

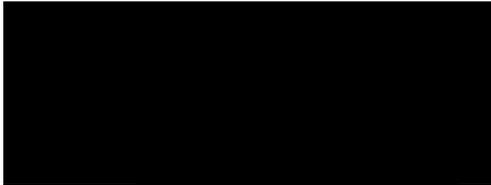
Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



B6

FILE:



Office: VERMONT SERVICE CENTER

Date: JAN 04 2005

SRC 02 040 56727

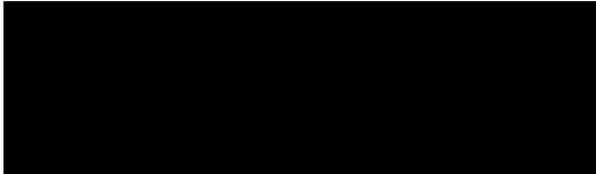
IN RE:

Petitioner:  
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:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

On appeal, counsel states that the evidence establishes the petitioner's ability to pay the proffered wage.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.50 per hour for 35 hours per week, which amounts to \$24,570.00 annually. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner from April 1998 until the present.

On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$228,492.00, and to currently have five employees.

In support of the petition, the petitioner submitted an undated letter from an Indian restaurant in Phagwara, Kapurthala (Pb.), India, stating that the beneficiary was employed by that restaurant from July 1994 to August 1997; and an apparently incomplete copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 24, 2002 the director requested additional

evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested copies of the beneficiary's Form W-2 wage and tax statements or Form 1099-Misc statements showing how much the beneficiary was paid by the petitioner.

In response, counsel submitted a letter dated September 25, 2002 accompanied by the following evidence: a summary of the petitioner's bank account monthly ending balances for June 2001 through July 2002; copies of the first page of each monthly statement for an account of the petitioner at [REDACTED] Orlando, Florida, for June 2001 through July 2002; a copy of a decision of the AAO dated November 8, 1993 in a case unrelated to the instant case; a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001; and an affidavit of the beneficiary dated September 19, 2002.

In a decision dated March 17, 2003, 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 denied the petition.

On appeal, counsel submits no brief and submits the following evidence: an affidavit from the petitioner's owner and president dated April 21, 2003; a summary of the petitioner's bank account monthly ending balances for June 2001 through March 2003; copies of the first page of each monthly statement for an account of the petitioner [REDACTED] Orlando, Florida, for August 2002 through March 2003; two luncheon menus of the petitioner; and ten color photographs, showing the exterior and interior of the petitioner's premises. On appeal, counsel also submits duplicate copies of the tax returns, the bank statements and the AAO decision which had been submitted previously for the record.

Counsel states on appeal that the record establishes that the petitioner had the ability to pay the proffered wage at the time of filing and continuing to the present.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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, the beneficiary claims on the Form ETA 750B to have been employed by the petitioner since April 1998. The record contains no W-2 forms or 1099 forms for the beneficiary. The beneficiary states in his affidavit that because he never had legal status in the United States, he never received W-2 forms nor 1099 forms, and that he was paid "under the table." (Beneficiary's Affidavit, September 19, 2002). The record contains no evidence indicating the amounts the beneficiary was paid during his claimed employment with the petitioner. Therefore the record lacks any evidence relating to the beneficiary's employment with the petitioner which might establish the petitioner's ability to pay the proffered wage to the beneficiary.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 structured as a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before the net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for ordinary income: \$5,751.00 for 2000; and \$1,306.00 for 2001. Since each of those figures is less than the proffered wage of \$24,570.00, those figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$19.00 for the end of 2000, and \$2.00 for the end of 2001. Since the figure for the end of 2000 is negative, and since the figure for the end of 2001 is less than the proffered wage of \$24,570.00, those figures also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements. 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.

On the petitioner's bank statements the ending balances are as follows:

2001	June	\$4,113.38
	July	\$9,285.41
	August	\$9,862.17
	September	\$2,347.91
	October	\$6,964.64
	November	\$5,982.07
	December	\$6,781.11

2002	January	\$8,050.77
	February	\$7,096.56
	March	\$7,212.27
	April	\$9,764.64
	May	\$10,264.35
	June	\$5,068.06
	July	\$8,355.31

The ending balances of the petitioner's bank statements 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 the petitioner's tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

The record includes a copy of an AAO decision dated November 8, 1993 in a case unrelated to the instant case. The copy of the AAO decision in the record contains no official citation nor does any evidence in the record indicate that the decision is a published one. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). For the foregoing reasons, the AAO decision submitted by counsel is not considered as a binding precedent in deciding the instant case.

In his decision, the director correctly analyzed the information from the petitioner's tax returns for 2000 and 2001, and correctly found that the information on those returns failed to establish the petitioner's ability to pay the proffered wage. The director also found that the bank statements in the record failed to establish the petitioner's ability to pay the proffered wage, and that the beneficiary's affidavit stating that he had been paid for his work with the petitioner "under the table" was not credible evidence to show that the petitioner had been paying the beneficiary. The director's analysis of the foregoing issues was also correct. The decision of the director to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal, counsel submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by

the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

The evidence newly submitted on appeal includes two luncheon menus of the petitioner; and ten color photographs, showing the exterior and interior of the petitioner's premises. Those documents provide further corroboration that the petitioner is a viable business, but they do not add significantly to the previous evidence.

Also newly submitted on appeal are a summary of the petitioner's bank account monthly ending balances for June 2001 through March 2003; and copies of the first page of each monthly statement for an account of the petitioner at [redacted] Orlando, Florida, for August 2002 through March 2003. These documents update the bank statement evidence submitted previously, which covered from June 2001 through July 2002. The ending balances on the bank statements newly submitted on appeal are as follows:

2002	August	\$3,764.17
	September	\$1,192.34
	October	\$6,825.31
	November	\$3,981.95
	December	\$11,298.44
2003	January	\$7,477.41
	February	\$4,833.41
	March	\$4,655.21

The bank statements newly submitted on appeal have the same evidentiary limitations as the bank statements submitted previously, which are discussed above. The ending balances of the petitioner's bank statements do not show monthly increases by amounts which would be sufficient to pay the proffered wage.

The evidence newly submitted on appeal also includes an affidavit from an owner of the petitioner stating the petitioner's ability to pay the proffered wage. According to the ETA 750, the affiant is the petitioner's president. The record does not indicate whether the president is the sole owner of the petitioner or a part owner, since on the petitioner's tax returns the Schedule E's, for itemizing the compensation of officers and their ownership shares, are blank.

The affidavit from the owner provides no additional financial information beyond that which was submitted prior to the director's decision. The owner states that the petitioner's officers can take reduced compensation from the current level of \$35,200.00 in order to assure the payment of the beneficiary's compensation. But no information is given on how the reduction in the compensation of officers would affect the petitioner's business. The owner cites the petitioner's retained earnings as a source on which it may draw to pay the proffered wage to the beneficiary. But the approximately \$30,000.00 in retained earnings at year end on each of the petitioner's tax returns in the record are based on assets which include \$35,000.00 in goodwill, a non-cash item that cannot be liquidated to pay the wage.

The owner also makes other statements in support of the petitioner's ability to pay the proffered wage as demonstrated by the "totality of the circumstances," but none of the statements is sufficiently detailed to establish that fact. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

For the foregoing reasons, the evidence newly submitted on appeal fails to overcome the decision of the director.

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.