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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
and Immigration
Services

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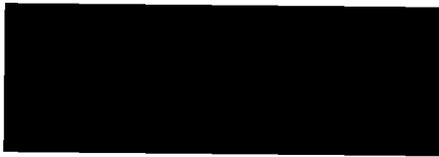
Date: **NOV 01 2011** Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on July 1, 2010. The matter is now before the AAO on a motion to reopen or reconsider.¹ The motion will be granted and the previous decision of the AAO will be affirmed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The AAO determined that there was insufficient evidence in the record to show that the petitioner had the continuing ability to pay the proffered wage to the beneficiary since the priority date. The AAO further determined that the record did contain sufficient credible evidence demonstrating the beneficiary had the required two years of experience in the offered job as listed on the ETA Form 9089. The AAO dismissed the appeal and affirmed the director's decision.

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.

As set forth in the AAO's decision, the first issue in this case is whether or not the petitioner has the continuing ability to pay the proffered wage to the beneficiary from the priority date of April 30, 2001 until the beneficiary obtains lawful permanent residence.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The content of counsel's motion does satisfy the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) because new facts have been asserted and new documentary evidence submitted relating to both the issue of the petitioner's ability to pay the proffered wage and the issue of whether the beneficiary had the required two years of experience in the offered job as listed on the ETA Form 9089.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The record reflects that a separate Form I-140, Immigrant Petition for Alien Worker, and corresponding Form ETA 750, Application for Alien Employment Certification, had previously been filed on the beneficiary's behalf by a different petitioner. In the instant case, the DOL accepted the current petitioner's ETA Form 9089 on April 30, 2001, the date on which the previously filed Form ETA 750 had originally been accepted. The proffered wage as stated on the ETA Form 9089 is \$2,200.00 per month or \$26,400.00 per year. The ETA Form 9089 states that the position requires two years of experience in the job offered. On the ETA Form 9089, signed by the beneficiary on May 12, 2006, the beneficiary claims to have worked for the petitioner since November 1, 2005.

It must be noted that the beneficiary claimed that he had been employed as an Indian cook by [REDACTED] in Nohar, Rajistan, India, from January 1985 to December 1989 and as a catering cook for [REDACTED] and [REDACTED] Haryana, India from January 1990 to July 1999 on the previously filed Form ETA 750 contained in the record. While the beneficiary reiterated his claim of employment as an Indian cook for [REDACTED] from January 1985 to December 1989 at part K of the ETA Form 9089, the beneficiary failed to claim any employment with [REDACTED] and [REDACTED] from January 1990 to July 1999. The record is absent any explanation for this discrepancy. The fact that the applicant has provided conflicting testimony relating to his employment history raises serious question regarding the credibility of such testimony. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal and on motion.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to employ 7 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

² The submission of additional evidence on appeal or on motion is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On motion, counsel asserts that the AAO failed to consider the totality of the circumstances to determine the petitioner's ability to pay the proffered wage. Counsel contends that the AAO needs to take into account factors such as the unique accounting practices of S corporations and compensation paid by the petitioning S corporation to its owner when determining whether the petitioner has submitted sufficient evidence to demonstrate that it has the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel notes that this reasoning was utilized by the seventh circuit court of appeals in the decision in *Construction and Design Co. v. United States Citizenship and Immigrations Services (USCIS)*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage.

Counsel also declares that the beneficiary underwent a polygraph examination which demonstrated that he was being truthful in claiming that he had been employed as a head chef at [REDACTED] from January 1985 to December 1989 and an executive [REDACTED] from June 1990 to March 1998. Counsel states that the Supreme Court and various circuit courts have issued decisions endorsing the use of polygraph examinations to aid fact finders in reaching conclusions relating to the credibility and veracity of testimony. Counsel includes copies of previously submitted documents as well as a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2009, a letter dated February 18, 2010 from polygraph examiner [REDACTED] regarding the beneficiary's polygraph examination, and a copy of the decision in *Construction and Design Co. v. USCIS*.

Relevant evidence in the record includes copies of the petitioner's Form 1120S tax returns for 2001 through 2008, a Form W-2, Wage and Tax Statement, reflecting wages paid to the beneficiary by the petitioner in 2008, a letter dated March 22, 2009 from [REDACTED], a certified public accountant, pertaining to the petitioner's ability to pay the proffered wage from 2001 to 2008, two separate affidavits signed by [REDACTED] regarding the applicant's employment as a head chef at [REDACTED] from January 1985 to December 1989, and an affidavit signed by [REDACTED] regarding the applicant's employment as an executive chef at [REDACTED] from June 1990 to March 1998.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on this document, 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. Although the AAO concluded that the petitioner failed to provide any evidence that the beneficiary has been in the petitioner's employ in the decision issued on July 1, 2010, a review of the record reveals that the petitioner had in fact provided a Form W-2 statement reflecting that the petitioner paid the beneficiary wages in the amount of \$28,208.36 in 2008. The Form W-2 statement demonstrates that the petitioner paid wages to the beneficiary in 2008 in an amount greater than the proffered wage of \$26,400.00. However, as discussed above, the beneficiary claimed that he had been employed by the petitioner since November 1, 2005 on the ETA Form 9089. In addition, it is noted that the director specifically requested that the petitioner provide any Form W-2 statements issued by the petitioner to the beneficiary in any years that the beneficiary had been employed by the petitioner since April 30, 2001 in a Request for Evidence (RFE) issued on February 13, 2009. The record is absent any explanation as to why the petitioner only submitted a W-2 statement reflecting wages paid to the beneficiary in 2008, if in fact the beneficiary had been employed by the petitioner since November 2005 as claimed on the ETA Form 9089. This evidence would have demonstrated the amount of wages paid by the petitioner to the beneficiary in 2005, 2006, and 2007. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

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 (1st 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 petitioner’s tax returns demonstrate its net income for the years from 2001 to 2009 as shown in the table below.

- In 2001, Schedule K of the Form 1120S stated net income⁵ of \$9,230.00
- In 2002, the Form 1120S stated net income of <\$7,892.00.>⁶
- In 2003, Schedule K of the Form 1120S stated net income of \$18,877.00.
- In 2004, Schedule K of the Form 1120S stated net income of \$23,205.00.
- In 2005, Schedule K of the Form 1120S stated net income of \$27,833.00.

⁵ 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 (2006-2009) of Schedule K. *See* Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on October 26, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner has additional deductions and other adjustments shown on its Schedules K for 2001, 2003, 2004, 2005, 2006, 2007, 2008, and 2009, the petitioner’s net income is found on Schedule K of its tax returns for those years.

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

- In 2006, Schedule K of the Form 1120S stated net income of \$45,475.00.
- In 2007, Schedule K of the Form 1120S stated net income of \$24,521.00.
- In 2008, Schedule K of the Form 1120S stated net income of \$43,425.00.
- In 2009, Schedule K of the Form 1120S stated net income of \$74,619.00.

Therefore, for the years 2001, 2002, 2003, 2004, and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets from 2001 to 2009 as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$11,820.00.
- In 2002, the Form 1120S stated net current assets of \$28,970.00.
- In 2003, the Form 1120S stated net current assets of \$20,699.00.
- In 2004, the Form 1120S stated net current assets of \$16,270.00.
- In 2005, the Form 1120S stated net current assets of \$25,268.00.
- In 2006, the Form 1120S stated net current assets of \$14,805.00.
- In 2007, the Form 1120S stated net current assets of \$36,964.00.
- In 2008, the Form 1120S stated net current assets of \$12,732.00.
- In 2009, the Form 1120S stated net current assets of \$34,027.00.

Consequently, the petitioner did not have sufficient net current assets to pay the proffered wage in 2001, 2003, 2004, 2005, 2006, and 2008.

Therefore, from the date the labor certification was accepted for processing by the DOL, the petitioner 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, or its net income or net current assets, specifically in 2001, 2003, and 2004.

⁷ 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.

The record contains a letter dated March 22, 2009 signed by [REDACTED] accountant, pertaining to the petitioner's ability to pay the proffered wage from 2001 to 2008. [REDACTED] concluded that the petitioner had the ability to pay the proffered wage in 2001, 2003, and 2004. He based his conclusion on the alleged replacement of a tandoori chef by the beneficiary, the availability of sums paid to the business owner, and the consideration of amounts allotted to depreciation. However, [REDACTED] opinion cannot be concluded to outweigh the evidence in the tax returns which indicate that the petitioner did not have sufficient net income or net current assets in those years to pay the proffered wage. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service [USCIS] is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

First, although the petitioner claimed that the beneficiary will replace a tandoori chef, the record does not establish that this worker's duties involved the same duties as those set forth in the ETA Form 9089. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duties, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. It is noted that the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing a U.S. worker with a foreign worker, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification.

Second, the petitioner claimed that sums paid to the petitioner's primary owner would have been available to pay the proffered wage. USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. Although the petitioner's owner had the discretion to redirect sums away from himself and dedicate these amounts to paying the proffered wage, it has not been established that the petitioner's owner could or would have done this. 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)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is further noted that the petitioner's owner was only paid officer's compensation in 2001 of \$21,000.00, in 2003 of \$17,307.63, and in 2004 of \$33,000.00. It is not credible that the petitioner's owner would have sacrificed such a large percentage of his wages to pay the beneficiary the proffered

wage in three separate years, even if the record established that the petitioner's owner had manifested this intent, which it does not.

Third, although the accountant claimed that amounts allocated to depreciation should be considered in measuring the petitioner's ability to pay the proffered wage, this issue was addressed *supra*. The law is clear that depreciation will not be added back into net income. *See, e.g., Chi-Feng Chang*, 719 F. Supp. at 537.

On motion, counsel asserts that the AAO failed to consider the totality of the circumstances to determine the petitioner's ability to pay the proffered wage. Counsel contends that the AAO needs to take into account factors such as the unique accounting practices of S corporations and compensation paid by the petitioning S corporation to its owner when determining whether the petitioner has submitted sufficient evidence to demonstrate that it has the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel notes that this reasoning was utilized by the seventh circuit court of appeals in a recently issued decision in *Construction and Design Co. v. United States Citizenship and Immigrations Services (USCIS)*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage.

The court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612. The AAO's consideration of the evidence in this matter is consistent with the decision in *Construction and Design Co.* Regardless, as the instant case did not arise in the seventh circuit, this decision is not mandatory precedent. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). Furthermore, the facts of *Construction and Design Co.* are distinguishable from the instant facts in that *Construction and Design Co.* dealt with the conversion of an independent contractor to a permanent employee.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

Assessing the totality of the circumstances, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The petitioner has not established that the tax years at issue were uncharacteristically unprofitable or a difficult period for the petitioner's business. It has also not established its reputation within the industry. The petitioner has failed to completely comply with the director's request for evidence, without plausible explanation. The many inconsistencies found in the record cast doubt on the authenticity of the remaining evidence. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be considered on motion is whether the petitioner has established that the beneficiary meets the qualifications set forth on the ETA Form 9089.

The petitioner submitted employment affidavits in an effort to substantiate the beneficiary's claimed qualifications. To meet the qualifications however, the employment affidavits must include the following: the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). In addition, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). According to the labor certification, the position requires two years of experience as an Indian specialty cook.

The petitioner submitted two affidavits dated September 1, 1999 and July 14, 2009, respectively, both of which are signed by [REDACTED] regarding the beneficiary's employment as a head chef at [REDACTED] in Nohar, Rajasthan, India, from January 1985 to December 1989. It must be noted that dates of the beneficiary's employment in the affidavit dated September 1, 1999, appear to have been altered in that the "5" in 1985 and the "9" in 1989 appear to have been inserted after the affidavit was executed. Furthermore, although [REDACTED] indicated that the beneficiary was employed by [REDACTED] for just under four years in each of the affidavits, he failed to provide a specific description of the beneficiary's duties.

The petitioner also submitted an affidavit dated July 10, 2009 that is signed by [REDACTED]. [REDACTED] stated that was the owner and chef of the [REDACTED] in Jalandhar City, India and that he employed the beneficiary as a chef from June 1, 1990 through March 30, 1998. However, [REDACTED] testimony contradicted the beneficiary's claim on the Form ETA 750 that he was employed by [REDACTED] and [REDACTED], Haryana, India, as a cook from January 1990 through July 1999. In addition, as previously discussed, the beneficiary did not claim any employment with the [REDACTED] on the ETA Form 9089. 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. *Matter of Ho*, 19 I&N Dec. 591-592. 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. *Id.*

On motion, counsel declares that the beneficiary underwent a polygraph examination which demonstrated that he was being truthful in claiming that he had been employed as a head chef at [REDACTED] from January 1985 to December 1989 and as an executive chef at [REDACTED] from June 1990 to March 1998. Counsel states that the Supreme Court and various circuit courts have issued decisions endorsing the use of polygraph examinations to aid fact finders in reaching conclusions relating to the credibility and veracity of testimony. While the Supreme Court and various circuit courts have noted that polygraph examination may be a useful tool to fact finders in some circumstances, none of these courts have issued a decision requiring that the results of polygraph examinations be accepted. In federal court proceedings, evidence of the results of a polygraph test is inadmissible and may not be "introduced into evidence to establish the truth of the statements made during the examination." *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988); see also *United States v. Frogge*, 476 F.2d 969 (5th Cir. 1973), cert. denied, 414 U.S. 849 (1974). Furthermore, the value of the polygraph is questionable for the same reasons that have led the federal courts to find them inadmissible. As previously mentioned, the results of a polygraph test may not be used to establish the veracity of the assertion tested. In establishing this rule, the courts have determined that "the polygraph has not yet been accepted . . . as a scientifically reliable method of ascertaining truth or deception." *United States v. Gloria*, 494 F.2d 477 (5th Cir. 1974). In immigration proceedings, however, documentary evidence need not comport with the strict judicial rules of evidence. Instead, as in deportation proceedings, "such evidence need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law." *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986); see also *Matter of D*, 20 I&N Dec. 827, 831 (BIA 1994).

Counsel includes a letter dated February 18, 2010 signed by polygraph examiner [REDACTED] regarding the beneficiary's polygraph examination. [REDACTED] notes that a Washington state court certified interpreter was used for the examination and he reviewed all relevant and comparison questions with the beneficiary to insure a common meaning. [REDACTED] states that in his opinion the beneficiary was not attempting deception when he responded affirmatively to the following questions:

- Did you work as a head [REDACTED] from January 1985 to December 1989?
- Did you work as executive [REDACTED] from June 1990 to March 1998?

As noted above, the record contains serious inconsistencies surrounding the beneficiary's work experience. The employment affidavits, the ETA Form 9089, and the Form ETA 750, contain inconsistent averments regarding the beneficiary's employment history. Furthermore, the methodology employed by [REDACTED] in conducting the beneficiary's polygraph examination is questionable because a translator was used to conduct the examination, the beneficiary was made aware of the questions to be asked in the examination prior to administration of the examination, and [REDACTED] provided his opinion regarding the veracity of two answers provided by the beneficiary during the examination rather than providing the results of the entire polygraph examination. Thus, [REDACTED] opinion that the beneficiary was not being deceptive in relating his employment history cannot serve to overcome the doubt raised by the conflicting and contradictory claims contained in the record. The record is devoid of evidence establishing the duties performed by the beneficiary for [REDACTED] from 1985 to 1989 or clarifying why, exactly, the various documents differ on where the beneficiary worked from 1990 to 1998, [REDACTED] or [REDACTED] and [REDACTED]. Accordingly, it has not been established that the beneficiary has the requisite two years of experience in the offered job. 8 C.F.R § 204.5(g)(1) and (1)(3)(ii)(A).

The motion will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

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 motion is granted, and the dismissal of the appeal is affirmed.