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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



File: LIN-03-061-50391 Office: Nebraska Service Center Date: APR 23 2004

IN RE: Petitioner: [Redacted]
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).

PUBLIC COPY

ON BEHALF OF PETITIONER [Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

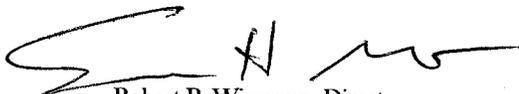
INSTRUCTIONS:

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 preference visa petition was denied by the Director, Nebraska 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 is an Indian Restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is July 23, 2001. The beneficiary's salary as stated on the labor certification is \$2,300 per month or \$27,600 per year.

The petitioner initially submitted a copy of its 2001 Form 1120 U.S. Corporation Income Tax Return. The tax return for 2001 reflected gross receipts of \$94,628; gross profit of \$76,856; compensation of officers of \$0; salaries and wages paid of \$21,600; and a taxable income before net operating loss deduction and special deductions of \$3,721. The petitioner's net current assets for 2001 were \$12,216. There were no current liabilities listed. In addition the petitioner submitted copies of its monthly commercial bank statements for the period from May 30, 2001 to October 29, 2002.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Request for Evidence (RFE) dated April 15, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of April 30, 2001, and continuing to the present. The RFE exacted the petitioner's "audited profit/loss statements, bank account records, and/or personnel records."

The petitioner's counsel submitted a letter stating that the petitioner's taxable income for 2001 was down because of events surrounding the tragedy that occurred on September 11, 2001. Counsel submitted the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. The tax return for 2002 reflected gross receipts of \$234,804; gross profit of \$182,084; compensation of officers of \$0; salaries and wages paid of \$50,544; and a taxable income before net operating loss deduction and special deductions of \$61,301. The petitioner's net current assets for 2002 were \$29,169, and there were no listed current liabilities. The petitioner also submitted its Profit and Loss Statement for the period January 1, 2003 through April 30, 2003.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director stated, in pertinent part, that:

The bank statements were reviewed and for the month of October 30, 2001 to November 28, 2001 the ending balance was \$2,114.41 [\$2,117.41]. This amount is insufficient to pay the proffered wage of \$2,300 per month.

On appeal, counsel again states that the events of September 11, 2001 had a significant impact on the petitioner's business during the last three months of 2001, normally his busiest time of the year. Counsel also states that during November 2001, the petitioner's "cash flow" was short only \$185.59, the difference between the proffered wage of \$2,300 per month and the November ending bank balance of \$2,114.41.

Even though the petitioner submitted its commercial bank statements as evidence that it had additional cash flow, there is no evidence that the bank statements somehow reflect any additional available funds that were not reflected on the tax return. In any event, the petitioner has not demonstrated by such claim that sufficient funds were available during November 2001.

Further, the petitioner has not demonstrated that the events that occurred on September 11, 2001, in New York, New York, significantly impacted his business in Seattle, Washington. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts,

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 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).

The petitioner's Form 1120 for calendar years 2001 and 2002 show an ordinary income of \$3,721 and \$61,301, respectively. The petitioner lists net current assets of \$12,216 for 2001. The record reflects that, based on the priority date, the petitioner was required to pay a prorated salary of \$12,113 of the proffered wage of \$27,600 for the remainder of 2001, which covers July 23, 2001 to December 31, 2001. Based on the petitioner's net current assets for 2001, the petitioner does have the ability to pay the proffered wage.

The petitioner's 2002 tax return illustrates that it could pay the proffered wage of \$27,600 out of either its a taxable income before net operating loss and special deductions of \$61,301 or its net current assets of \$29,169. Thus, the petitioner established its ability to pay the proffered wage in 2002.

After a review of the federal tax returns, 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.