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and Immigration
Services

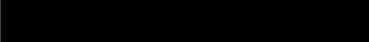
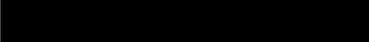
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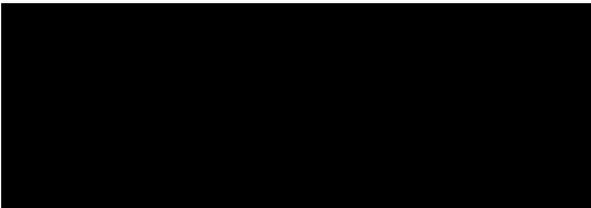
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FILE: EAC 02 160 52993 Office: VERMONT SERVICE CENTER Date: **JUN 17 2005**

IN RE: Petitioner: 
Beneficiary: 

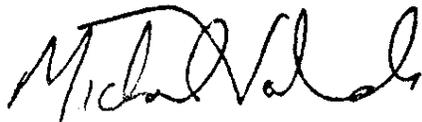
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a processor of hamburger and other meats. It seeks to employ the beneficiary permanently in the United States as a butcher. 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 granting 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 January 19, 2001. The proffered wage as stated on the Form ETA 750 is \$12.59 per hour, which equals \$26,187.20 per year.

On the petition, the petitioner stated that it was established during 1956 and operated under its current name since September of 1989. The petitioner further stated that it employs two workers. The petition states that the petitioner's gross annual income during 2000 was \$300,454. In the space reserved for reporting its net annual income the petitioner inserted, "N/A." No explanation was submitted for why that information is inapplicable. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Roselle, New Jersey.

In support of the petition, counsel submitted the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Because the priority date is January 19, 2001, evidence pertinent to the petitioner's finances during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered

wage beginning on the priority date.¹ Financial information from the 2000 return will not, therefore, be considered. Both returns, however, show that the petitioner reports taxes pursuant to the calendar year.

The 2001 return shows that during that year the petitioner had taxable income before net operating loss deduction and special deductions of \$1,929. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 11, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary.

In response, the petitioner submitted no W-2 forms.² Counsel argued that the petitioner's increasing receipts, expenses, and gross profits demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Counsel also noted that, had the petitioner not had net operating loss carryover during 2001, it would have had taxable income of \$1,929.

Counsel argues that the petitioner's depreciation deduction is a fictional expense and should be included in the calculation of the petitioner's ability to pay the proffered wage. Counsel further notes that the petitioner opted for accelerated depreciation of its assets; implying that, in the alternative, the amount of depreciation accorded to 2001 should be adjusted for the purpose of determining the petitioner's ability to pay additional wages.

Counsel asserts that the petitioner's total assets at the end of 2001 should also be considered a fund available to pay additional wages. Further, counsel asserts that the petitioner's tax return may not have reflected cash payments and receipts. Further still, counsel asserts that hiring the beneficiary will increase the petitioner's productivity and profits, thus enabling it to pay additional wages. Finally, counsel asserts that the Request for Evidence was based on the size of the petitioning entity. How counsel arrived at that conclusion is not stated and is unclear.

As additional evidence, counsel submits (1) a compiled EOY balance sheet covering 1999, 2000, and 2001, (2) a compiled Schedule of Selling, General, and Administrative Expenses for the same years, (3) a compiled projection of those same expenses for 2002 and 2003, (4) a letter, dated October 3, 2002, from the petitioner's accountant, (5) a copy of the petitioner's Dun & Bradstreet (D&B) report, (6) copies of bank statements pertinent to the petitioner's account, and (7) a copy of the petitioner's owner's Form 1040 U.S. Individual Income Tax Return.

¹ This office notes, however, that the petitioner's 2000 tax return shows a loss as its taxable income before net operating loss deduction and special deductions and shows negative net current assets. If the 2000 return were relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, it would not tend to support that ability.

² The petitioner has never submitted W-2 forms or any other evidence to demonstrate that it has employed the beneficiary.

The petitioner's accountant's October 3, 2002 letter states that he has reviewed the petitioner's 2000 and 2001 tax returns and that he believes that the company will be able to pay the proffered wage.

Counsel cited the additional evidence submitted as additional support for the proposition that the petitioner is able to pay the proffered wage. Counsel stressed some aspects of the D&B report. Counsel cited the petitioner's bank statements as evidence that it has been able to meet its expenses, but without specifying how those statements show that ability.

Counsel asserted that the petitioner's personal income tax return shows that he could have adjusted the income he received from the petitioner as necessary to pay the proffered wage. That assertion is addressed below.

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 December 2, 2002, denied the petition. In the decision the director noted that the D&B report states that "D&B has been unable to obtain sufficient financial information from this company to calculate business ratios," and that statistics pertinent to the petitioner's profitability and short-term solvency were, therefore, omitted from the report.

On appeal, counsel submits (1) an affidavit, dated December 30, 2002, from the petitioner's owner (2) additional bank statements, (3) a letter, dated December 19, 2002, from an accountant, and (4) a letter, dated December 30, 2002, from another accountant.

The petitioner's owner's December 30, 2002 affidavit states that, upon hiring the beneficiary, he will release the petitioner's two part-time employees and cease to draw a salary himself. The petitioner's owner states that he will then use the amounts saved on those salaries and the petitioner's net income to pay the proffered wage.

The December 19, 2002 accountant's letter stresses the petitioner's gross receipts, profit, and depreciation deduction in stating that the petitioner has the ability to pay the proffered wage. The accountant further states that, based on four months of sales,³ he projects that the petitioner will have a substantial increase in sales. The evidence pertinent to those four months of sales was not included in the submissions on appeal. Further, whether the petitioner's business has an annual cycle is not discussed. Whether the petitioner's profit during four months, even if it were demonstrated, supports the forecast increase in annual sales cannot be determined.

The December 30, 2002 accountant's letter notes that, if the petitioner had not taken a net operating loss deduction it would have declared a taxable income of \$1,929 during 2001. The accountant further states that, if it is able to employ the beneficiary, it will no longer employ its two part-time employees and will no longer

³ The accountant states, "We selected four months from calendar year 2002 and annualized sales. The annualized sales will approximate \$326,000, an increase of almost \$13,000 over year 2001 and an increase of \$26,000 from the year 2000." The accountant does not state that the months selected were the four most recent months, or give any reason to believe that they are representative of the entire 2002 calendar year. Further, the accountant makes clear that he is comparing those four months to 2000 and 2001, rather than to the same months during those years. The accountant's methodology is questionable, and his forecast of increased sales is, therefore, unreliable.

pay a salary to its owner, and that their salaries should be included in the calculation of funds available to pay the proffered wage.

The accountant also indicates that increases in the petitioner's compensation of officers, rent, and telephone expenses should be considered funds available to pay additional wages. The accountant characterizes those increases as being for the owner's benefit. In what way the increases in rent and telephone expenses might benefit the petitioner's owner is unclear, and the accountant did not elucidate. As to the petitioner's officer compensation, the accountant is indicating that the petitioner might have paid less compensation to its owner as necessary to pay the proffered wage. That argument is addressed below.

In a letter dated January 3, 2003, counsel asserts that the director inappropriately relied on the petitioner's size in denying the petition. The decision of denial does not mention the petitioner's size, and counsel did not indicate what other indication exists that the petitioner's size was a factor in the decision.

In an undated brief filed to supplement the appeal, counsel again urges that the decision of denial was based on the petitioner's size but, again, offers no support for that position. Counsel's assertion remains unpersuasive.

Counsel further asserts that the director failed to consider some portion of the evidence submitted, but provides no support for that assertion. Counsel implies that the unaudited financial statements submitted should have been accorded more weight. Counsel asserts that, contrary to the decision of denial, the petitioner's 2000 and 2001 tax returns support the proposition that the petitioner is able to pay the proffered wage, but were "read out of context." The petitioner's unaudited financial statements and figures from its tax returns are addressed further below.

Counsel again asserts that, had the petitioner not taken a net operating loss deduction, it would have had taxable income of \$1,929 during 2001. Counsel again asserts that the petitioner, if permitted to employ the beneficiary, would no longer employ its two part-time workers and would no longer pay compensation to its owner. Counsel states that, therefore, the funds paid out in salaries and compensation of officers would be available to pay the proffered wage. Counsel cites the affidavit from the petitioner's owner and the December 30, 2002 accountant's letter as support for that proposition.

Counsel cites various non-precedent decisions of this office for various propositions, including the proposition that the petitioner is free to submit any other form of evidence, in addition to that specified in 8 C.F.R. § 204.5(g)(2) or requested by CIS, that it feels may be helpful in the determination of the petitioner's ability to pay the proffered wage.⁴

⁴ Among the other propositions for which counsel cites non-precedent decisions are (1) that a sole proprietor can show ability to pay the proffered wage if he is willing to waive compensation or transfer personal funds, and (2) that an employer can show ability to pay the proffered wage with funds previously paid to contractors whose work will be obviated by hiring the beneficiary. Those propositions are inapposite in the instant case, where (1) the petitioner is not a sole proprietorship, but a corporation, and (2) the record contains no evidence that the petitioner has previously hired contractors to perform the duties of the proffered position.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. This office accepts, however, that the petitioner is able to submit any form of secondary evidence it believes to be helpful. CIS will then analyze the relevance, reliability, and sufficiency of that evidence.

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

While that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a petitioner may demonstrate its ability to pay the proffered wage notwithstanding that it suffers a loss of reports low profits during a salient year. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in *Sonogawa* the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large

profit.⁵ No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel asserts that the petitioner's owner will cease to draw officer compensation or salary from the petitioner if it is able to hire the beneficiary. Counsel also asserts that, if permitted to employ the beneficiary, the petitioner will no longer employ the two part-time employees on its payroll.

The petitioner's tax return appears to indicate that, other than the petitioner's owner, it employs only two part-time workers. Counsel appears to state, then, that the beneficiary would perform all of the paid labor at the petitioner's business. The job descriptions on the Form ETA 750 and the Form I-140 petition, however, do not include any sales or management duties, or any duties other than those of a butcher. Counsel has not demonstrated that the petitioner could continue operation with one full-time butcher and no manager, salespeople, or other employees.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, counsel has not demonstrated that the petitioner's owner could afford to forego compensation. During 2001 the petitioner's owner received \$23,400 from the petitioner. To assume that the petitioner's owner would forego all compensation is unreasonable. Further, the petitioner's owner's compensation would have been insufficient, either by itself, or combined with the petitioner's net income during 2001, the only year for which the petitioner submitted reliable evidence, to pay the proffered wage.

The record does not indicate how many hours per week the petitioner's owner and the two part-time workers, combined, have worked for the petitioner. Absent that evidence, the petitioner has not established what portion of their weekly labor the beneficiary could replace by working for the petitioner full-time. The petitioner has not established, therefore, what portion of their wages could be made available to pay the proffered wage. The wages paid to the two part-time workers and the officer compensation paid to the petitioner's owner will not be included in the determination of the petitioner's ability to pay the proffered wage.

That the petitioner apparently intends to dismiss two part-time workers in order to employ the beneficiary raises another issue. The fundamental purpose of the visa category pursuant to which the petition in this case was filed is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. If the petitioner is seeking to replace incumbent workers with the beneficiary out of preference, rather than necessity due to shortage, that would be inconsistent with the purpose of the instant visa category. Because this consideration formed no part of the basis for the decision of denial, however, and the petitioner has not been accorded an opportunity to reconcile its claim of inability to fill with proffered position with a U.S.

⁵ In fact, the petitioner's net operating loss deduction indicates that during several recent years, taken together, it has posted no profit at all.

worker with its willingness to discharge current workers and pay their wages to the beneficiary, that issue plays no part in today's decision.

The petitioner's Dun & Bradstreet report is not convincing evidence of the petitioner's ability to pay the proffered wage. Counsel notes that the report shows that the petitioner has a Financial Stress Class Rating of 1 and is in the 52nd percentile on D&B's Financial Stress National Percentile, indicating that it is slightly less likely than the average company to experience such financial stress that it discontinues operations with a loss to creditors. As the director observed, however, statistics pertinent to the petitioner's profitability and short-term solvency were omitted from the report based on lack of information. Further, the petitioner's credit score in the same report shows that the petitioner is a higher risk than other companies in the same region, a higher risk than other companies in the same industry, a higher risk than other companies in the same employee size range, and a higher risk than other companies with a comparable number of years in business. The report, as a whole, is not convincing evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's argument that the increasing volume of the petitioner's business shows the ability to pay the proffered wage is unconvincing. The petitioner is obliged to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's volume of business is increasing, and its profits are also increasing, that might demonstrate that, at some future time, the petitioner will have the ability to pay the proffered wage. The petitioner, however, must show the ability to pay the proffered wage on the priority date and during each ensuing year to the present.⁶

This office accepts the implicit argument that net operating loss deductions do not represent a current expenditure and do not affect the petitioner's ability to pay the proffered wage during the year taken. This office will consider the taxable income before net operating loss deduction and special deductions shown on the petitioner's Form 1120 U.S. Corporation Income Tax Return to be the appropriate index of the petitioner's net income during any given year.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁷ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

⁶ Exceptions pursuant to *Matter of Sonogawa* are discussed *supra*.

⁷ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage, however, is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel submitted selected portions of the petitioner's financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited.

The submitted portions of the petitioner's financial reports were not accompanied by an accountant's report. A notation on those documents, however, makes clear that they were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's assertion, made in response to the July 11, 2002 Request for Evidence, that the petitioner's tax returns may not reflect cash payments and receipts is not supported by any evidence in the record. The assertions of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The October 3, 2002 accountant's letter merely stated that, having reviewed the petitioner's 2000 and 2001 tax returns he believes that the petitioner will be able to pay the proffered wage. That letter does not state any basis for believing that the petitioner has had the ability to pay the proffered wage since the priority date, nor any reason for believing that the petitioner will continue to have that ability, except to imply that the evidence is contained somewhere in the petitioner's tax returns. Absent any indication of the reasoning the accountant employed to reach his conclusion, the accountant's conclusory statement is unconvincing.

Finally, counsel argues that the petitioner need only prove the ability to pay the beneficiary \$8 per hour, rather than the current proffered wage of \$12.59 per hour. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that, if the predominant wage rises after the priority date, the petitioner should be required only to prove the ability to pay the amount of the proffered wage on the priority date, rather than the subsequent, presumably higher, figure.

Counsel asserts that such an increase in the predominant wage for the proffered position occurred after the priority date in this case, but provides no evidence of that assertion. The record does not demonstrate that the predominant wage for the proffered position on the priority date was \$8, rather than that it was \$12.59 and the petitioner merely offered less. The record contains no indication that the instant case is affected by the rule counsel ostensibly drew from *Masonry Masters*. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 total 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$26,187.20 per year. The priority date is January 19, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,929. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

Counsel did not submit the petitioner's 2002 tax return or any other reliable evidence pertinent to its ability to pay the proffered wage during 2002. This office notes, however, that the appeal in this matter was submitted on January 6, 2003, when the petitioner's 2002 return was unlikely to be available. The petitioner is excused from providing evidence pertinent to its ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.