PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

B6

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 2 9 2004

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]

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 Citizenship and Immigration Services (CIS) 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.

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 (AAO) on appeal. The appeal will be sustained. The petition will be approved.

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 an Indian food specialty 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director erred in his finding that the petitioner failed to demonstrate its ability to pay the beneficiary's offered salary.

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) also provides 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.

The sole basis of the appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the approved labor certification is $9.60 per hour or $19,968 annually.

The petitioner initially submitted its Form 1120, U.S. Corporation Income Tax Return for 2001 to establish its ability to pay the beneficiary's proposed salary. The petitioner's 2001 corporate tax return

indicates that the petitioner was incorporated on October 30, 2000 and declared $6,152 in taxable income before net operating loss deduction (NOL) and special deductions in 2001. Schedule L of the 2001 tax return shows that the petitioner had $18,440 in current assets and $3,026 in current liabilities. The difference between these figures reflects that the petitioner's net current assets were $15,414.

On September 30, 2002, the director issued a "Notice of Intent to Deny" the petition concluding that the petitioner's taxable income and net current assets could not cover the beneficiary's proposed salary. The petitioner was afforded thirty (30) days to submit additional evidence or arguments in support of the petition. The director advised the petitioner that any evidence should be in the form of annual reports, audited financial statements or copies of the original signed federal tax returns.

In response, prior counsel contended that the previously submitted 2001 tax return reflected that the petitioner had the ability to pay the proffered wage based on a combination of the taxable income and net current assets. Counsel also submitted a copy of a 2002 payroll record that indicates that for the two-week pay period ending October 8, 2002, the beneficiary had been paid at the rate of $800 for 80 hours of work.

On December 9, 2002, the director denied the petition, determining that the petitioner had not established its continuing ability to pay the proffered wage as of the April 30, 2001 visa priority date. The director noted that CIS doesn't combine the taxable income and net current assets and again concluded that the petitioner's 2001 taxable income and net current assets fell short of the proposed salary.

On appeal, current counsel contends that the corporate tax return for 2001 supports the petitioner's ability to pay the beneficiary's proposed salary. Counsel asserts that depreciation should be factored in because it artificially depresses net income. Counsel's argument on this point is not persuasive.

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).

Counsel also argues that the director misinterpreted the petitioner's assets available to pay the beneficiary's proposed salary as reflected on Schedule L of the 2001 corporate tax return. Counsel asserts that the petitioner's total assets are $155,637 as shown in Schedule L and not $15,414 as noted above and cited by the director. When reviewing a petitioner's assets in relation to its ability to pay the proffered salary, CIS examines a petitioner's current assets and current liabilities to arrive at a figure that would reflect the petitioner's net current assets. Net current

assets are the difference between current assets and current liabilities. It identifies the amount of liquidity that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the balance sheet. CIS does not consider long-term assets and liabilities because they do not directly affect the petitioner's liquidity during the year that is being evaluated. In this case, as noted above, the petitioner's net current assets as shown on Schedule L of the 2001 corporate tax return were $15,414.

In this case, however, it is appropriate to calculate the petitioner's ability to pay the proffered salary based on the portion of the salary that the petitioner would have had to pay had the beneficiary been hired on the priority date of April 30, 2001. Here, that would have represented the ability to pay the offered salary for the remaining 8 months of the year. This represents approximately $13,309 in wages. The petitioner's net current assets of $15,414 for 2001 were sufficient to cover this amount.

Based on the evidence contained in the record it is concluded that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

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.