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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 15 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.

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a jewelry-casting model maker. 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 brief and additional evidence.

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.

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 26, 1998. The proffered wage as stated on the Form ETA 750 is $13.50 per hour, which amounts to $28,080.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1978, to have a gross annual income of $640,028.00, and to currently have one employee. In support of the petition, the petitioner submitted copies of unaudited financial statements of the petitioner dated June 30, 2002, July 16, 2002 and December 31, 2002; a copy of Internal Revenue Service Form 4868 Application for Automatic Extension of Time to File U.S. Individual Income Tax Return for 2001; a copy of California Form 3519 (PIT) Payment Voucher for Automatic Extension for Individuals; and a letter dated August 24, 2002 from a previous employer of the beneficiary.

The record of the proceedings before the director contains two of Form G-28 notices of entry of appearance as attorney or representative dated April 5, 2001 submitted by an individual, one on behalf of the petitioner and one on behalf of the owner. The individual who submitted those Form G28's does not claim to be either a licensed attorney or an accredited representative, but rather states in block number four of the Form G-28, "I provide

Immigration translation and filing services to the community." That statement fails to satisfy the requirements of the regulation at 8 C.F.R. § 292.1 for representation by persons who are neither licensed attorneys nor accredited representatives. In the proceedings before the director the director therefore treated the petitioner as self-represented, an approach which was correct.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 6, 2003 the director requested additional evidence pertinent to that ability. In response, the petitioner submitted copies of Form 1040 U.S. individual income tax returns for the petitioner's owner for the years 1998, 1999, 2000 and 2001 and copies of California Form 540 California resident income tax returns for the years 1998, 1999, 2000 and 2001.

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 April 25, 2003 issued a notice of intent to deny the petition. In response, the petitioner submitted a letter dated May 20, 2003 from a certified public accountant stating the accountant's opinion that the petitioner had the ability to pay the proffered wage in the years 1999, 2000, and 2001. The accountant's letter was supported by a financial analysis prepared by the accountant, equipment amortization schedules prepared by the accountant, copies of equipment leases of the petitioner and a copy of Form 1099-MISC Miscellaneous Income showing income received by the petitioner's owner in 2002 from a company in Los Angeles, California.

In a notice of decision dated June 9, 2003, the director determined that the evidence submitted in response to the notice of intent to deny did not overcome the grounds for denial, and denied the petition.

On appeal, the petitioner is represented by a licensed attorney, who submitted G-28 forms dated June 30, 2003 on behalf of the petitioner and on behalf of the beneficiary. On appeal, counsel asserts that the director's finding that the prospective employer is unable to pay the proffered wage is in error. Counsel submits a brief on appeal, and additional copies of Form 1040 U.S. individual income tax returns for the petitioner's owner for 1998, 1999 and 2000. No new evidence is submitted on appeal.

In his brief, counsel asserts that in evaluating the petitioner's ability to pay the proffered wage Citizenship and Immigration Services (CIS) should consider the petitioner's business income as shown on the Schedule C's attached to the Form 1040 U.S. individual income tax returns of the petitioner's owner. Furthermore, counsel asserts that depreciation expenses should be added to the net profit of the business in order to assess the funds which were available to the petitioner to pay the proffered wage in each of the relevant years.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner 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, the petitioner did not establish that it employed and paid the beneficiary in any of the years from 1998 through the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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. 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.

The evidence in the record indicates that the petitioner is a sole proprietorship. For a sole proprietorship CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner. The Form 1040 U.S. individual income tax returns of the petitioner's owner show adjusted gross income of $21,648.00 for 1998; $22,690.00 for 1999; $35,026.00 for 2000; and $36,841.00 for 2001. The adjusted gross income of the petitioner's owner in 1998 and in 1999 was less than the proffered wage of $28,080.00. Furthermore, although the owner's adjusted gross income in 2000 and in 2001 was greater than the proffered wage, the amounts remaining for the owner's personal household expenses after paying the proffered wage would have been only $6,946.00 in 2000 and $8,761.00 in 2001. The owner's Form 1040 tax returns show no dependents in 2000, and one dependent in 2000. The amounts of $6,946.00 and $8,761.00 are found to be insufficient to pay the owner's reasonable household expenses in the years 2000 and 2001 respectively.

The petitioner's evidence also includes unaudited financial statements for the petitioner dated June 30, 2002, July 16, 2002 and December 31, 2002, submitted with the original filing of the petitioner, as well as a letter from a certified public accountant dated May 20, 2003, submitted in response to the notice of intent to deny.

The accountant's letter expresses the accountant's opinion that the petitioner had the ability to pay the proffered wage during the years 1999, 2000 and 2001. The accountant's letter offers no information on the year 1998, which is the year of the priority date. Furthermore, even for the years covered by the letter, the accountant does not state that his opinion is based on audited financial statements for the petitioner. The letter states that the accountant's analysis is based on the documents cited in the director's notice of intent to deny. That notice had cited the Form 1040 U.S. individual income tax returns of the petitioner's owner. The accountant's letter also states that the accountant's analysis is based on equipment lease documents of the petitioner, which are attached to the accountant's letter. Based on those documents the accountant prepared partial financial statements for the petitioner for the years 1999, 2000 and 2001.

The analysis and the financial statements of the accountant contain no indication that they are audited financial statements. Nor do the financial statements of the petitioner which were submitted at the same time as the I-140 petition contain any indication that they are audited financial statements. As evidence of the petitioner's ability to pay the proffered wage, unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an <u>unaudited</u> document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

For the foregoing reasons, the petitioner's financial statements and the accountant's letter and supporting documents fail 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.

In his decision denying the petition the director stated that the evidence submitted in response to the notice of intent to deny failed to overcome the reasons for denial as stated in that notice. The director did not specify what evidence had been received in rebuttal to the notice of intent to deny, but the record indicates that the director was referring to the letter from the certified public accountant and the documents supporting that letter, which are discussed above. As noted above, the accountant's letter and supporting documents fail to establish the petitioner's ability to pay the proffered wage during the relevant period. The director's decision to deny the petition was therefore correct.

Counsel's assertions on appeal that CIS should look to the business income of the petitioner as shown on the Schedule C's attached to the petitioner's Form 1040 U.S. individual income tax returns are not persuasive. For a sole proprietorship no separation of legal liability exists between the owner and the owner's business. Therefore it is appropriate for CIS to consider the petitioner's net income to be the owner's adjusted gross income, rather than the business income of the petitioning business as shown on the Schedule C's. Similarly, counsel's assertions that CIS should add depreciation expenses to the petitioner's net income are not persuasive. There is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. Counsel's assertions on appeal therefore fail to overcome the decision of the director.

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.