U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

B6

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 156 52637 Office: VERMONT SERVICE CENTER Date: AUG 26 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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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 householder. It seeks to employ the beneficiary permanently in the United States as a live-out housekeeper. 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 petitioner seeks the 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 December 1, 1999. The beneficiary's salary as stated on the labor certification is $18 per hour or $37,440 per year.

Counsel initially submitted no evidence of the petitioner's ability to pay the proffered wage or of the beneficiary's experience of three (3) months in the job offered, as required by Form ETA 750. In a request for evidence (RFE) dated July 1, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date, continuing until the beneficiary obtains lawful permanent residence, and specified evidence of qualifying experience. The RFE exacted, for 1999, the petitioner's federal income tax return with schedules and attachment, or annual report with audited financial statements, as well as Wage and Tax Statements (Forms W-2), as evidence of wage payments to the beneficiary.

In response to the RFE, counsel submitted the 1999-2001 Form 1040, U.S. Individual Income Tax Return, for the petitioner under the social security number 112-76-9149 (SSN-9). Their content and effect appear below, since these exemplars cut off amounts at the right margin for 1999 and 2001. Counsel, however, obviated evidence of Forms W-2 with the stipulation that the petitioner would not employ the beneficiary before she obtained lawful permanent residence. The SSN-9 filer offered his father's 1999-2001 Forms 1040 under the SSN 131-72-7704 (SSN-4), accompanied by the father's assertion in an undated letter that he did, and would,

give his son "some necessary help" and "pay the expenses of my grand children including [the beneficiary's] salary" (undated letter). The father did not execute the blank jurat or otherwise lay any foundation for sworn testimony, a contractual obligation, or any actual disbursements.

The director considered legible parts of 1999-2001 Forms 1040 for SSN-9 and found that they did not support the ability to pay the proffered wage as of the priority date. The director observed that the father's tax returns in SSN-4 neither pertained to the petitioner's ability to pay the proffered wage nor established that the father had paid any funds to the beneficiary. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

The petitioner appealed and replicated both the petitioner's and his father's 1999-2001 Forms 1040. The petitioner's Form 1040 for 1999 was still defective, but counsel ultimately supplied an additional brief and a set of complete copies. Counsel offered 1999 Forms W-2 relating to the petitioner's household, but they did not reveal any income beyond that reported in the 1999 Form 1040 of SSN-9 on line 7.[1] The 1999-2001 Forms 1040 reflected, respectively, adjusted gross income (AGI) at line 33 of $28,374, $17,973, and $52,839.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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).

The AGI was less than the proffered wage both as of the priority date and in 2000. 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 relies on the 2001 AGI as sufficient to pay the proffered wage, insists that the petitioner's father has supported the petitioner's household in the past, based on the undated letter, and, on appeal, claims that the father is a household member.[2] Further discussion follows.

---

[1] The Form W-2c with the Form 1040 of SSN-9 supported it, but was illegible, and counsel made no note of it.

[2] Counsel's claim of the father's residence is improbable. Tax returns for SSN-9 reflect filers in North Bergen, NJ, but, for SSN-4, filers in Shelbyville, TN.

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).

The undated letter of the father lays no foundation for his contractual obligation to pay, or payment of, any sum. Consequently, his tax returns are irrelevant. Though the circumstances differ, the reasoning of the court is persuasive in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). *Sitar* states the principle that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

A corporation exists as an entity separate from its owners, but counsel offers no authority that the Form 1040 filer represents any other person or entity. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (BIA 1984). Therefore, the AAO considers the income and personal liabilities of the Form 1040 filer as factors in the ability to pay the proffered wage, and the Form 1040 reports them each year. Consequently, the petition requires the showing of enough income to sustain both the living expenses of the petitioner's household and the proffered wage. Though the petitioner acknowledges the issue, the petitioner has presented no evidence of living expenses.

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).

Moreover, only in 2001 did the petitioner report AGI in SSN-9, as equal to, or greater than, the proffered wage, viz., $52,839. The 2001 AGI minus the proffered wage, $37,440, leaves a remainder of $15,399 for living expenses of this Form 1040 filer's household of four (4) in North Bergen, New Jersey. For 2001, the proffered wage is seventy-one per cent (71%) of the AGI, and it is improbable that the petitioner might support its household on the remainder. *See Ubeda v. Palmer, supra.*[3]

The petitioner offers its Statement of Financial Condition as of December 31, 1999 (1999 unaudited balance sheet) on appeal, and counsel emphasizes that it shows net worth of $401,750. A balance sheet should reflect net current assets available to meet current liabilities. Net current assets equal the difference of current assets minus current liabilities.[4] The 1999 unaudited balance sheet, however, does not differentiate current assets and current liabilities and, thus, allows no computation. The certified public accountant (CPA) offers no explanation for the mixture of assets and liabilities on the 1999 unaudited balance sheet. Counsel points to no

---

[3] In *Ubeda*, 539 F.Supp. at 560, the Court found it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse, and five dependents on a gross income of slightly more than $20,000 given the beneficiary's proposed salary of $6,000 or approximately thirty per cent (30%) of the petitioner's gross income. Circumstances of the present petition, of course, differ, but the reasoning of this authority is convincing.

[4] 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). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

authority to justify the substitution of net worth, instead of net current assets, as an alternative, viable measure of the ability to pay the proffered wage when the net income, or AGI in this case, is deficient.

The Accountants' Review Report of the CPA, dated May 22, 2003, in fact, withheld any opinion concerning the 1999 unaudited balance sheet, as the review was "substantially less in scope than an audit in accordance with generally accepted auditing standards." The unaudited report only reflects representations of management, and they have 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). Others are not persuasive evidence of the ability to pay the proffered wage.

Counsel's brief on appeal presented seven (7) bank statements, selected from among 12 dated January 10 to December 8, 2000, and charged the AAO to review them. The AAO has complied in respect to their relevance to the ability to pay the proffered wage at the priority date and in 2000. The highest balance was $20,731.80, the median balance was $7,153.53 and the balance as of the priority date was $12,811.27, each less than the proffered wage. First, bank statements are not among the types of evidence specified for proof of the ability to pay the proffered wage. *See* 8 C.F.R. 204.5(g)(2). This regulation allows additional material in "appropriate cases," but the petitioner has not shown that the prescribed documentation is inapplicable, inaccurate, or unavailable. Second, bank statements show only the amount in an account on a single date. No balance was equal to, or greater than, the proffered wage. *A fortiori*, once spent, the balance reveals no source of other funds to support the proffered wage. Third, no evidence proved that the petitioner's bank statements, somehow, represent additional funds beyond those of the tax returns and financial statements. 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 the petitioner's federal tax returns, bank statements, Forms W-2, 1999 unaudited balance sheet, undated correspondence, and briefs, 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.