**U.S. Department of Homeland Security**

Citizenship and Immigration Services

B10

PUBLIC COPY

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

[redacted]

File: LIN 03 011 50099 [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 03 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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

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.

Helen E Crawford for

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 dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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.

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.

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.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is December 3, 2001. The beneficiary's salary as stated on the labor certification is $45,323 per year.

Counsel initially submitted a 2001 Form 1065, U.S. Return of Partnership Income and argued that:

> The petitioner must demonstrate [the ability to pay the

> proffered wage] at the time the priority date is established…. Such proof is enclosed in the [Form 1065] tax return. Note that the tax return shows a $75K loss, later the return shows that $100K was through depreciation (see Form 4562 and 1065 line 16) more importantly the total (line 8 on the 1065) is almost $550K.

The director did not issue a request for evidence (RFE) pursuant to 8 C.F.R. § 103.3(a)(1)(iv), but did consider counsel's two points. Counsel did not present any authority for them, either before the director or on appeal.

Counsel conceded the apparent deficiency in the petitioner's 2001 Form 1065, namely, an ordinary loss from trade or business activities of ($75,436). The director considered the authorities, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present, and denied the petition.

The director might better have issued the RFE. Counsel, however, states no prejudice that the petitioner suffered. In fact, counsel addressed pertinent issues explicitly.

On appeal, counsel submits a brief and several items of evidence. The AAO will fully consider them, too.

Selected bank statements of November and December 2002 relate to Best Western University Inn (Inn), not the Super 8 Motel (petitioner). Furthermore, they do not pertain to the priority date and show, only fleetingly, the continuing ability to pay.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12)

Counsel states that the 2001 financial statement of the Inn is audited and proves eligibility under the petition. To the contrary, these financial statements are marked "For Internal Use Only *** Presented Without Audit." Though the record does not connect the Inn to the petitioner, other issues control the denial

of this petition.

Unaudited financial statements, as proof of the ability to pay the proffered wage, are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), *supra*. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Counsel argues, notwithstanding, that particulars of the unaudited financial statement of 2001 support the ability to pay the proffered wage, in that:

> [It] shows the company's total assets worth $2,036,568.05. Further note that the total amount of partners' capital is $314,981.91 and a net cash flow from operating activities is $53,154.04.

The authorities are settled in determining the petitioner's ability to pay the proffered wage, CIS [formerly the Service or INS] will 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. Tex. 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).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

Counsel's argument implies that partners' capital is available to pay the proffered wage, but does not provide any evidence that it was so applied. On the contrary, Schedule L of the 2001 federal tax return, the balance sheet, reports current assets, including cash, ($675,859.04) minus current liabilities, ($1,721,586.14). Their difference reveals a deficit ($1,045,727.10) of net current assets, less than the proffered wage.

Copies of 2002 Employer Quarterly Federal Tax Returns (Form 941) evidence quarterly payment of wages between $36,659 and $47,908. A certified public accountant (CPA) states that Forms 941 represent wages for nine (9) employees. Once disbursed, such sums were not available to pay the beneficiary.

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).

Counsel offers Wage and Tax Statements (Forms W-2), said to prove the ability to pay the proffered wage. They report wages paid to the beneficiary in 2000 ($1,100), 2001 ($24,900), and 2002 ($26,300), less than the proffered wage.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

After a review of the federal tax return, the CPA's statement, bank statements, Forms 941, unaudited financial statements, Forms W-2 and briefs of counsel, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.