparing ingredients for Indian style dishes and desserts; introducing new specialties; and supervising and training cooks in preparation and cooking Indian style dishes.
 NO. OF HOURS PER WEEK
 40

In this case, a job verification letter was submitted with the petition to prove the beneficiary's work experience as a Indian cuisine cook.

An undated letter from the restaurant ' [REDACTED] ' the beneficiary's prior employer, stated:

* * *

This is to inform that [the beneficiary] worked in our restaurant from May 19, 1997 to June 30, 1999 in the post of assistant Chef on a full time basis.

He was responsible for selecting ingredients, chopping & marinating, preparing ingredients for North Indian style dishes and also desserts; introducing new specialties; supervising and training cooks in preparation of above.

He [the beneficiary] was directly under my supervision, a sincere and hardworking Employee.

[REDACTED] (proprietor)

As part of the employment based immigration process, the beneficiary prepared and submitted Form G-325A dated August 22, 2002, that provides biographic information, and a summary of the beneficiary's employment experience for the past five years (i.e. 8/1997 to 8/2002). The beneficiary stated "None" in his employment experience section.

The director requested an investigation be conducted by the U.S. Embassy – New Delhi, and on October 16, 2003, a visit was made to The [REDACTED] which is the Indian restaurant and the beneficiary's prior employer. The Managing Partner of the restaurant, identified as [REDACTED] was interviewed and who after reviewing the above letter, declared to the investigator that he had issued the job verification, but then he contradicted it. He said that the beneficiary worked as "Chef trainee," and not as an assistant chef.

In rebuttal to the statement made to embassy investigator, counsel introduced three affidavits, one from Mr. [REDACTED] two from co-workers at The [REDACTED]. On The [REDACTED] stationery, in his letter dated May 8, 2004, [REDACTED] states that he checked his business records and confirms that the beneficiary worked at the restaurant from May 19, 1997 to June 30, 1999. He states in pertinent part, "I confirm that [the beneficiary] had joined our organization, first as a trainee, and was later promoted to Asst. Chef. He worked in this position from May 19, 1997 to June 30, 1999"

There is no demarcation given in this job verification to account for the amount of time the beneficiary was in training and when he undertook the duties of assistant chef. Reading the two job verification letters given by Mr. Muppidi, it is not credible that the beneficiary was trained "on-the-job" in 42 days (since the job of Indian cuisine chef as described in the labor certification requires two years experience) and, then assumed the position of assistant chef at The Orchid for the next two years to do the following:

Plan menus and cook Indian dishes (including Mixed Vegetable Pakora, Rasam, Masala Dosa, Uttappam, Methu Vada, Aloo Paratu, Samosa Ragada, Tandoori Chicken, Chicken Tikka, Andhra Chicken Curry, Chicken Masala, Lamb Pasanda; Shrimp Saag, Dal Curry, Aloo Mutter, Vegetable Biryani and Naan), according to recipes; prepare meats, soups and sauces, vegetables and other foods prior to cooking; season and cook food according to prescribed method; portion and garnish food; serve food to waiters on order; estimate food consumption; and requisition or purchase supplies.

The beneficiary is not stating that he was employed or was trained as a cook either before he worked at The Orchid restaurant, or since July of 1999. Under the facts of this case, it is reasonable to conclude that the beneficiary was in fact trained at The Orchid to cook as [REDACTED] first indicated.

Counsel introduces two affidavits on appeal given by co-workers who both worked with the beneficiary at the [REDACTED] restaurant. The first affidavit attested October 19, 2004, given by [REDACTED] states that he worked as "Commi.I"² in [REDACTED] restaurant from December 1991 to December 2000 and that the beneficiary "...worked under me as Asst. Chef in the same restaurant The [REDACTED] from 19-05-1997 to 30-06-1999" The second affidavit is from [REDACTED]. It is attested the same above date. He states in pertinent part that "... [the beneficiary] worked ... as Asst. Chef here" Both these affidavits verify the beneficiary's employment; however, they do not overcome the question raised by [REDACTED] two

¹ Also identified as [REDACTED]

² There is no explanation for this term given by petitioner.

statements of the duration of the beneficiary's employment in the capacity of assistant chef. Neither of these two affidavits mentioned a training period as [REDACTED] stated.

The problem that arises in this case is the multiple inconsistencies in information provided by the employer, the co-workers, and the beneficiary (his Form G-325A stated he was unemployed from 8/1997 to 8/2002), and the lack of credible evidence of two years job experience as Indian cuisine chef, or "Specialty Cook, Indian Cuisine; or Assistant Chef." *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."

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not met that burden.

The second issue that arises in this case is whether or not the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$24,000.00 per year.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; the U.S. federal income tax return of

petitioner for 2000; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), a request for evidence was issued to petitioner requesting additional evidence on July 11, 2002. The petitioner responded with copies of bank statements and transmitted to U.S. Citizenship and Immigration Services (CIS) information that it had requested a time extension to file its tax return. Subsequently, after an additional request for evidence, on September 22, 2004, the director issued a decision to revoke the approval of the petition for immigrant visa finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. An appeal was filed of the director's decision on October 8, 2004. Counsel submitted a brief and additional evidence.

On appeal, counsel asserts that the petitioner's net income is equal or greater than the proffered wage of \$24,000.00 per year; that evidence demonstrates that the petitioner's net current assets are equal to or greater than the proffered wage; and, that the petitioner "... has paid or currently is paying the proffered wage [to the beneficiary]."³ Counsel submits additional evidence, among other documents, which are the petitioner's corporate tax returns for 2001 and 2002 as well as other documents.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. No evidence was submitted to show that the petitioner employed the beneficiary.

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. *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.

The tax returns⁴ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,000.00 per year from the priority date of April 26, 2001:

³ No evidence was submitted to demonstrate this employment or wage/compensation paid by the petitioner to the beneficiary.

⁴ The U.S. federal income tax return of petitioner was submitted for 2000 but since it was before the priority date of the labor certification, it has limited probative value in the determination of the ability to pay the proffered wage. It stated an income loss.

- In 2001, the Form 1120S stated a taxable income loss⁵ of <\$51,085.00>⁶.
- In 2002, the Form 1120S stated a taxable income loss of <\$50,443.00>.
- In 2003, the Form 1120S stated a taxable income loss of <\$3,456.00>.

Based upon its taxable income for the years examined, the petitioner could not pay the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, the petitioner's Form 1120S return stated current assets of <\$20,000.00> and \$15,000.00 in current liabilities. Therefore, the petitioner had <\$35,000.00> in net current assets. Since the proffered wage was \$24,000.00 per year, this sum is less than the proffered wage.
- In 2002, the petitioner's Form 1120S return stated current assets of <\$20,000.00> and \$42,146.00 in current liabilities. Therefore, the petitioner had <\$62,146.00> in net current assets. Since the proffered wage was \$24,000.00 per year, this sum is less than the proffered wage.
- In 2003, the petitioner's Form 1120S return stated current assets of <\$16,626.00> and \$42,064.00 in current liabilities. Therefore, the petitioner had <\$58,690.00> in net current assets. Since the proffered wage was \$24,000.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel advocates the use of the cash balance of a business account to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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,

⁵ IRS Form 1120S, Line 21.

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

no evidence was submitted to demonstrate that the funds reported on the petitioner's 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.

Contrary to all of counsel's assertions on appeal, the petitioner's net income is not equal or greater than the proffered wage of \$24,000.00. In 2001 and 2002, the Forms 1120S stated a taxable income loss, and in 2003 a taxable gain of \$3,456.00. Counsel states that the evidence demonstrates that the petitioner's net current assets are equal to or greater than the proffered wage. In any year for which tax returns were submitted, the net current assets were less than the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage 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 three corporate tax returns 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.

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 petition is dismissed.