B10

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 02 114 54929 Office: NEBRASKA SERVICE CENTER Date: MAR 29 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for a 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

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director to request additional evidence and entry of a new decision.

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 or professional. The petitioner is a computer consulting and distribution firm. It seeks to employ the beneficiary permanently in the United States as a computer programmer. 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's proffered salary.

On appeal, counsel submits additional evidence and asserts that the director misinterpreted the information presented on the petitioner's tax returns. Counsel argues that the petitioner has established its ability to pay the beneficiary's wage offer.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) also provides employment-based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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. . . . 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.

In this case, eligibility for the visa classification rests upon whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. 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 December 7, 1998. The beneficiary's salary as stated on the labor certification is $29.46 per hour based on a 40-hour week or $61,276.80 annually. The visa petition indicates that the petitioner was established in 1992 and employs five people.

As evidence of its ability to pay the beneficiary's proposed salary of $61,276.80, counsel initially submitted copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for the calendar years 1998, 1999, 2000, and 2001. The petitioner's 1998 tax return showed that the petitioner declared -$157,484 in ordinary income. The petitioner's "balance sheet per books" figures are set forth in Schedule L. It indicates that the petitioner had $167,700 in current assets and $224,058 in current liabilities, producing -$56,358 in net current assets. Net current assets are the difference between current assets and current liabilities. It identifies the amount of liquidity that a petitioner has as of the date of filing that could reasonably be expected to be converted to cash

or cash equivalents (available to pay the proffered wage) within the year, less any financial encumbrances on the assets.

The petitioner's 1999 corporate tax return reflects that the petitioner declared -$19,927 as ordinary income. Schedule L indicates that the petitioner had $231,315 in current assets and $116,398 in current liabilities, resulting in $114,917 in net current assets.

The 2000 corporate tax return shows that the petitioner had -$6,826 in ordinary income. The petitioner's Schedule L current assets totaled $190,501. Current liabilities were $64,817. The difference of $125,684 represented the petitioner's net current assets that year.

The petitioner's 2001 corporate tax return indicates that it declared $16,721 as ordinary income. Schedule L reveals that the petitioner's current assets were $121,548 and current liabilities were $16,114, resulting in $105,434 in net current assets.

In a request dated April 5, 2002, the director required additional evidence to establish the petitioner's continuing ability to pay the proffered wage as of the priority date. The director noted that the record reflected that the petitioner had employed the beneficiary since earlier than the priority date in December 1998. He advised the petitioner to submit copies of the beneficiary's last three years of Wage and Tax Statements (W-2s) in order to establish the petitioner's ability to pay the beneficiary's proposed salary of at least $60,000.

Counsel included copies of the beneficiary's W-2s for the years 1999, 2000, and 2001 with her response. They show that the petitioner paid the beneficiary $36,000 per year for each of those years. Counsel explained that the petitioner was not actually obligated to pay the proffered wage as stated in the approved labor certification until the beneficiary is actually admitted to permanent residency. Counsel also submitted a letter dated June 26, 2002, from Larry Little, a certified public accountant. Mr. Little's letter asserts that the petitioner could have paid the beneficiary the $60,000 proposed salary in 1999, 2000, and 2001 if non-cash deductions were added back to the petitioner's income. Mr. Little states that more cash could have been generated if the company could have reduced the owner's salary and added additional duties to the beneficiary's responsibilities, instead of hiring an additional employee at $27,000 per year in 1999. Mr. Little also notes the petitioning business showed an increase in profitability in 2001.

The director denied the petition, determining that the financial evidence contained in the record could not meet the approximate $24,000 yearly difference between the beneficiary's proposed salary of about $60,000 and the actual annual wages paid of $36,000. At least as to 1999 through 2001, we do not concur. As noted above, while the petitioner's net income figures for each year from 1998 through 2001 were insufficient to cover the $25,276.80 difference between the actual wages that the petitioner paid the beneficiary and the beneficiary's proposed salary of $61,276.80, the petitioner's net current assets can also be considered in determining its financial ability to pay the proffered wage.

The petitioner's net current assets of $114,917, $125,684, and $105,434 were more than sufficient to meet the proffered wage in 1999, 2000, and 2001, respectively. Furthermore, as the priority date was December 7, 1998, the petitioner need only have the ability to pay for approximately 3 weeks of the beneficiary's employment in 1998, or $3,535.20. As noted by the director and as shown on the ETA-750, Part B, it appears that the petitioner has employed the beneficiary since December 1997. The director did not request the beneficiary's 1998 W-2s from the petitioner.

On appeal, counsel attaches a chart summarizing some of the petitioner's income and expense figures and advances several arguments in support of the petitioner's ability to pay the beneficiary's proposed salary. One is that the petitioner has had the ability to pay the proffered wage, but used its profits to reinvest in the company's growth. Counsel proposes that CIS should only rely on tax returns to the extent that they reflect ordinary and

necessary expenses rather than elective expenses such as advertising and depreciation. Counsel includes a copy of a non-precedent decision in support of her contentions.

As discussed above, the petitioner's ability to pay the beneficiary's proffered salary has already been found for 1999, 2000 and 2001. The petition is being remanded in order to allow the director to request copies of the beneficiary's 1998 W-2s and determine the petitioner's ability to pay for that period of 24 days which covers the priority date of the visa petition, as well as any updated financial information that the director determines is appropriate to request. It is noted, however, that CIS generally will review 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).

It is further noted that the non-precedent decision cited by counsel appears to involve a non-profit organization that was attempting to hire a live-in housekeeper. Since housekeeping expenses (an undisclosed amount) were already included in the petitioner's net income, it was not necessary to have the proffered wage reflected in the net income. In this case, the beneficiary's actual salary paid is already reflected within the petitioner's net income on the corporate tax returns. That has been already been factored into the calculation. Not reflected within the petitioner's net income on the tax returns is the difference between the actual wages paid and the beneficiary's proposed salary. For three of the relevant years, that difference is covered by the petitioner's net current assets disclosed on Schedule L.

Therefore, in view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request further evidence related to the petitioner's continuing ability to pay the proffered salary, such as the beneficiary's W-2, relevant to the 3-week period in 1998, as well as any updated pertinent financial information that the director deems appropriate. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.