U.S. Department of Homeland Security
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Washington, DC 20536

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U.S. Citizenship and Immigration Services

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[redacted]

JAN 27 2004

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 written statement 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.

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.

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. Here, the petition's priority date is April 16, 2001. The beneficiary's salary as stated on the labor certification is $23,712.00 per annum.

With its initial visa petition, counsel submitted copies of the petitioner's unaudited financial statements for the periods from November 2000 to October 2001, a copy of the petitioner's tax report for the State of Ohio, and a copy of the petitioner's Internal Revenue Service (IRS) Form 1120-A for 2000.

Because the documentation submitted was insufficient evidence of the petitioner's ability to pay the proffered wages, the director requested additional evidence of such ability. In response, the petitioner submitted a compilation of the petitioner's profit and loss statement from April 2001 to March 2002, and a copy of the petitioner's 2001 corporate franchise tax report.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because the petitioner's net income, as reflected on its 2000 taxes, was less than the proffered wage, and denied the petition accordingly.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and 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).

On appeal, counsel submits a copy of the petitioner's IRS Form 1120-A for 2001 and a copy of its profit and loss statement for September 1, 2001 through August 31, 2002.[1] The petitioner's IRS Form 1120-A for calendar year 2001 shows a taxable income of $22,407. The petitioner could not pay the proffered wage of $23,712 out of this figure. However, the petitioner's current assets are $41,257 and its current liabilities are $1,760.[2] Therefore, the petitioner's net current assets are $39,497. The petitioner could pay the proffered wage of $23,712 a year out of its net current assets. Because the priority date is April 2001, the petitioner's financial situation only needs to be evaluated for 2001 and thus, its situation in 2000 as reflected on its 2000 tax returns is irrelevant.

Accordingly, after a review of the record, 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.

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. The petition is approved.

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[1] The accountant who prepared this financial statement states that it is a compilation of management's representations, and has been audited and reviewed.

[2] Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, if the petitioner could show net current assets that are greater than the proffered wage, it could evidence the ability to pay.