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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 04 2006

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: SELF-REPRESENTED

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

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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 hotel. It seeks to employ the beneficiary permanently in the United States as a building maintenance repairer. 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, the petitioner submits additional evidence and asserts that it has had the continuing 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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 March 22, 2001. The proffered wage as stated on the Form ETA 750 is $15.00 per hour, which amounts to $31,200 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since May 2000.

On Part 5 of the petition, filed May 20, 2002, the petitioner claims to have been established in September 1999, to have a gross annual income of approximately $668,000, and to currently employ five workers.

In support of its continuing ability to pay the proposed wage offer of $31,200, the petitioner initially submitted a copy of its Form 1065, U.S. Return of Partnership Income for 2001. It shows that the petitioner reported $667,975 gross receipts or sales, no salaries or wages paid, no guaranteed payments to partners and ordinary

income of -$173,499. Schedule L of the tax return shows that the petitioner had no current assets and $32,897 in current liabilities, resulting in -$32,897 in net current assets. Besides net income, CIS will consider a petitioner's net current assets as a means of reviewing its ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal income tax return. If the end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. In this case, neither the petitioner's net income, nor its net current assets as shown on its 2001 tax return could cover the proffered wage.

On March 14, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. The director also specifically requested a copy of the beneficiary's Wage and Tax Statement (W-2) if the petitioner employed the beneficiary that year.

In response, the petitioner submitted two personal financial statements of the petitioner's co-owners, both dated March 15, 2003. A letter from the petitioner's co-owners accompanied these statements. The letter states that the beneficiary was not issued a W-2 because of a lack of a social security number, but has now obtained a tax identification number.

The director denied the petition on May 5, 2003. He determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date.

On appeal, the petitioner submits an unaudited profit and loss statement covering a period from Januray 2001 through December 2002, an unaudited balance sheet covering 2001 and 2002, and two documents titled "transaction detail by account" presenting general ledger data for 2001 and 2002. The co-owners explain in the cover letter that they have employed the beneficiary since late 2000, "first as an employee of a cleaning service, then as an independent contractor." They state that, as a result of legal advice, the beneficiary's 2001 wages were reported under her friend's social security number, who sometimes works with her. They further state that the beneficiary reported her 2002 wages under her own social security number.

The unaudited financial statements the petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Moreover, CIS will not consider evidence of wages paid to an individual who is clearly not the beneficiary. It is further noted that while the co-owners' letter, submitted on appeal, indicates that the beneficiary reported her 2002 wages under a social security number, the record contains no evidence that the petitioner has ever issued any 2002 W-2 or Form 1099 to the beneficiary. It is further noted that while the petitioner's 2001 transaction ledger shows various

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

amounts paid by check to the beneficiary that cumulatively exceed the proffered wage, the 2002 transaction ledger, submitted on appeal, contains only a credit for $1,869 and a debit for $1,869, in the beneficiary's name. There is no other evidence of compensation paid to the beneficiary during that period. The 2001 transaction ledger also contradicts the co-owners statement that the beneficiary's 2001 wages were reported under another name. It is the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid 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, petitioner has not established that it employed and paid the beneficiary the full proffered wage during the relevant period. To the extent that a petitioner may have paid a beneficiary a salary less than the proffered wage, consideration will be given to the amount of compensation representing wages paid. If the petitioner's net income or net current assets, as shown on its federal income tax return or audited financial statements can cover the difference between the actual wages paid and the proffered wage, the petitioner will be deemed to have demonstrated its ability to pay the proffered wage.

It is noted that the petitioner in this case files its tax return as a partnership. Depending on the nature of a partnership, in some cases, a petitioner's ability to pay the proffered wage may be reviewed through the consideration of a general partner's income, as well as his personal assets and liabilities. That review may be accomplished through an examination of individual income tax returns or audited financial statements. In this case, the nature of the partnership has not been established and the co-owners' personal unaudited financial statements do not provide sufficient first-hand evidence of the petitioner's ability to pay the proffered wage. It is further noted that real property assets are not considered representative of a readily available resource out of which a proffered wage may be paid.

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 next 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. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava,* 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Based on a review of the petitioner's tax return and other financial information contained in the record, the AAO cannot conclude that the petitioner has persuasively established that it has 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.

ORDER: The appeal is dismissed.