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U.S. Citizenship and Immigration Services

[redacted]

MAR 17 2004

FILE: WAC 02 170 52745 Office: CALIFORNIA 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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. 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 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, the petitioner submits additional information and contends that it has the financial ability to pay the proffered wage.[1]

Section 203(b)(3)(A)(i) of 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) states in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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. 8 C.F.R. § 205.2(d). Here, the petition's priority date is December 9, 1997. The beneficiary's salary as stated on the approved labor certification is $625 per week or $32,500 annually.

As evidence of its ability to pay, the petitioner submitted copies of its Form 1120S U.S. Income Tax Return for an S Corporation for the years 1997 through 2001. The 1997 tax return shows that the petitioner had gross receipts/sales of $124,812, no officers' compensation, salaries and wages of $22,480, and an ordinary income of $2004. Schedule L of this tax return also reflected that the petitioner had $24,831 in net current assets.

The 1998 Form 1120S federal corporate tax return showed that the petitioner had $120,234 in gross receipts/sales, no officers' compensation, $16,485 in salaries and wages, and ordinary income of $1,976. Schedule L of this tax

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[1] The appeal Form I-290B was signed by the president of the petitioning corporation representing the petitioner and also accompanied by a cover letter from counsel of record. As no withdrawal of representation is contained in the record, a copy of this decision will be provided to counsel as a courtesy.

return indicated that the petitioner had $26,807 in net current assets.

The 1999 Form 1120S tax return showed that the petitioner had $119,171 in gross receipts/sales, no officers' compensation, $16,965 in salaries and wages, and $2361 in ordinary income. Schedule L showed that the petitioner's net current assets were $18,966.

The 2000 Form 1120S tax return reflected that the petitioner had $136,310 in gross receipts/sales, no officers' compensation, $18,438 in salaries and wages, and an ordinary income of $5184. Schedule L indicated that the petitioner's net current assets were $24,150.

The 2001 Form 1120S tax return showed that the petitioner had $169,152 in gross receipts/sales, $5300 in officers' compensation, $22,850 in salaries and wages, and an ordinary income of $14,147.
Schedule L showed that the petitioner's net current assets were $38,297.

The director reviewed that financial information reflected in the petitioner's ordinary income and net current asset figures and concluded that the petitioner had not demonstrated its ability to pay the proffered wage. We agree with the director's conclusion and further note that except for 2001 when the petitioner's net current assets of $38,297 were sufficient to cover the offered wage of $32,500, none of the petitioner's figures presented as ordinary income or net current assets in any of the other years could meet the beneficiary's proffered wage.

On appeal, the petitioner submits copies of its quarterly wage reports for the quarter ending September 30, 2001 through the quarter ending June 30, 2002. The petitioner asserts that it has always paid its employees' wages and that its gross sales have increased. The petitioner's assertion that it has always met its payroll obligations is not persuasive to establish its ability to pay the proffered wage of a prospective employee. The salaries and wages paid to other employees as shown by the quarterly wage reports represent funds already disbursed and are not readily available to pay the wage of the beneficiary. Similarly, the petitioner's contention that its gross income has increased represents a commendable record, but does not reflect a consideration for the expenses incurred in order to generate its income.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

As previously noted, the petitioner's corporate tax returns do not indicate that, with the exception of the year 2001, the petitioner's ordinary income or net current assets were sufficient to demonstrate its ability to pay the proffered wage. We cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.