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U.S. Citizenship  
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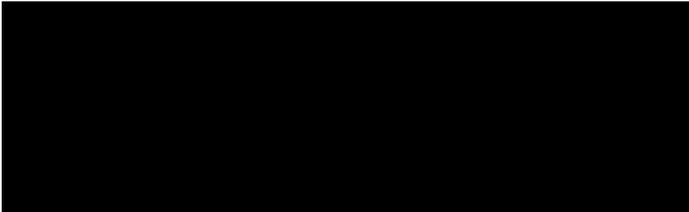
FILE: WAC 02 040 54736 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



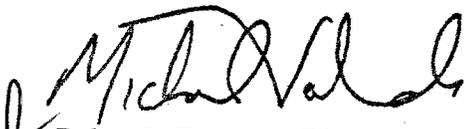
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider.<sup>1</sup> The motion will be granted, the previous decisions of the director and the AAO will be withdrawn, and the petition will be approved.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.

On August 2, 2002, the director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage of \$24,960 per year as of the priority date of the visa petition, December 29, 1997. The director's decision was based on the petitioner's failure to submit evidence of its continuing ability to pay the proposed wage offer consistent with the provisions of 8 C.F.R. § 204.5(g)(2), which requires either federal tax returns, annual reports or *audited* financial statements. The petitioner had responded to the director's February 2002 request for evidence and June 2002 notice of intent to deny with only unaudited financial statements.

The AAO dismissed the petitioner's appeal on October 28, 2003. The AAO reviewed the petitioner's financial information and also determined that its unaudited financial statements did not comply with the evidentiary requirements of 8 C.F.R. § 204.5(g)(2).

On motion, counsel submits copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 1997 through 2002. The taxable income before the net operating loss deduction (NOL) is shown to be \$133,939 for 1997; \$248,528 for 1998; \$280,321 for 1999; \$640,555 for 2000; \$245,321 for 2001; and \$511,326 for 2002.

In determining a petitioner's continuing ability to pay a proffered salary, CIS may 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 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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<sup>1</sup> Counsel's motion is styled as a "motion to reopen and reconsider." As it asserts new facts and offers additional documentary evidence, it will be considered as a motion to reopen under 8 C.F.R. § 103.5(a)(2).

In this matter, the U.S. parent corporation, "Restaurant Business Inc." appears to be the petitioner named on the approved labor certification and the visa petition. As such, its consolidated federal tax returns, submitted on motion, are appropriate evidence to be considered. As noted above, its taxable income before the NOL deduction demonstrates that the petitioner had sufficient funds to cover the proffered salary of \$24,960 in each of the relevant years.

Upon review, the petitioner has been able to present convincing additional evidence to overcome the findings of the director and the prior AAO decision. The petitioner has demonstrated its ability to pay the proffered 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 motion to reconsider is granted, and the previous decisions of the director and the AAO are withdrawn. The petition is approved.