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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 20 2004
WAC 03 063 53409

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

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 technical and consulting resource provider. 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.

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 July 27, 2001. The beneficiary's salary as stated on the labor certification is $112,133 per year.

The director considered the initial evidence insufficient, as to the beneficiary's education and as to the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 7, 2003, the director required an official transcript of the beneficiary's education and degree and 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 RFE requested, for 2002 to the present, the petitioner's complete, signed federal income tax return, annual report, or audited financial statement. Also, the RFE requested its business license and its quarterly wage reports for the last four quarters (Form DE-6) with each employee's name, social security number, and hours worked.

In a response of May 30, 2003 to the RFE, counsel submitted the transcript and the degree of a bachelor of science in an approved sandwich programme in catering administration from the Dorset Institute of Higher Education (1987) and the degree of master of business administration from the University of Leicester (1997). Other submissions included the petitioner's business license, expiring June 30, 2003.

The response to the RFE offered "proforma income statements 2003 & 2004" (unaudited financial statements) of IPOND, L.L.C. [1] The AAO sets forth, below, the petitioner's 2002 Form 1065, U.S. Return of Partnership

[1] The petitioner presents several acronyms of its name, but this one suffices for these purposes. A report, in the unaudited financial statements, claimed seven (7) contracts of the petitioner with businesses and named four (4).

Income, as well as that for 2001, already in the record. [2] Form DE-6 reported that the petitioner paid $27,999.99 to the beneficiary in 2003. The petitioner claimed, in a letter dated May 19, 2003 (2003 IPOND letter), that it employed him part-time in 2002.

The petitioner was established in 2000. The petitioner's 2001 and 2002 Form 1065 reported ordinary (loss) in both years, and Schedule L, the balance sheet, contained data to calculate net current assets: [3]

	2001	2002
Ordinary income (loss)	$(161,274)	$(136,514)
Current assets	$ 32,305	$ 12,567
Current liabilities	$ 11,978	$ 11,578
Net current assets	$ 20,327	$ 989

The director issued, next, a notice of intent to deny (NOID) the petition, dated June 17, 2003. Counsel responded to the NOID with a brief dated July 15, 2003. Counsel asserted that the Form DE-6, for the first quarter of 2003 (2003 Q1), reflected payment of wages to the beneficiary and proved the ability to pay the proffered wage, since federal tax returns represented only "paper" losses. Counsel relied on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). Counsel stated that Citizenship and Immigration Services (CIS), formerly the Service or INS, must consider gross income, the payment of wages, retained earnings, and significant depreciation and disregard "the bottom line on tax returns." [4]

The director considered that ordinary losses and net current assets were less than the proffered wage, and that they remained so, even taking other wages paid and depreciation into account. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel summarizes the brief in response to the NOID and asserts, in addition:

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[2] Forms 1065, next noted, designate both principals as limited liability company members.

[3] 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, 1120S, or 1065. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

[4] Counsel cited (Case name omitted for privacy), EAC0200953358, as authority that the best evidence of the ability to pay the proffered wage is the payment of it, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

> In this instance the totality of the circumstances includes . . . personal financial records pertaining to the assets of one partner alone reflecting the petitioner's personal financial ability to pay the [beneficiary's] salary since [the priority date].

Considering counsel's points in response to the NOID and on appeal, *seriatim*, the petitioner claims that it had the ability to pay the proffered wage to the beneficiary at all times since the priority date was established. While it is true that the petitioner has paid the beneficiary wages equal to the proffered wage rate during the first quarter of 2003, the Form DE-6 for 2003 Q1 does not demonstrate the petitioner's ability to pay the wage since the priority date. Indeed, the petitioner conceded in the 2003 IPOND letter that it employed the beneficiary only part-time in 2002.

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).

No credible documentation supports the payment of any wages to the beneficiary in 2002. A selected page, from an unaudited financial statement, names the beneficiary and states a salary paid to the beneficiary in 2002 of $46,231, less than the proffered wage. In the absence of any Form W-2, Form DE-6 confirms only that the petitioner paid $27,999.99 to the beneficiary in 2003.

The response to the director's request for evidence included unaudited financial statements. AAO notes that the unaudited report only reflects representations of management, and they are not persuasive. 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 asserts that the petitioner suffered only "paper" losses and that CIS must add back to income such expenses as wages paid, retained earnings, and significant depreciation, in order to determine the totality of circumstances. [5] In determining the petitioner's ability to pay the proffered wage, CIS 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.*

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[5] No credible evidence reflects any retained earnings to add back. Moreover, the AAO knows of no basis to distinguish "significant" depreciation from other types. 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).

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.

On appeal, counsel makes reference to personal financial records of the assets of one partner. The partnership, however, must demonstrate the ability to pay the proffered wage. Its Forms 1065 reflect no net current assets equal to, or greater than, the proffered wage. The record, moreover, documents neither a partner, an audited financial statement, nor the asset.

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's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa,* have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Wages, once paid to other employees, are not readily available to demonstrate the ability to pay the proffered wage. The petition states that the beneficiary's position is not a new one, but the record does not demonstrate the position, salary, and duties of anyone whom the beneficiary might replace.

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.