B-6

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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN-03-087-51720

IN RE: Petitioner: [redacted]
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:

[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

PUBLIC COPY

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 rehabilitation facility. It seeks to employ the beneficiary permanently in the United States as a marketing 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.

The director denied the petition because he determined the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is April 20, 2001. The beneficiary's salary as stated on the labor certification is $37,148.80 per year.

With the petition, counsel submitted copies of the petitioner's 2001 Form 1120S U.S. Corporation Income Tax Return. This tax return reflects the petitioner's name and employer identification number (EIN), but lists a different address than the petitioner listed on the petition. The tax return for 2001 reflected gross receipts of $991,020; gross profit of $991,020; compensation of officers of $0; salaries and wages paid of $68,464; and ordinary income of $17,313. Schedule L reflected current assets of $7,550, current liabilities of $912 and net current assets of $6,638.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 27, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE exacted the petitioner's bank statements and monthly balance sheets, annual report or audited financial statement, as well as Wage and Tax Statements (Forms W-2) or quarterly wage reports, as evidence of wage payments to the beneficiary or other employees, if any, for 2002.

Counsel submitted an unaudited income statement for the 12 month period ending December 31, 2002, and the petitioner's commercial bank statements for the period April 30, 2001 through January, 2003. The statements reflected monthly balances ranging from $3,245.78 to $72,828.89. All of the bank statements

reflect the petitioner's name, but list a different address other than what was provided on the petitioner's visa petition. In addition, counsel submitted Form 941 Employer's Quarterly Federal Tax Return for the quarters ending March 31, 2001, reflecting wages paid of $7,736.00; June 30, 2001, reflecting total wages paid of $19,268; September 30, 2001 reflecting wages paid of $11,025, December 31, 2001, reflecting wages paid of $30,855; June 30, 2002, reflecting wages paid of $44,056.45; September 30 2002, reflecting wages paid of $49,334,92; and December 31, 2002, reflecting wages paid of $7,736. Most of these forms listed the petitioner's address as it is reflected on the visa petition, and some list the petitioner's name and EIN but list a different address.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that CIS conclusions are erroneous because the beneficiary will not be an addition to the petitioner's payroll. Counsel states that the beneficiary will replace an already existing employee. Counsel further states that the petitioner's commercial bank statements reflect its ability to pay the proffered wage. Counsel submits a Form 941 for the quarter ending March 31, 2003, reflecting wages paid of $5,845.20 as well as commercial bank statements for the months of January, February, March, and June 2003.

The record reflects that the petitioner has omitted significant documentary evidence, or in the alternative submitted selective evidence, in attempting to establish its ability to pay the proffered wage. The record does not contain the petitioner's 2002 tax return. The unaudited income statement is of little probative evidentiary value since it is based solely on the representations of management and is not within the scope of 8 C.F.R. § 204.5(g)(2). Form 941 for the period ending March 31, 2002 was not submitted. Further, the commercial bank statements, submitted by counsel, have not been demonstrated to be additional funds that are not reflected in the petitioner's tax returns. 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). Nor is there any evidence that such funds have been put aside to pay the proffered wage. Rather, the statements reflect that they are used to pay the various expenses and liabilities incurred by the petitioner.

Counsel's statement on appeal that the beneficiary will replace another employee is not corroborated by any evidence as to whom this individual is, a termination date, or wages paid. 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). 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, Supra.*

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, 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 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 *K.C.P. Food Co., Inc. v. Sava*, the court held that the CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's Form 1120S for calendar year 2001 shows an ordinary income of $17,313 and net current assets of $6,637. The petitioner could not pay a proffered salary of $37,148.80 out of either of these figures and has not provided evidence of the availability of any other funds.

After a review of the federal tax returns, 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.