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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Date: **JUL 15 2011** Office: CALIFORNIA SERVICE CENTER

FILE:



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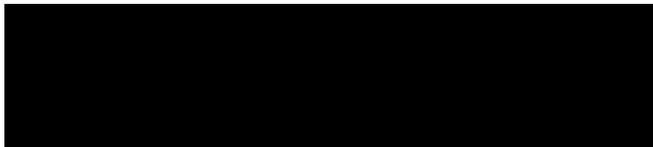
Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and the matter 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 curry chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possessed the required two years of experience in the proffered position of curry chef. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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.

As set forth in the director's January 8, 2008 denial, the first issue to be examined in this case is whether the beneficiary possessed the required two years of experience as curry cook as of the priority date of January 13, 1998.

In order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Here, the Form ETA 750 was accepted for processing by the DOL on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$18.58 per hour or \$38,646.40 per year. The Form ETA 750 states that the position requires two years experience in the job offered. At part 15 of the Form ETA 750B, which was signed by the beneficiary on January 9, 1998, the beneficiary claimed to have been employed as an Indian cuisine chef by Sutelj Restaurant and Beer Bar in Nawanshahr, India, for forty hours per week from June 1993 to July 1995.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

On appeal, the petitioner's president and chief executive officer asserted that the consular officer who visited the beneficiary's former employer at [REDACTED] in India failed to verify the identity of the individual that was interviewed and whether such individual was in fact the

owner of the restaurant. The petitioner's president and chief executive officer stated that the director denied the petition without addressing an employment affidavit from [REDACTED] relating to the beneficiary's previous employment at [REDACTED] in India that was submitted in response to the Notice of Intent to Deny issued on September 15, 2006.

In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany 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. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

At part 13 of the Form ETA 750A, the petitioner listed the duties of the offered job as follows:

Plan menus and prepare vegetarian and non-vegetarian curry entrees in the Northern Indian style. Orders, receives, and checks foodstuffs and supplies. Supervise kitchen staff consisting of one kitchen helper who assists the chef in cutting the meats and vegetables, and cleaning.

At part 15 of the Form ETA 750B where beneficiaries are asked to list their work experience, the beneficiary indicated that he was a self-employed farmer working on a family owned farm in Bhan Majara, India from 1977 to April 1996. As noted previously, the beneficiary also claimed that he was employed as an Indian cuisine chef by [REDACTED] in Nawanshahr, India, for forty hours per week from June 1993 to July 1995.

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at \*7.

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

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties

performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added). Therefore, USCIS may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. USCIS may also consider copies of Forms W-2, Wage and Tax Statement, issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the events and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence. 8 C.F.R. § 103.2(b)(2)(i).

Relevant evidence in the record regarding the beneficiary's two years of required experience in the offered job of curry chef included an employment affidavit containing the letterhead of ██████████ ██████████ in Nawanshahr, India, that is dated April 5, 2002, and signed by ██████████ who listed his position as managing director. In his affidavit, ██████████ reiterated the beneficiary's claim that he was employed as a chef at this establishment from June 1993 to July 1995 and stated in pertinent part:

During this period, [the beneficiary] was responsible for preparing a wide variety of traditional Indian style entrees, side dishes, breads, and desserts. These included both vegetarian and non-vegetarian curry dishes as well as tandoori style dishes. In addition, [the beneficiary] was also responsible for purchasing fresh produce and other food stuffs and other kitchen supplies as well as supervising his kitchen staff of one to two kitchen assistants.

In order to determine the veracity of the beneficiary's claim that he was employed as a chef at ██████████ ██████████ in Nawanshahr, India, from June 1993 to July 1995, a consular officer from the American Embassy in New Delhi, India visited this establishment on March 20, 2006. The notes of the consular officer reflect that he interviewed the owner, ██████████ (no first name given), who indicated that he had always owned this business. ██████████ confirmed that the beneficiary and ██████████ had worked for ██████████ ██████████ noted that ██████████ had worked as a manager but left his employment and migrated to Canada at some time prior to the date that ██████████ had executed the employment affidavit discussed above on the beneficiary's behalf on April 5, 2002. When the consular officer confronted ██████████ with this inconsistency, ██████████ claimed that ██████████ returned to India for a two month visit during which he executed the employment affidavit. When the consular officer asked ██████████ the reason why ██████████ executed the employment affidavit on ██████████ letterhead if he was no longer

working at the establishment, [REDACTED] stated that [REDACTED] had returned to his job at [REDACTED] during this two month visit. The consular officer then inquired if [REDACTED] possessed records relating to either the beneficiary's employment or [REDACTED] employment. [REDACTED] concluded the interview by refusing to cooperate and answer any further questions from the consular officer.

The record shows that the director issued a notice of intent to deny on September 15, 2006, informing the petitioner of the information received from the consular officer regarding his attempt to confirm the beneficiary's claim of employment at [REDACTED]. The director informed the petitioner that the inconsistencies in [REDACTED] testimony raised questions regarding the beneficiary's claimed employment with this establishment. The director requested that the petitioner provide documentation to reconcile the inconsistencies in [REDACTED] testimony.

In response, the petitioner submitted an employment affidavit containing the letterhead of [REDACTED] in Nawanshahr, India, that is dated November 17, 2006, and signed by [REDACTED] who listed his position as owner. In his affidavit, [REDACTED] reiterated the beneficiary's claim that he was employed as a chef at this establishment from June 1993 to July 1995. [REDACTED] also stated that [REDACTED] had worked in a managerial position for [REDACTED] and left this position on an unspecified date in 2002.

The statements on appeal by the petitioner's president and chief executive officer relating to the beneficiary's claimed employment at the [REDACTED] have been considered. However, the inconsistencies in [REDACTED] testimony as noted above tend to impair the beneficiary's claim of employment for this enterprise Restaurant and Beer Bar. The employment affidavit signed by [REDACTED] failed to address these inconsistencies and merely reiterated the beneficiary's claim of employment without providing a specific and detailed description of his duties as a chef for this enterprise. More importantly, the record is absent any independent evidence such as copies of paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment. Finally, the record does not contain two or more affidavits sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the events and circumstances attesting to the unavailability of evidence such as copies of paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment pursuant to 8 C.F.R. § 103.2(b)(2)(i). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For these reasons, neither [REDACTED] employment affidavit nor [REDACTED] non-specific employment letter can be considered as sufficient evidence to establish that the beneficiary possessed the required two years of experience in the offered job as of the priority date of January 13, 1998.

It is further noted that the record contains a separate application, a transcribed interview dated May 5, 1997, and the transcripts of a removal hearing conducted on August 27, 1997, the applicant himself testified that his past employment in India had consisted of agricultural work without any

reference to his claimed employment as an Indian cuisine chef for ██████████ in Nawanshahr, India, from June 1993 to July 1995.<sup>1</sup> The fact that the applicant failed to attest to his employment at this enterprise in these three separate instances only serves to further undermine the credibility of his claim that he had gained the required two years of experience in the offered job by working for ██████████ as an Indian cuisine chef from June 1993 to July 1995. Thus, it cannot be concluded that the beneficiary is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises*, 229 F. Supp. 2d at 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Although not noted by the director, the next issue to be examined in these proceedings is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 either 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). the Form ETA 750 was accepted on April 27, 2001.

As previously noted, the Form ETA 750 has a priority date of January 13, 1998 and the proffered wage as stated on the Form ETA 750 is \$18.58 per hour or \$38,646.40 per year. The evidence in the record of proceeding reveals that the petitioner is structured as an S corporation. The petitioner

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<sup>1</sup> USCIS administrative procedure only requires the creation of A-file to house the appellate record of any denied *immigrant* visa petition. USCIS Adj. Field Manual 22.2(1)(2) (“If the grounds of denial have not been overcome, an A-file is created to house the record and the case must be forwarded to the AAO in accordance with 8 C.F.R. § 103.3.”) If an A-file already exists for that alien, the denied petition is consolidated into the existing A-file. The system is designed to consolidate the denials common to an alien into his or her permanent A-file so that they can be reviewed with subsequent visa petitions to prevent petitioners for permanent resident status from concealing an element of ineligibility or materially changing their claims.

indicated at part 5 on the Form I-140 petition that it was established on an unspecified date in 1997, employs seven workers, and has gross annual income of \$850,000.00. According to the tax returns in the record, the petitioner's fiscal year corresponds to the calendar year.

Relevant evidence in the record included Forms 1120S, U.S. Income Tax Return for an S Corporation, for 1998, 1999, 2000, and 2001, the petitioner's profit and loss statements for 1998, 1999, 2000, and 2001, the petitioner's balance sheets for 1998, 1999, 2000, and 2001, State of California Forms DE-6, Quarterly Wage and Withholding Report, for quarters ending March 31, 1999, June 30, 1999, September 30, 1999, December 31, 1999, March 31, 2000, June 30, 2000, September 30, 2000, December 31, 2000, March 31, 2001, June 30, 2001, September 30, 2001, and December 31, 2001, as well as three paychecks stubs dated August 18, 2004, September 15, 2004, and October 6, 2004, representing wages paid by the petitioner to the beneficiary.

On February 11, 2011, the AAO issued a Request for Evidence/Notice of Derogatory Information (RFE/NDI) informing the petitioner that evidence had come to light during the adjudication of the appeal that the petitioning business in this matter may not longer be in operation or, if it is, it may no longer be operated by the petitioning corporation, [REDACTED]. According to the official website of the county clerk of San Mateo County, California, the petitioner's fictitious name for its restaurant, [REDACTED], expired on March 3, 2002. *See* <http://www.smcare.org/apps/eFBN/default.asp> (accessed on April 12, 2011) If the restaurant is no longer an active business, or is no longer owned by the petitioner, the petition and its appeal to this office may have become moot.<sup>2</sup> In which case, the appeal shall be dismissed as moot. Therefore, the AAO requested that the petitioner provide evidence that its fictitious name has not expired and that it was an active business properly conducting business in the state of California under the name [REDACTED].

In addition, the AAO informed the petitioner that the record did not contain sufficient evidence to establish that it had the continuing ability to pay the beneficiary the proffered wage since the priority date. The AAO acknowledged that the record contained the State of California Forms DE-6 statements and three paychecks stubs discussed above, but noted that the record is absent other documentation, such as Forms W-2, Wage and Tax Statement, Forms 1099-MISC, or additional paychecks, to demonstrate that the petitioner had the continuing ability to pay the proffered wage since the priority date of January 13, 1998. In addition, the AAO acknowledged that the record contains the petitioner's Forms 1120S tax returns for 1998, 1999, 2000, and 2001 as well as the petitioner's balance sheets for 1998, 1999, 2000, and 2001, but that these balance sheets were unaudited. The record is absent any evidence required by the regulations such as federal tax returns or audited financial statements demonstrating the petitioner's ability to pay the proffered wage in 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010. It is imperative for the AAO to

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<sup>2</sup> Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

determine that all of the petitioner's supporting documents are consistent with the claims made on the present petition. Thus, the petitioner was asked to provide the AAO with the following additional evidence:

- Copies of any Forms 1099-MISC or Forms W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010; and,
- Copies of the petitioner's federal tax returns or audited financial statements for 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010.

The AAO also noted that the petitioner filed other petitions for other beneficiaries in 2004. Therefore, the petitioner must establish that it could pay the proffered wage to the beneficiary of the instant petition as well as to the beneficiaries of the other petitions. Finally, the petitioner was asked to provide the priority date of the petition and evidence of any wages having been paid to the beneficiary of this petition from the priority date to the date of this petition's withdrawal on June 28, 2006, as well as evidence of wages having been paid to the beneficiary of the petition from the priority date of April 13, 2001 to the date that beneficiary adjusted to permanent resident status on March 29, 2008.

In response, the petitioner's president and chief executive officer asserts that it has the continuing ability to pay the beneficiary the proffered wage as well as the wages of the beneficiary of the petition, from the priority date of April 13, 2001 to the date that beneficiary adjusted to permanent resident status on March 29, 2008. The petitioner's president and chief executive officer notes that the beneficiary of the other petition, never had work authorization and was not employed by the petitioner prior to this petition's withdrawal on June 28, 2006. The petitioner's president and chief executive officer indicates that he and his wife wholly own a different corporation, that was utilized to open a different restaurant, in Milipitas, California in 2008, which was subsequently forced to close in December 2010 because of a general downturn in the local economy. The petitioner's president and chief executive officer acknowledges that the beneficiary worked at and was paid by the separate corporation, from June 2008 to December 2010 as part of a special assignment instead of working for and being paid by the petitioner.

The petitioner's president and chief executive officer submits documentation establishing that the petitioner is an active business operated by the petitioning corporation, and that it is properly conducting business in the state of California in San Mateo County under the name ". The petitioner's president and chief executive officer includes Form W-2 statements reflecting wages paid to the beneficiary in the instant case in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010, as well as Form W-2 statements reflecting wages paid to the beneficiary of the petition, in 2007 and 2008. The petitioner's president and chief executive officer includes the petitioner's Form 1120S tax returns for 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. In the instant case, the record contains Form W-2 statements reflecting employee compensation paid to the beneficiary by the petitioner, [REDACTED] with Federal Employer Identification Number (FEIN) [REDACTED], as follows:

- 1998 – \$10,887.30 (\$27,759.10 less than the proffered wage of \$38,646.40).
- 1999 – \$13,750.16 (\$24,896.24 less than the proffered wage of \$38,646.40).
- 2000 – \$13,896.93 (\$24,749.47 less than the proffered wage of \$38,646.40).
- 2001 – \$14,128.28 (\$24,518.12 less than the proffered wage of \$38,646.40).
- 2002 – \$13,670.88 (\$24,975.52 less than the proffered wage of \$38,646.40).
- 2003 – \$13,651.50 (\$24,994.90 less than the proffered wage of \$38,646.40).
- 2004 – \$26,277.48 (\$12,368.92 less than the proffered wage of \$38,646.40).
- 2005 – \$28,829.60 (\$9,816.80 less than the proffered wage of \$38,646.40).
- 2006 – \$29,874.24 (\$8,772.16 less than the proffered wage of \$38,646.40).
- 2007 – \$30,240.96 (\$8,405.44 less than the proffered wage of \$38,646.40).
- 2008 – \$15,201.48 (\$23,444.92 less than the proffered wage of \$38,646.40).
- 2009 – No Form W-2 statement provided reflecting wages paid to the beneficiary by the petitioner, [REDACTED].
- 2010 – No Form W-2 statement provided reflecting wages paid to the beneficiary by the petitioner, [REDACTED].

Clearly the petitioner has not established that it paid the beneficiary either the full proffered wage in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, or any wages in 2009 and 2010. However, it must be noted that the petitioner is only obligated to show that it can pay the difference between the proffered wage and wages already paid in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008.

The petitioner's president and chief executive officer indicates that he and his wife wholly own a different corporation, [REDACTED], that was utilized to open a different restaurant, [REDACTED] in Milipitas, California in 2008, which was subsequently forced to close in December 2010 because of a general downturn in the local economy. The petitioner's president and chief executive officer acknowledges that the beneficiary worked at [REDACTED] and was paid by the separate corporation, [REDACTED], from June 2008 to December 2010 as part of a special assignment instead of working for and being paid by the petitioner, [REDACTED]. The petitioner's president and chief executive provides Form W-2 statements reflecting wages paid by [REDACTED], to the beneficiary in 2009 and 2010. Clearly, [REDACTED], with FEIN [REDACTED] is a different corporate entity than the petitioner [REDACTED] with FEIN [REDACTED]. Therefore, any wages paid by [REDACTED], will not be considered in determining whether the petitioner has established the continuing ability to pay the proffered wage to the beneficiary since the priority date. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash

expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The Form 1120S tax returns for the petitioner, [REDACTED] demonstrate its net income for the years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 as shown in the table below.

- In 1998, Schedule K of the Form 1120S stated net income<sup>3</sup> of \$32,786.00.
- In 1999, Schedule K of the Form 1120S stated net income of \$117,135.00.
- In 2000, Schedule K of the Form 1120S stated net income of \$261,574.00.
- In 2001, Schedule K of the Form 1120S stated net income of \$135,093.00.
- In 2002, Schedule K of the Form 1120S stated net income of \$79,146.00.
- In 2003, Schedule K of the Form 1120S stated net income of \$71,644.00.
- In 2004, Schedule K of the Form 1120S stated net income of \$77,890.00.
- In 2005, Schedule K of the Form 1120S stated net income of \$136,569.00.
- In 2006, Schedule K of the Form 1120S stated net income of \$128,345.00.
- In 2007, Schedule K of the Form 1120S stated net income of \$101,072.00.

<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on December 14, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

- In 2008, Schedule K of the Form 1120S stated net income of \$65,432.00.
- In 2009, Schedule K of the Form 1120S stated net income of \$11,170.00.
- In 2010, Schedule K of the Form 1120S stated net income of <\$14,167.00.><sup>4</sup>

Clearly, the petitioner possessed sufficient net income to pay the difference between wages paid and the full proffered salary of \$38,646.40 in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008. However, in 2009 and 2010, years in which the petitioner, [REDACTED], did not pay the beneficiary any wages, the petitioner did not have sufficient net income to pay the proffered wage in each year.

As an alternate means of determining the ability of the petitioner, [REDACTED], to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a corporate entity's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the corporation is expected to be able to pay the proffered wage using those net current assets. The tax returns of the petitioner demonstrate its end-of-year net current assets for 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 shown in the table below.

- In 1998, the Form 1120S stated net current assets of \$35,147.00.
- In 1999, the Form 1120S stated net current assets of \$54,069.00.
- In 2000, the Form 1120S stated net current assets of \$58,818.00.
- In 2001, the Form 1120S stated net current assets of \$55,170.00.
- In 2002, the Form 1120S stated net current assets of \$38,130.00.
- In 2003, the Form 1120S stated net current assets of \$35,167.00.
- In 2004, the Form 1120S stated net current assets of \$25,363.00.
- In 2005, the Form 1120S stated net current assets of \$50,241.00.
- In 2006, the Form 1120S stated net current assets of \$29,703.00.
- In 2007, the Form 1120S stated net current assets of \$29,703.00.
- In 2008, the Form 1120S stated net current assets of \$27,610.00.
- In 2009, the Form 1120S stated net current assets of \$42,299.00.
- In 2010, the Form 1120S stated net current assets of \$23,982.00.

<sup>4</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Consequently, the petitioner did have sufficient net current assets to pay the difference between wages paid to the beneficiary and the full proffered wage in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, as well as sufficient net assets to pay the full proffered wage of \$38,646.40 to the beneficiary in 2009. Nevertheless, the petitioner did not have sufficient net current assets to pay the beneficiary the full proffered wage of \$38,646.40 in 2010.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner, [REDACTED] had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary from 1998 to 2010, or its net income in 2009 and 2010, or net current assets in 2010. The evidence in the record is unclear as to whether the petitioner had the ability to pay the wages of the beneficiary of the instant petition and the beneficiary of the petition, [REDACTED] from the priority date of April 13, 2001 to the date that beneficiary adjusted to permanent resident status on March 29, 2008, as well as the beneficiary of the petition, [REDACTED] which was withdrawn on June 28, 2006, through an examination of net income and net current assets from 1998 to 2010, as the petitioner has failed to provide the proffered wages being offered to the beneficiaries of the petitions, [REDACTED].

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, no specific detail or documentation has been provided similar to *Sonogawa*. The instant petitioner, [REDACTED] has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonogawa* are present in this matter. While the petitioner's president and chief executive officer claims that he and his wife wholly own a different corporation,

██████████, that was utilized to open a separate restaurant, ██████████, in 2008, which was subsequently forced to close in December 2010 because of a general downturn in the local economy, the record is absent evidence to document this loss. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, any losses experienced by the separate and distinct corporate entity, Swaraj Inc., with FEIN 26-2694348, are neither material nor relevant to the business activities of the petitioner, Suraj Indian Cuisine with FEIN 94-3262290. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary since the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.