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: VERMONT SERVICE CENTER Date: AUG 1 6 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as an Unskilled, Other Worker 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.

for 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a hairdresser. 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.

The beneficiary seeks classification as an unskilled, other worker pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). This category provides immigrant visas for qualified aliens who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 from 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 11, 2001. The beneficiary's salary as stated on the labor certification is $12.44 per hour or $25,875.20 per year.

Counsel initially submitted a 2000 Form 1120-A, U.S. Corporation Short Form Income Tax Return, and a 2001 Form 1120, U.S. Corporation Income Tax Return, further detailed below. Also, a 2002 Wage and Tax Statement (W-2) indicated that the beneficiary received wages of $10,400.

In a request for evidence (RFE) dated August 27, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage, particularly as of 2001, the priority date and continuing to the present. The RFE stated particulars in which the 2001 Form 1120 failed to justify the ability to pay the proffered wage. It exacted the 2001 Form W-2, if the petitioner paid wages to the beneficiary then, and the 2002 Form 1120.

In response to the RFE, counsel submitted prescribed evidence, the 2002 Form 1120. Other evidence included a complex of unaudited financial papers, namely, a detail trial balance for January 1, 2002 to December 31, 2002 and a balance sheet, a profit and loss statement, and a reconciliation report, as of December 31, 2002 (2002 unaudited statements). The 2002 unaudited statements lacked any foundation or provenance. In any event, they contained only damaging evidence, since they confirmed a net loss for 2002, ($9,005.72), and net current assets of $4,238.56, both less than the proffered wage. AAO notes that the 2002 unaudited statements reflect only representations of management and are of little evidentiary value. If the petitioner has recourse to financial statements, the regulation plainly and specifically requires audited financial documents. *See* 8 C.F.R. § 204.5(g)(2). Further, in response to the RFE, quarterly wage reports for 2002 merely duplicated evidence of

wages paid to the beneficiary, as found on the 2002 Form W-2, being $10,400, less than the proffered wage. A single bank statement of December 31, 2002 carried forward a balance of $1,705.50, less than the proffered wage.

The petitioner's 2001 and 2002 Form 1120 reported taxable income before net operating loss deduction and special deductions, net income or (loss) and net current assets.[1] They follow and were all less than the proffered wage:

	2001	2002
Net (loss)	$ (971)	$ (9,006)
Current assets	$13,870	$ 4,239
Current liabilities	$none	$none
Net current assets	$13,870	$ 4,239

The director noted the failure to respond with any stronger data for 2001, as requested, 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.

On appeal, counsel submits a brief without any points and authorities. Counsel states that the business has good will that ensures revenues to pay the proffered wage. The definition of current assets, however, stipulates that they are convertible to cash within a year. *See, supra*, n 1. Good will is not such a property, nor does the owner of a going concern sell it. Counsel states that the petitioner offers to "pledge company assets in order to ensure that the offered wage is paid to Beneficiary upon her full time employment."

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).

Counsel identifies no asset except ones included in net current assets for 2001, $13,870, less than the proffered wage, offers no explanation for omitting further credible evidence for 2001, and states on appeal:

> Petitioner has been operating as a successful hair salon for more than 14 years. Petitioner seeks to employ the beneficiary as a full time stylist. . . . That is, when Beneficiary is employed full time, she will be able to handle many more clients resulting in increased income to the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For

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[1] Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the tax return, such as Form 1120. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that her reputation would increase the number of customers.

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).

After a review of federal tax returns, the Form W-2, quarterly wage reports, 2002 unaudited statements, bank account balances, and the brief, 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.