U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 1 6 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed on June 11, 1996, and approved by the Department of Labor (DOL), on April 17, 1997.[1] The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submitted the I-290B Notice of Appeal containing a brief summary of the reasons in support of the appeal. Counsel requested a period of ninety (90) days to submit an appeal brief, but the record contains no such brief. Along with the I-290B, counsel submitted copies of the petitioner's tax returns for 1999 and 1996, and a copy of the page containing Part 6 of the I-140. Also attached for each of those years were documents entitled, "Operating Statement" relating to Evergreen Oriental, Inc.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor 8 C.F.R. § 204.5(d). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on June 11, 1996. The proffered wage as stated on the Form ETA 750 is $10 per hour, or approximately $20,800 per year.

With the petition, the petitioner submitted the Form ETA 750, a certificate of employment from the beneficiary's most recent employer in China, a copy of a license issued to the beneficiary as a Class II Chinese Specialty Chef issued by the Chinese Ministry of Labor, copies of the first page only of the petitioner's 1998 and 1997 tax returns. Because the evidence submitted was insufficient to demonstrate the

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[1] The approved ETA 750 was in the name of a previous beneficiary. The record contains a request to substitute the current beneficiary, along with a new ETA 750, Part B signed by the substituted beneficiary and evidence establishing the beneficiary's qualifications.

petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's experience, the director, on February 12, 2002, requested additional evidence pertinent to that issue. Specifically, the director requested copies of the petitioner's annual reports, tax returns, or audited financial statements for the years 1996, 1999 and 2000.

On or about May 1, 2002, counsel responded by submitting various documents including the corporate tax returns for 2001 and 2000, a copy of Forms W-3, corporate transmittal statements of wages paid for the years 1996 and 1998 through 2001, and a copy of the W-2 wage and tax statement of total wages paid for 1997.[2]

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on June 28, 2002, denied the petition finding that although the W-3 forms showed that the petitioner met its payroll during those years, they did not show the amounts available for an additional employee. The director additionally found that the failure to submit tax returns for 1996 and 1999 cast doubt on the financial ability of petitioner to pay the proffered wage in those years and further noted that the 1997 returns reflected a net income that was insufficient to pay the proffered wage in that year.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner has not established that it has previously employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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).

In the instant case, the director found that the petitioner had net income[3] for each of the years as follows:

2001:	$22,672	2000:	$27,325	1998:	$40,623	1997:	$5,272

The director noted that the absence of evidence for the 1997 tax year, and the low amount of the net income for 1997 indicated that the petitioner had failed to establish that it had the ability to pay the proffered wage in

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[2] A review of the record reflects that these were the documents submitted, although counsel's cover letter indicates that W-3 forms were submitted from 1997 through 2001, and makes no mention of the W-2 form.

[3] Although the director's decision also noted the amount of depreciation for each of those years, consideration of depreciation is not appropriate and therefore only the petitioner's net income will be examined. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985).

those years. As to the W-3 forms, the director noted that they were of limited value as they showed total wages paid and did not provide evidence of additional amounts available to pay the wage of an additional employee.

On appeal, counsel argues that the director erred in its conclusion that the petitioner was seeking to add a new employee, noting that Part 6 of the Form I-140 notes that the petitioner was not seeking to fill a new position. In addition, counsel also asserts that CIS should take into account the W-3 forms as evidence of the petitioner's ability to pay the proffered wage, and further requests that CIS accept the tax returns for 1999 and 1996.

First, we note that counsel is correct that the record reflects that the beneficiary's position would not be a new one. However, counsel has failed to indicate which employee the beneficiary would be replacing. Furthermore, as to the argument in support of the W-3 forms, we disagree that the use of W-3 forms is specifically authorized by regulations, as counsel is citing proposed regulations that were not issued as final or otherwise implemented. Nevertheless, the W-3 forms, while considered, were found not to further the petitioner's position as the forms merely establish aggregate amounts of wages paid, thereby preventing any assessment of the wages paid to any individual employee, and in particular, the employee whose position the beneficiary would be assuming.

Second, we address the issue of counsel's submission of the 1999 and 1996 tax returns for the first time on appeal. We note that these documents had been previously requested by the director yet were not submitted. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena,* 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* We further note that the returns were executed in 2000 and 1997, and thus were available at the time of the director's request in 2002. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director.[4]

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 and the petition is denied.

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[4] Furthermore, even if considered, the evidence still does not establish the petitioner's ability to pay the proffered wage for 1996, as we note that the 1996 tax return shows a taxable or net income of $1,799. Again, although the W-3 wage transmittal form shows that wages in excess of $87,000 were paid, there is no indication of what wages were paid to individual employees, and in particular, to the individual holding the position that the beneficiary will occupy.