U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 02 032 52334 Office: CALIFORNIA SERVICE CENTER Date: SEP 17 2004

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.

for

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. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a manufacturer and wholesaler of fine jewelry. It seeks to employ the beneficiary permanently in the United States as a jewelry specialist, buyer. 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 12, 1998. The beneficiary's salary as stated on the labor certification is $21.35 per hour or $44,408 per year.

In response to the request for evidence (RFE) dated February 16, 2002, the petitioner submitted copies of its 1998-2000 Form 1120S, U.S. Income Tax Return for an S Corporation. The 2000 Form 1120S reported both net income and net current assets less than the proffered wage in 2000:

	1998	1999	2000
Net income (Ordinary income from trade or business)	$ 11,699	$ 30,066	$ 21,188
Current assets minus	$ 562,469	$ 758,839	$ 825,921
Current liabilities equal	$ 178,404	$ 544,303	$1,239,816
Net current assets or (a deficit)	$ 384,065	$ 214,536	$ (413,895) [1]

[1] 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

Other submissions in response to the RFE included 2001 quarterly wage reports to the State of California (Form DE-6), Wage and Tax Statement (Forms W-2 and W-3), and statements of miscellaneous income (Form 1099) for various employees. No source reflected the petitioner's payment of any commission or wage to the beneficiary at any time.

The beneficiary averred prior experience at [redacted], and the petitioner offered copies o[redacted] checks to the beneficiary, dated from March 28, 1995 to March 14, 1996. The labor certification claimed prior experience with [redacted] from April 1996 to, at least, January 1998. *See* Form ETA 750, Part B, block 15a. The proceedings contain no letter verifying the alleged Bednor experience, in response to the RFE.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

The petitioner appealed, and counsel stated that the petitioner would have completely avoided the payment of $27,927 in commissions in 2000 had it employed the beneficiary. Counsel did not offer to prove any particular commission or independent contractor that the petitioner might have replaced. The funds, once disbursed for compensation to others, are not readily available to pay to the beneficiary.

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 produced no document to support the status of loans to shareholders in 2000 as a current asset, as defined above and as found in the federal tax return. *See* n.1. Counsel stated on appeal that the petitioner would have "entirely avoided" commission costs of $75,500, referenced in 2001 Forms 1099, if it had hired the beneficiary. The record does not document the duties of any of the subjects of Forms 1099.

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).

On appeal, counsel submitted financial statements in Exhibits E and G, in regard to the year ending December 31, 2001. A Disclaimer asserted that they represented only a compilation of statements for presentation, but no audit. 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), *supra*. Others are not persuasive evidence of the ability to pay the proffered wage.

Counsel's rationale on appeal appeared to justify the ability to pay the proffered wage in 2000 with the accretion to net income of "substantial assets," loans to shareholders, and "paper losses such as depreciation and other miscellaneous paper losses." The AAO observed that counsel's enumeration contradicted several judicial

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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). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

authorities and cited them. [2] In the absence of any payment of wages to the beneficiary, the AAO evaluated net income or net current assets in 2000, each less than the proffered wage. The AAO concluded that the petitioner did not demonstrate the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence and dismissed the appeal. *See* 8 C.F.R. § 204.5(g)(2), *supra*.

Counsel counters with this motion to reconsider (MTR) and acknowledges the holding in *Chi-Feng Chang v. Thornburgh*, but asserts that:

> Nevertheless, in a 1994 published decision, *In re X*, 13 Immig. Rptr. B2-166 (AAO 1994), the AAO recognized that certain losses are "artificial losses and not actual expenses to the business. *Id.*at 167. The AAO further stated that the petitioner should indicate that [sic] whether "the depreciation figure or any of the other deductions listed on its tax return are actually available funds that could easily be converted to ready cash for the purposes of paying the proffered wage as certified." *Id.*at 167.
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> . . . Through consideration of applicable accounting principles and the tax planning strategies used by the petitioner's accountant, the petitioner unequivocally established that it possesses ample resources that could easily be converted into cash and used to pay the proffered wage to the beneficiary.

The proceedings contain no documentation of the means to convert any particular asset or deduction to cash in 2000, nor of the accounting principle or strategy to realize the procedure.

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 refers to *In re X* and states that it is a "published decision," but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, 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). *Chi-Feng Chang v. Thornburgh* stands as the law controlling this MTR.

Moreover, counsel neither claims that CIS approved the petition in respect to *In re X*, nor that the record before the director contained any copy of it, nor that the director reviewed it, if there was one. If the previous non-immigrant petitions were approved based on the same unsupported and contradictory assertions as the current record, the approval would constitute clear and gross error. Neither the AAO nor CIS is required to approve applications or petitions if eligibility has not been demonstrated, merely because a prior approval may have been erroneous. *See e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that any agency must treat acknowledged errors as binding

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[2] The present MTR takes issue with only *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989) in respect to the addition of depreciation expense back to income, and the AAO discusses it, below.

precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Since *In re X* is not a precedent decision, the petition must be dismissed under 8 C.F.R. 103.5(a):

> (3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or [CIS's] policy. . . .
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> (4) *Processing motions in proceedings before [CIS].* A motion that does not meet applicable requirements shall be dismissed. . . .

Beyond the decision of the director and of the AAO, dismissing the appeal, the AAO notes that the RFE explicitly required evidence of two (2) years of the prior experience of the beneficiary in the job offered, as required in the Form ETA 750. The RFE required a letter from the prior employer, and the record, as presently constituted, contains no letter. Ben's checks to the beneficiary, dated from March 28, 1995 to March 14, 1996, reflect one (1) year at most. The checks do not, of course, attest to permanent, full-time employment. Employment is defined as permanent, full time work. 20 C.F.R. § 656.3, *Employment*. Evidence must relate to qualifying experience. *See* 8 C.F.R. § 204.5(g)(1). This further reason prevents the approval of the petition, though not a basis of the decision to dismiss the MTR.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

After a review of the entire record, 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 motion to reconsider is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.