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

U.S. Citizenship and Immigration Services

B-6

[redacted]

FILE: WAC 02 264 52767 Office: CALIFORNIA SERVICE CENTER Date: JUN 24 2004

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a program manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a statement.

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 granting 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 nature, for which qualified workers are not available in the United States.

The regulation at 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 the continuing ability to pay the proffered wage 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 17, 1997. The proffered wage as stated on the Form ETA 750 is $2,059.98 per month, which equals $24,719.76 per year.

With the petition, counsel submitted (1) a photocopy of a credit report, from Credit Bureau Resource, pertinent to the credit accounts of the petitioner's owner and the owner's spouse; (2) photocopies of monthly statements of bank accounts belonging to the petitioner's owner and owner's spouse; (3) tax bills covering the fiscal years ending June 30, 2000 and 2001 for a property the petitioner's owner and owner's spouse own; (4) a June 2002 monthly mortgage statement showing a monthly payment of $988.02 and a principal balance of $126,899.64 on a mortgage of a property; (5) the 1997, 1998, 1999, and 2000 Form 1040 joint returns of the petitioner's owner and owner's spouse. Corresponding Schedules C for 1997, 1998, and 2000 show that the petitioner was owned as a sole proprietorship during those years. No Schedule C was provided for 1999.

The 1997 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $2,865.79, which included all of the petitioner's profit of $2,184.98, offset by deductions.

The 1998 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $2,568.32 during that year, which included all of the petitioner's profit of $2,204.96, offset by deductions.

The 1999 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $4,821.13 during that year. Although no Schedule C was provided for 1999, Line 12 of the Form 1040 shows $2,975.42 in business income, some or all of which was likely the petitioner's profit.

The 2000 return shows that the petitioner's owner and owner's spouse declared a loss of $161 as its adjusted gross income during that year, including all of the petitioner's profit of $152, offset by deductions.

The tax bills show the assessed value and taxable value of the land and improvements of the petitioner's owner and owner's spouse real property. No evidence was submitted to show that the total of those amounts is equal to the appraised value or market value of the property. Information pertinent to mortgage balances by which the property is allegedly encumbered was handwritten on those tax bills. That information is unattributed. That information will be accorded no evidentiary value.

Counsel also submitted a letter, dated August 12, 2002, in support of the petition. In that letter, counsel stated that the documents submitted show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director, on December 4, 2002, issued a notice of intent to deny. The director accorded the petitioner 30 days to submit additional evidence of its ability to pay the proffered wage.

In response, counsel submitted photocopies of statements of the bank account of the petitioner, and of another account that belongs to the petitioner's owner and owner's spouse. Counsel argued that those bank accounts show the petitioner's ability to pay the proffered wage. Counsel cited a non-precedent decision of this office in support of that proposition.

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 January 16, 2003, denied the petition.

On appeal, counsel states that the bank statements establish that the petitioner clearly had sufficient funds to pay the proffered wage during each of the salient years. Although counsel also stated that a brief would follow within 30 days, no further information, argument, or documentation has been submitted.

Counsel's citation of a non-precedent decision is of no effect. Although 8 C.F.R. 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel was free to recount the reasoning upon which the case was decided and to argue that the reasoning is sound and convincing, counsel made no such argument.

Evidence pertinent to the real estate the petitioner's owner and owner's spouse own is not persuasive. A tax bill does not necessarily contain an accurate estimate of the value of real estate. Although one mortgage document was submitted, showing the principal balance of a particular mortgage during June 2002, no evidence was submitted that the property is not otherwise encumbered.[1] Further, if the property is held as tenancy by the entireties or some similar form of ownership, one spouse may not alienate or encumber the property without the permission of the other. No evidence in the record suggests that permission would be forthcoming. Finally, equity in real estate is not the sort of liquid asset readily available to pay wages.

Counsel's reliance on the bank account statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the petitioner's bank statements reflect balances between $7,254.39 and $43,261.32 while the owner's bank statements reflect bank balances of between $2,104.82 and $11,875.11 and interest checking and CD balances hovering around $11,000. We note that any funds used to pay the proffered wage in any given year would no longer be available in subsequent years. As the bank balances do not reflect *increases* in cash of at least the proffered wage during each successive year, they cannot demonstrate an ability to pay the proffered wage.

Counsel's reliance on the petitioner's credit, and that of the petitioner's owner and owner's spouse, is similarly misplaced. An indication of available credit is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner did not establish that it employed and paid 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, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS, then the Immigration and Naturalization Service, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses

[1] This office assumes that the property tax bill and the mortgage statement pertain to the same property, although that is not entirely clear. If this assumption were incorrect, however, that would have no substantive effect on the decision.

were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The proffered wage is $24,719.76 per year. During 1997, the petitioner's owner and owner's spouse declared an adjusted gross income of $2,865.79, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted insufficient evidence of any other funds available to pay the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 1997.

During 1998, the petitioner's owner and owner's spouse declared an adjusted gross income of $2,568.32, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted insufficient evidence of any other funds available to pay the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 1998.

During 1999, the petitioner's owner and owner's spouse declared an adjusted gross income of $4,821.13, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted insufficient evidence of any other funds available to pay the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner and owner's spouse declared a loss as its adjusted gross income, including the petitioner's profit offset by deductions. No portion of the proffered wage could be paid with a loss. The petitioner has submitted insufficient evidence of any other funds available to pay the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, or 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

Beyond the decision of the director, this office notes that the record contains a copy of the Form ETA 750 labor certification, rather than the original, as is required by 8 C.F.R. § 204.5(l)(3)(ii)(B). The petition might also have been denied for this reason. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

ORDER: The appeal is dismissed.