**U.S. Department of Homeland Security**

Bureau of Citizenship and Immigration Services

B6

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

*ADMINISTRATIVE APPEALS OFFICE*
*425 Eye Street N.W.*
*BCIS, AAO 20 Mass, 3/F*
*Washington, D.C. 20536*

File: EAC 02 073 50160 Office: Vermont Service Center Date: APR 15 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Service (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for

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 on appeal. The appeal will be sustained.

The petitioner manufactures ladies garments. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $69,368.00 per annum.

Counsel submitted a copy of the beneficiary's W-2 Wage and Tax

Statement which showed she was paid $26,324.00 in 1998, and copies of the petitioner's 1998 through 2000 Form 1120S U.S. Income Tax Return for an S Corporation.

The tax return for calendar year 1998 reflected gross receipts of $27,113,324; gross profit of $3,118,350; compensation of officers of $248,152; salaries and wages paid of $1,143,569; and an ordinary income (loss) from trade or business activities of -$59,265. The tax return for calendar year 1999 reflected gross receipts of $40,831,396; gross profit of $4,711,883; compensation of officers of $361,690; salaries and wages paid of $1,540,648; and an ordinary income (loss) from trade or business activities of $105,029.

The tax return for calendar year 2000 reflected gross receipts of $56,767,554; gross profit of $5,857,261; compensation of officers of $461,394; salaries and wages paid of $1,890,723; and an ordinary income (loss) from trade or business activities of $140,435.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that:

> Given the negative net income of the Company in 1998, the Service was correct to focus its inquiry on the Company's current assets and current liabilities, since such figures are one factor to assess a company's working capital and its ability to meet its obligations as they become due. We ask the Service to revisit and review the Company's Current Assets on Schedule L, as reflected on Lines 1-6, and Current Liabilities, as listed on Lines 16-18, for each of January 1, 1998 and December 30, 1998.

Counsel's argument is persuasive. The petitioner's Form 1120S for calendar year 1998 shows an ordinary income of -$59,265. The petitioner could not pay a proffered salary of $69,368.00 out of this income. Even if the wage paid of $26,324.00 were added, the petitioner still could not pay the wage offered. The petitioner's current assets of $5,397,702, however, are sufficient to pay the wage offered.

Accordingly, after a review of the federal tax return for 1998, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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 met that burden.

**ORDER:** The appeal is sustained.