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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 12950325 Office: CALIFORNIA SERVICE CENTER Date: AUG 1 8 2005

IN RE: Petitioner: [redacted]
Beneficiar

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

DISCUSSION: The service center director denied the employment-based visa petition on August 8, 2002, and the Administrative Appeals Office (AAO) subsequently denied the appeal on April 5, 2004. The matter is now before the AAO as a motion to reconsider, and/or reopen. The motion to reopen is granted. The appeal will be dismissed.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 stated that the position to be filled by the beneficiary was not a new position, and the beneficiary was replacing another employee. Thus, based on its current assets and financial banking resources, the petitioner was able to pay the difference between the current employee's salary and the proffered salary.

The AAO denied the appeal, citing to *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) and its findings with regard to evidence submitted for the first time on appeal. Based on the evidence in the record prior to receipt of the appeal, the AAO determined that the petitioner had not established it had the ability to pay the proffered wage. In addition, the AAO stated that the petitioner had not established that the beneficiary was qualified to perform the duties of the position.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. On motion, counsel states that the instant I-140 petition established that the proffered position was not a new position, an issue overlooked by the director in his decision. Counsel also stated that the AAO should not have rejected the materials submitted on appeal that provided additional information on the petitioner's financial assets. Counsel's statements are viewed as sufficient to approve the motion to reopen the proceedings.

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 September 1, 1998. The proffered wage as stated on the Form ETA 750 is a monthly salary of $4,929.60 or an annual salary of $59,155.20. 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 August of 1997, to have six employees and to have a gross annual income of $727,905.60. In support of the petition, the petitioner submitted IRS Form 1120S, the petitioner's corporate income tax return for 1998, 1999, and 2000. The petitioner also submitted an unaudited profit and loss statement for January through December 2001.

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 April 25, 2002, the director requested additional evidence pertinent to that ability. The director stated that the federal income tax returns initially submitted by the petitioner did not establish that the petitioner had enough ordinary income or net current assets to pay the proffered wage of $59,155.20, and that in 1999 and 2000, the petitioner showed a business loss with current assets well under ten thousand dollars. The director noted that the petitioner appeared to be a viable business with significant gross income, but that the petitioner had the burden of proving its ability to pay the beneficiary's salary for the time period in question. Finally the director stated that the evidence in the record did not indicate that the petitioner would be able to take on the additional expense of paying the beneficiary's wage.

In response, the petitioner, who also served as counsel, cited *Chi-Feng Chang vs. Thornburg*, 719 F. Supp. 532 (N.D. Texas 1989) and stated that the petitioner in *Chi-Feng Chang* had net losses in years previous to the filing and a net loss of over $18,000 for the year the petition was filed. Counsel stated that no such evidence was in the record of the instant petition, which demonstrated the petitioner's ability to pay the proffered wage as well as sustain consistent growth. The petitioner also submitted a statement from a certified public accountant and stated that the accountant's statement indicated that the employer's officer's salaries were not adjusted in order to reduce corporate income tax liabilities on the petitioner's income statements, and that without these salaries, the corporation would have made a substantial gain on its income statement, and, accordingly, would have paid a lot of corporate income taxes. The petitioner also noted that the financial statement submitted for the first quarter of 2002 indicated net capital of $24,499.

The submitted statement by [redacted] CPA, examined each of the petitioner's income tax returns for 1998 through 2001 and noted how the addition of the monies paid to the sole owner of the petitioner to the petitioner's taxable income would have affected the taxable income each year. According to the accountant, in 1998, while the reported taxable income was $16,463, the taxable income, if the officer's salary had not been paid would have $79,463, and that in 1999, with a taxable loss of $3,037, if the salary of the proprietor's sole owner had not been paid, the petitioner would have had a taxable income of $68,413. The accountant

also stated that in 2000, the petitioner would have had a taxable income of $67,221, if the officer's salary were not paid, as opposed to a taxable loss for 2000 of $436. Finally in 2001, the accountant stated that the petitioner's taxable loss of $22,164, which included the salary paid to the petitioner's owner, would have been a taxable income of $45,860. Mr. also stated that the petitioner's owner had a $25,000 available line of credit. The accountant's compilation report and balance sheet for March 2002 indicated that the petitioner had a net income of $24,499 and salaries paid out of $37,519.

On August 8, 2002, the director denied the petition. In his denial of the petition, the director examined the petitioner's gross receipts, compensation of officers of the corporation, salaries and wages, and ordinary income for the years 1998 to 2000, and determined that the petitioner has the following net current assets for these years: 1998, $35,241; in 1999, $8,289; and in the year 2000, $2,646. The director stated that neither the petitioner's net income nor its net current assets were sufficient to pay the proffered wage for any year in question. The director also added that although the petitioner's accountant had asserted that the beneficiary's wage could have been paid from officer compensation, the petitioner's officer's compensation was a real expense for each of the years in question.

On appeal, counsel stated that the director misread the record when he stated that the petitioner did not appear to have sufficient financial resources to pay the additional expense of paying the beneficiary's wage. Counsel stated that the proffered job was not a new position, and that the beneficiary would replace (Ms. . Counsel stated that Ms. was paid $55,000 in 1998, which is $4,155.20 less than the proffered wage. Counsel stated that the difference between Ms. salary and the actual wage could have been paid from the petitioner's $35,241 net current assets in 1998. With regard to the year 1999, counsel stated that Ms. was paid $48,875, or $10,280.20 less than the proffered wage. Counsel stated that since the petitioner took on more employees in 1999, increasing salaries and wages for 1998 by $7,279, and still showed net current assets of $8,289, the petitioner had shown the ability to pay the $10,280 difference in pay between the actual wages paid to Ms. Liu and the proffered wage.

Counsel further noted that Ms was paid $48,000 in wages in both 2000 and 2001. In 2000, counsel pointed out that the petitioner's gross receipts were $712,812, an increase of $51,177, and that the petitioner paid $222,119 in wages, an increase of $75,200 from 1999 wages. Counsel further stated that the tax return documents showed net current assets of $2,446. Counsel noted that the petitioner had ten employees in 2001, and paid salaries and officer compensation totaling $216,551 that year, which also established that the petitioner had the ability to pay the $11,155.20 difference in wages between Ms. salary and the proffered wage. In his concluding remarks on appeal, counsel cited to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Com. 1967), and stated that the petitioner in the instant petition had been in business for five years and had submitted tax returns showing consistent increases in profits, business, and employment. Counsel asserted that based on these factors, it was reasonable to conclude that the petitioner had the continued ability to pay the proffered wage.

Counsel submitted the following additional documents to the record:

> Form W-3 Transmittal of Wage and Tax Statements 1998, that indicated the petitioner had paid $198,139 in wages in 1998.

Forms W-2 for the year 1998 for ten employees, including the petitioner's owner, and [redacted] were also submitted. According to these forms, the petitioner's owner earned $63,000 while Ms. [redacted] earned $55,000.

Form W-3 Transmittal of Wage and Tax Statements for 1999 that indicated the petitioner paid $217,369.13 in wages and other compensation.

Forms W-2 for 1999 indicated the petitioner paid salaries to twelve individuals, with the petitioner's owner earning $71,450 and Ms [redacted] earning $48,875.

Form W-3 for 2000 that indicated the petitioner paid $222,119.27 in wages.

Forms W-2 for 2000, which were also submitted, indicated that the petitioner paid eight employees, and that the petitioner's owner was paid $67,656.67, while Ms. [redacted] was paid $48,000 in 2000.

Form W-3 for 2001 that indicated the petitioner paid $216,551 in wages that year.

Forms W-2 for 2001 that indicated the petitioner paid eleven employees during the year. The petitioner's owner was paid $68,023.70 while Ms. [redacted] was paid $48,000.[1]

Form 1120S, the petitioner's corporate income tax return for 2001. This document indicated the petitioner had ordinary income of $43,836 in 2001.

A letter to the petitioner from Wells Fargo Bank, Alhambra, California, dated August 20, 2002, that stated the petitioner had a basic business checking account that was opened on August 29, 1997, and the current balance was $95,656.41, with an average balance of $84,85664.[2]

On April 5, 2004, the AAO denied the appeal. In its review of the appeal, the AAO cited to *Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988) and declined to accept the evidence submitted for the first time upon appeal. The AAO stated that the petitioner was put on notice for the need for evidence on its ability to pay the proffered wage by regulations, by the published decisions of the AAO and its predecessor agencies, as well as by the director's request of further evidence. The AAO stated that even though the request for further evidence did not mention by name or category any of the documentation submitted by the petitioner on appeal, this fact did not relieve the petitioner from its burden of proving its ability to pay the proffered wage. The AAO review of the case therefore was based on the record as constituted prior to the receipt of the appeal.

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[1] The petitioner's 2001 income tax return identified the salary paid to the petitioner's owner as compensation of officers, on line 7, in the deductions listed on the first page of the return.

[2] This last figure is a typographical error. Counsel on appeal stated the average balance as $84,856.64.

In reviewing the director's decision, the AAO noted that the director had miscalculated the petitioner's net current assets for 1999, and that the petitioner's net current assets were actually $6,560 in 1999. The AAO further determined that the director was correct in not accepting the unaudited financial statements provided by the petitioner. The AAO examined the letter from the petitioner's CPA who asserted that if the salary payments had not been made to the petitioner's owner, the petitioner's ordinary income would have been sufficient to pay the proffered wage for the years 1998 to 2001. The AAO stated that the petitioner is a law firm and the petitioner's owner appeared to be the only attorney working in the office during the time in question, and that the record lacked any evidence that the owner would have been willing to work without a salary during this period. The AAO therefore stated that the director's determination not to accept the owner's compensation as a financial resource available to the petitioner was correct.

With regard to the petitioner's circumstances being analogous to those of the petitioner in *Sonegawa*, 12 I&N Dec. 612 (BIA 1967), the AAO found that no unusual circumstances parallel to those in *Sonegawa* were shown to exist in the instant petition, and commented that the petitioner also had not established that the years 1998 to 2000 were ones with uncharacteristically low profits for the petitioner, thus showing the pattern of profitable years on either side of an unprofitable year, as was the case in *Sonegawa*.

The AAO further examined an issue not raised by the director in his denial of the petition, namely, the beneficiary's qualifications for the proffered position. The AAO determined that the record lacked evidence that the beneficiary had the required experience for the position offered. According to the AAO, Form ETA 750, block fourteen, stated the position required four years of experience in the job offered, and block fifteen of the same document contained the following special requirement: "Must have the four years experience as a Senior Administrative Assistant in the company." The AAO stated that Form ETA 750B, which listed the beneficiary's prior work experience, showed no experience in a position of senior administrative assistant, and no experience working with the petitioner. The AAO stated that the employment verification letter in the record that confirmed the beneficiary's prior work experience in Taiwan stated that the beneficiary joined the Ministry of Foreign Affairs on January 8, 1975, and currently served as administrative officer in the office of Telecommunications Services, Ministry of Foreign Affairs. The AAO states that no further information was given about the responsibilities of the beneficiary in this position. Therefore the AAO determined that the petitioner had not established that the beneficiary possesses the required experience for the position offered as of the priority date.

On motion to reopen/reconsider, counsel states that the AAO rejected the evidence submitted on appeal, even though the materials submitted on appeal were the same as the materials submitted by the petitioner in *Sonegawa* on appeal, namely additional income tax information with regard to wages for regular and part-time employees. Counsel notes that the appeal materials submitted by the petitioner in *Sonegawa* were not rejected on the basis of the application of any regulatory or administration decision authority, as were the petitioner's appeal materials. Further counsel states that the regional commissioner's decision in *Sonegawa* did not mention whether a financial statement prepared by an accounting firm submitted by the petitioner in *Sonegawa* was "unaudited" or whether it was submitted for the first time on appeal, but rather the commissioner included the evidence in the review of the petitioner's circumstances.

Counsel also states that the AAO decision appeared to argue that cases without unusual circumstances parallel to those of *Sonegawa* did not require consideration of all the circumstances that showed reasonable expectations of continued increases in business, profits, and the continued payment of wages to current employees. Counsel asserts that all these factors establish the petitioner's ability to pay the proffered wage. Counsel further asserts if the petitioner was able to pay ten employees in 2001, and pay salaries and officer compensation totaling $216,551 in 2001, the petitioner clearly has the continued ability to pay the $11,155.20 difference in the wages paid to Ms. [redacted] and the proffered wage.

Counsel further notes that in *Matter of Soriano*, 19 I&N Dec. at 764, the BIA held that where a visa petition had once been denied based upon a finding that a marriage was entered into solely to bestow an immigration benefit, the petitioner bears a heavy burden of proof with respect to any subsequently field visa petition involving the same beneficiary. In *Matter of Soriano*, counsel continues, the petitioner appealed the denial of a second petition filed on behalf of the same beneficiary, although a previous petition she filed had been denied by the director on the basis of fraud. Counsel also noted that since the director in *Matter of Soriano* had written to counsel advising him that he had 30 days to submit additional evidence in support of his appeal, the BIA accordingly remanded the matter to the district director to consider the evidence submitted on appeal. Counsel states that similarly, *Matter of Obaigbena* 19 I&N Dec. 533, (BIA 1988) involved an appeal following the denial of two previous visa petitions. Counsel states that in this case, despite denying counsel's request for an extension of time to respond to a notice of intent to deny, and entering a denial of the visa petition for a third time, the director advised the petitioner that his denial of an extension of time to submit a rebuttal did not preclude the petitioner from presenting additional documentation on appeal. Counsel further states that the record contained no derogatory or adverse evidence, at the time of the decision and that the record contained the director's acknowledgement that the petitioner's income tax evidence indicated that it paid substantial wages during the period of time in question. Counsel states that the evidence indicating the number of employees and the wages paid by the petitioner was not presented for the first time on appeal, and was submitted in addition to the evidence already in the record.

Counsel asserts that the AAO relied on the findings in *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) to reject counsel's assertion that the proffered position is not a new one, and that the beneficiary would replace a current employee. Counsel further stated that this case involved a motion that denied to suppress as involuntary and products of coercion, the statements made by aliens to INS agents, during a raid of a shoe factory, offered by the legacy INS in deportation proceedings because the motion was supported by counsel's offer of proof that the BIA characterized as a "mixed legal and factual declaration by counsel not based on counsel's personal knowledge and never corroborated personally by the respondent." Counsel states that his assertion that the position offered is not new is clearly corroborated in the record on the I-140 petition. Counsel also states that since counsel personally reviewed the entire record of this matter, prepared, and submitted a brief in support of the motion, counsel's assertions are clearly based upon personal knowledge, a fact that the AAO also failed to address.

Counsel then states that the AAO went beyond the decision of the director in finding that the beneficiary was not qualified for the position. Counsel states that the director's request for further evidence did not notify the petitioner that the record lacked sufficient evidence of the beneficiary's qualifications. Counsel states that based on *Matter of Soriano*, where a visa petition was denied based on a deficiency of proof, and the

petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, the record should be remanded to the director to consider and address any new evidence on the issue.

In conclusion, counsel states that the petitioner in *Sonegawa* submitted further evidence that persuaded the regional commissioner that her expectations of increasing business and profits were reasonable. Counsel states that the petitioner in the instant petition likewise has been in business for at least seven years now and has submitted tax returns showing consistent increases in profits, business, and employment. Counsel asserts that it is thus reasonable to conclude that the petitioner has the continuing ability to pay the proffered wage.

With regard to the applicability of *Matter of Soriano* to the instant petition as it pertains to the rejection of evidence submitted to the record for the first time on appeal, counsel's remarks have some merit.[3] The director, in his request for further evidence, mentioned that the petitioner had already submitted its federal income tax returns for three years, and did specify three types of further evidence that could be submitted, namely, annual reports, audited financial statements, or copies of the original signs federal income tax returns. However, the director did not specify any particular evidence to be submitted, such as the petitioner's federal income tax return for 2001. The director further noted that it is did not appear that the petitioner could add additional staff based on its financial resources. The director did not address this issue in his denial, but rather addressed the issue of the petitioner's compensation of its sole officer.

On appeal, new counsel for the petitioner then addressed the issue raised by the director in his request for further evidence, namely, wages for an additional employee. Counsel further provided wage and income tax information as to actual employees from 1998 to 2001, which included information as to the wages of an employee that the petitioner stated would be replaced by the beneficiary. The petitioner also submitted further financial information, as well as its 2001 income tax return, which carries much more probative weight as to the petitioner's ability to pay the proffered wage, than the unaudited profit and loss statement for 2001 initially submitted to the record.[4]

In addition, although new counsel did address the topic of additional employee versus replacement employee for the first time on appeal, the issue was first brought up by the director in his request for further evidence, although the director requested no further evidence with regard to this issue. In addition, the initial I-140 petition does clearly establish that the proffered position is not for a new position. In addition, although the director give some generic instructions to the petitioner in the request for further evidence, he did not specify any particular document to be submitted by the petitioner. For example, it is not clear why the director did not request the petitioner's 2001 corporate income tax return, which as of the date of the RFE, namely, April 25, 2002, should have been available. For the petitioner to submit further evidence on appeal to further address

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[3] It appears that the AAO adjudicator in the denial of the petition also found counsel's statements and the evidence submitted to have some merit, as he or she referenced counsel's statements and the unaccepted evidence in his or her remarks.

[4] The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the 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.

the petitioner's ability to pay the proffered wage in 2001, and the issue of replacing another employee, appears appropriate. The findings in the *Soriano* case law are not viewed as apposite to the circumstances found in the instant petition. Therefore the evidence submitted on appeal as well as the director's initial denial of the petition will be considered in these proceedings.

On appeal, counsel submitted a letter that provides information on the petitioner's bank account with Wells Fargo, including the starting date of the account, balance as of the date of the letter, and average balance. Counsel's reliance on the balance in the petitioner's bank account as of August 2002 is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. 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, no evidence was submitted to demonstrate that the funds reported on the bank's letter dated August 2, 2002, somehow reflect additional available funds as of the priority date of 1998, or in any of the ensuing years during the time period in question. Finally, while the bank statement reflects funds in the petitioner's business checking account in August 2002, the petitioner's corporate income tax return for 2002 is not in the record, so it is not possible to evaluate if the petitioner has more current available funds in 2002 that are not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The petitioner's accountant in a letter submitted in response to the director's request for further evidence identified a line of credit available to the petitioner; however, no evidentiary documentation of such a line of credit was put into the record. It is noted that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is further noted that in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans, if any, will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

Furthermore, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Another issue raised in response to the director's request for further evidence involved the use of the petitioner's sole owner/officer's salary to pay the proffered wage. Corporations such as personal services corporations and other similar corporations may have employees-owners with financial flexibility who can set their own salaries based on the profitability of their corporations, and as such, officer compensation, in certain cases, can be utilized as an additional source of funds to pay the beneficiary's wages. However, in the instant petition, the petitioner has not provided sufficient evidence to establish that this analysis would be appropriate. First, the petitioner's owner has provided no statement with regard to using any of his compensation as an additional source of funds with which to pay the proffered salary. Such documentation would be essential in the instant petition, as in several years in the period of time in question, the difference between the officer's compensation/salary and the proffered wage for several years is very little, which would rise the issue of how flexible the employee-owner in the instant petition can be in adjusting his own salary/compensation.[5] Second, and more importantly, although the petitioner's income tax returns vary in identifying the officer's remuneration as either compensation or salary, the W-2 Forms submitted on appeal appear to establish the officer/owner's compensation as his salary. While officers' compensation can be viewed as discretionary expenses, wages, on the other hand, are not discretionary expenses. Thus, without more persuasive evidence, the owner's salary is not viewed as discretionary funds that can be used to pay the proffered wage.

On appeal, counsel advises that the beneficiary's position is not new and that the beneficiary will replace Ms. [redacted] another employee. While the materials submitted on appeal identified the petitioner's employees, there is no listing provided as to the duties performed by the various full time and part time employees. Although counsel identifies one of the petitioner's employees and establishes her wages for the years 1998 to 2001, the petitioner has not provided sufficient persuasive evidence that the petitioner will replace Ms. [redacted] with the beneficiary. The petitioner has not documented the position, duties, and termination of the worker who performs or performed the duties of the proffered position. Furthermore, there is no evidence that Ms. [redacted] position involves the same duties as those set forth in the Form ETA 750. If Ms [redacted] performed other kinds of work, then the beneficiary could not have replaced her. Without more persuasive evidence, the wages already paid to Ms. Liu are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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

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[5] For example, in 1998, the owner's compensation was $63,000, while the proffered wage is $59,148.

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 the full proffered wage in 1998 and onward.

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.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns show the following amount of ordinary income for the years 1998 to 2001: $16,463, -$3,037, -$436, and $43,836. These figures fail to establish the ability of the petitioner to pay the proffered wage based on its ordinary income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available 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 assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or

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[6] 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.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner submitted the following information for tax years 1998 through 2001:

	1998	1999	2000	2001
Ordinary Income	$ 16,463	$ -3,037	$ -436	$ 48,836
Current Assets	$ 35,241	$ 8,289	$ 2,646	$ 37,974
Current Liabilities	$ 0	$ 1,729	$ 0	$ 0
Net current assets	$ 35,241	$ 6,560	$ 2,646	$ 37,974

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in any year from 1998 to 2001. In 1998, the petitioner shows a net income of $16,463 and net current assets of $35,241, and has not, therefore, demonstrated the ability to pay the proffered wage of $59,155.20 out of its net income or net current assets. In 1999, the petitioner shows a net income of -$3,037 and net current assets of $6,560, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2000, the petitioner shows a net income of -$436 and net current assets of $2,646, and therefore, has not demonstrated the ability to pay the proffered wage in that year. Finally, in 2001, the petitioner shows $48,836 in ordinary income and $37,974 in net current assets. Therefore, the petitioner has not demonstrated that it had sufficient ordinary income or net current assets in 2001 to pay the proffered wage of $59,155.20.

In looking at the totality of the circumstances of the petitioner, in its response to the director's request for further evidence, the petitioner's accountant described how the subtraction of the sole owner's salary from the petitioner's deductions would increase the petitioner's ordinary income in the years from 1998 to 2001. As stated previously, the issue of the employee/owner's compensation in the instant petition is not viewed as an additional source of funds with which to pay the proffered wage. As also stated previously, the petitioner has not provided sufficient evidence to establish that it will replace another employee with the beneficiary. Therefore, even within the context of the totality of circumstances addressed in *Sonegawa*, the petitioner has not established that it has the ability to pay the proffered wage.

With regard to the beneficiary's work experience, an issue first raised by the AAO in its review of the initial appeal, it is noted that 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). Therefore the AAO could review a ground for ineligibility not raised by the director in his decision.

Upon review of the record, the letter of employment verification submitted by the petitioner with the initial petition does not provide specific details as to any senior administrative assistant duties performed by the beneficiary in her Taiwanese employment. Furthermore, the petitioner has provided no further clarification with regard to the four years of work experience "in the company" outlined in block 15, of Form ETA 750. Without more persuasive evidence, the petitioner has not established that the beneficiary is qualified to

perform the duties of the position. Although counsel states that the matter should be remanded to the director for further consideration, the AAO does not view this action as necessary, as the petition remains denied based on the primary issue identified by the director in his initial decision.

As previously stated, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date and onward. 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. The appeal will be dismissed. The petition will be denied.

ORDER: The motion to reopen is granted. The decision of the AAO dated April 5, 2004, is withdrawn with regard to the review of materials submitted on appeal. The remainder of the AAO decision is affirmed. The petition is denied.