**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]

JUN 1 8 2004

FILE: WAC 02 199 50471 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a trading company. It seeks to employ the beneficiary permanently in the United States as an administrative 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.

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 January 15, 1999. The beneficiary's salary as stated on the labor certification is $4,929.60 per month or $59,155.20 per year.

Counsel initially submitted the petitioner's tax returns for 1999, 2000, and 2001, deemed insufficient evidence of its ability to pay the proffered wage. In requests for evidence (RFE) dated September 17 and November 26, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFEs exacted, for 1999, 2000, and 2001, the petitioner's signed federal income tax returns with all schedules, annual reports, or audited financial statements. They stated the possibility of a financial officer's statement for a company with more than 100 employees.

The earlier RFE requested evidence of three (3) years of experience in the position offered. The proceedings raised no issue of experience after the submission of the evidence on October 22, 2002, in response to the RFE.

The beneficiary resided abroad at all times from 1999 to 2001. The petitioner does not suggest that it employed the beneficiary at any time. The 1999 and 2000 Form 1120, U.S. Corporation Income Tax Return reflect, respectively, taxable income before net operating loss deduction and special deductions of $40,380 and $54,660, less than the proffered wage. The 2001 Form 1120 states taxable income of $63,257, equal to or greater than the proffered wage.

The AAO will consider, also, the difference of current assets minus current liabilities, as reported in Schedule L of the federal tax returns, i.e., net current assets, as a measure of the ability to pay the proffered wage from year to

year. 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 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.

For 1999, net current assets were $41,359, less than the proffered wage. In 2000 and 2001, net current assets were $97,618 and $120,600, equal to, or greater than the proffered wage.

The director weighed unfavorably, but did not define, "negative cash assets," determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date continuing to that time, and denied the petition.

On appeal, counsel submits a brief and, justly, notes that the record contains no account of "negative cash assets." On the other hand, counsel calls attention only to cash at the end of 1999-2001, but does not consider the net current assets that afford a picture of the petitioner's ability to meet its obligations year to year.

In substance, counsel states on appeal:

> As was noted above, the position is not new to the business and has been performed by other employees. Such a failure to consider evidence of record is an abuse of discretion requiring reconsideration.

Counsel sets forth wages that the petitioner paid from 1999-2001, but the evidence does not show that such expenses, once disbursed, are available to pay the beneficiary's salary. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the beneficiary's proffered position. The petitioner gave no evidence of any position that involves the same duties as those set forth in the Form ETA 750. If the departing employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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 concedes that Citizenship and Immigration Services (CIS), formerly the Service or INS, may consider net income, without reference to depreciation or other expenses, to test the ability to pay the proffered wage. 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.

In the brief, counsel concedes that the petitioner bears the burden of proof in regard to tax returns that are open to differing interpretations. In addition, he insists that CIS must rely on the totality of the evidence and complains that the director selected some data and ignored the rest. Counsel, in turn, can cite only 2001 taxable income, as equal to or greater than the proffered wage, in order to justify the reconsideration of the denial. The authorities do not justify this focus on 2001.

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 1999. In addition, it must demonstrate such financial ability 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).

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.