



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



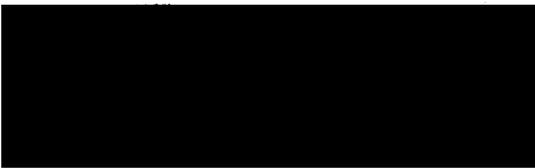
136

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2005
WAC 03 158 53192

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

The petitioner is a civil engineering, planning, and surveying company. It seeks to employ the beneficiary permanently in the United States as an administrative officer. 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.

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 October 22, 1996. The proffered wage as stated on the Form ETA 750 is \$38,380 per year.

On the petition, which was filed on April 28, 2003, the petitioner stated that it was established during 1988 and that it employs 32 workers. The petition states that the petitioner's gross annual income is \$3.4 million and that its net annual income is \$309,754. 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 Irvine, California.

In support of the petition, counsel submitted (1) the petitioner's 1996, 1997, 1998, 1999, 2000, and 2001, Form 1120 U.S. Corporation Income Tax Returns, (2) a printout of the petitioner's adjusting entries for the end of 2001, (3) a copy of the petitioner's unaudited December 31, 2002 balance sheet, (4) a copy of the petitioner's unaudited 2002 income statement, (5) a Statement of Deposits and Filings printout, dated January 25, 2003, pertinent to the petitioner's fourth quarter 2002 wages and withholding, prepared by the petitioner's tax filing service, and an Annual FUTA Information printout for 2002, (6) copies of the petitioner's California

Form DE-6 Quarterly Wage and Withholding Reports for all four quarters of 2002, and (7) an undated and unattributed set of statements, labeled Exhibit 8(1), pertinent to the petitioner's tax returns, and (8) a copy of the petitioner's unaudited December 31, 2002 financial statements.

The proposition that the petitioner's closing entries were intended to support is unknown to this office, and counsel has not explained his purpose in placing them in the record. Those closing entries will not be further considered.

The petitioner's tax returns show that it is a subchapter C corporation, that it reports taxes based on the calendar year and cash basis accounting, and that it incorporated on July 31, 1989.¹

The petitioner's 1996 tax return shows that during that year it declared taxable income before net operating loss deduction and special deductions of \$28,749. The corresponding Schedule L shows that at the end of that year the current liabilities shown on that page exceeded the current assets shown on that page.

The petitioner's 1997 tax return shows that during that year it declared a loss of \$8,804 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the current assets shown on that page were \$56,674 and the current liabilities shown on that page were \$50,900, which yields net current assets of \$5,774 shown on that page.

The petitioner's 1998 tax return shows that during that year it declared taxable income before net operating loss deduction and special deductions of \$15,406. The corresponding Schedule L shows that at the end of that year the current liabilities shown on that page exceeded the current assets shown on that page.

The petitioner's 1999 tax return shows that during that year it declared taxable income before net operating loss deduction and special deductions of \$3,446. The corresponding Schedule L shows that at the end of that year the current liabilities shown on that page exceeded the current assets shown on that page.

The petitioner's 2000 tax return shows that during that year it declared a loss of \$67,675 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the current assets shown on that page were \$93,982 and the current liabilities shown on that page were \$88,456, which yields net current assets of \$5,527 shown on that page.

The petitioner's 2001 tax return shows that during that year it declared a loss of \$31,477 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the current assets shown on that page were \$38,839 and the current liabilities shown on that page were \$34,856, which yields net current assets of \$3,983 shown on that page.

The petitioner's 2002 Form DE-6 wage reports show that the petitioner employed between 27 and 30 employees during those four quarters, but do not show that it employed the beneficiary.

¹ Although this appears to contradict the petitioner's assertion, on the Form I-140 petition submitted in this case, that it was established during 1988, the difference is not material to the approvability of the instant petition. Further, the discrepancy might be explained if the petitioner was originally held under some other form of ownership, and incorporated under subchapter C on July 31, 1989.

The undated and unattributed set of statements pertinent to the petitioner's tax returns note that the petitioner is a subchapter C corporation and states that such corporations typically draw all or most of the net income from the corporation as Line 12 Compensation of Officers, leaving very little or no taxable income so as to avoid paying corporate taxes.² The statement cites the petitioner's officer compensation as evidence of its ability to pay the proffered wage during 1996, 1997, 1998, 1999, 2000, and 2001. The statement avers that, had the petitioner needed to pay additional wages, it could have reduced its officer compensation as necessary.

The statement also cites the petitioner's depreciation deduction as a fund available to pay additional wages, noting that depreciation is a "paper loss," and does not reduce the cash available to the corporation during the year taken.

As to 2002, the statement observes that the unaudited financial statements submitted show that the petitioner had net profit of \$309,507.84 during that year.

Finally, the statement observes that the petitioner had cash on hand during each of the salient years sufficient to pay the annual amount of the proffered wage.

Because it found that the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on November 6, 2003, issued a Notice of Intent to Deny in this matter. The petitioner was accorded 30 days to submit additional evidence.

In response, counsel submitted a spreadsheet, dated November 26, 2003, from a certified public accountant. That spreadsheet and accompanying comment cite the petitioner's Schedule L end-of-year Cash, its gross receipts, its compensation to officers, its total salary expense, its depreciation deduction, its taxable income, its "temporary help" expenses, and its "excessive officer's compensation" as evidence of the petitioner's ability to pay the proffered wage during the salient years.

As to the petitioner's depreciation expense, the accountant reiterates counsel's observation that a depreciation deduction does not require or represent any expenditure of cash during the year taken. Counsel states that the petitioner's depreciation expense is, therefore, correctly added to the petitioner's net income.

The accountant states that the petitioner's temporary help expenses were \$53,960 during 2000 and \$59,140 during 2001, and states that those expenses are shown on the petitioner's Form 1120 U.S. Corporation Income Tax Return at Page 1, Line 26. Line 26 on both of those the Form 1120 corporate income tax returns shows the petitioner's Other deductions and references Statement 5 for an itemization. The 2000 Statement 5 shows that the petitioner's temporary help expenses were \$8,253 during that year. The 2001 Statement 5 shows no temporary help expenses.

² The unattributed statement cites no authority for that assertion.

Further, neither the petitioner, nor counsel, nor the accountant submitted any evidence that the wages paid to the temporary help were for performance of the duties of the proffered position. Without such evidence, those amounts have not been shown to be available to pay the proffered wage.

The accountant took an average of the petitioner's officer compensation during 1996, 1997, 1998, and 1999 and declared amounts paid above that average during any given year to be excessive. The accountant stated that the petitioner's owners should have taken no more than \$120,000 during 2000 as their compensation and declares the difference between that amount and the amount actually taken to be excessive. The accountant implied that those amounts he declared excessive represent funds available to pay additional salaries.

The accountant noted that the petitioner computes its taxes pursuant to cash convention and does not, therefore, include its payables and receivables in its tax computations. The accountant stated that, if the petitioner had declared its receivables, as permitted pursuant to accrual convention accounting, its income would have been higher.

The accountant further observes that because the petitioner reports taxes pursuant to cash convention, its receivables are not shown on its Schedule L. The accountant states that, therefore, no conclusion can be drawn from the petitioner's net current assets, as computed from figures shown on the Schedule L, being less than the annual amount of the proffered wage.

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 March 3, 2004, denied the petition.

On appeal, counsel states, "[CIS's] finding that the petitioner failed to demonstrate its ability to pay the offered wage is in error and contrary to the evidence submitted."

Subsequently, counsel submitted a brief to supplement the appeal. In the brief, counsel urges that the petitioner's current assets, its depreciation deductions, its bank balances, and its gross receipts show the ability to pay the proffered wage.

Counsel also argues that the petitioner's accounts receivable are greater than its accounts payable, and points to the petitioner's unaudited balance sheet as evidence of that assertion. Counsel also notes that unspecified "figures [on the petitioner's tax returns] fluctuate from year to year on a distinct upward trend," and states that this trend also supports the assertion that the petitioner's receivables exceeded its payables during each of the salient years.

Counsel again urges that the petitioner's low profits are the result of the petitioner's owner taking compensation to avoid corporate taxation, and that the petitioner's owner could have taken less compensation as necessary to pay the proffered wage.

Counsel argues that the magnitude of the petitioner's operations also shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Finally, counsel cited a non-precedent decision; the facts of which he asserts are similar to the facts of the instant case. 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. Counsel's citation of a non-precedent decision is of no effect.³

Counsel's reliance on unaudited financial records is misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The arguments of counsel and the accountant that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage are unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year taken. It is a systematic allocation of the cost of a tangible 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.⁴

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.

The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not

³ Counsel may have intended to imply that the reasoning of that non-precedent decision was sound and should be applied to the instant case, notwithstanding that the case is not *per se* precedent. Counsel states that the case involved consideration of all or part of a petitioner's officer compensation, when that compensation is paid out merely to avoid corporate taxation. The consideration of officer compensation is addressed below.

⁴ Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date. To accept such a scenario is unacceptable.

recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business.

The accountant observed that, because the petitioner prepares its tax returns pursuant to cash convention, nothing is proven by the fact that the petitioner's net current assets as shown on its tax returns are less than the proffered wage. The accountant is correct. That observation, however, does not demonstrate the petitioner's ability to pay the proffered wage, nor does it obviate the petitioner's obligation, pursuant to 8 C.F.R. § 204.5(g)(2), to do so.

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 convinced this office 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.⁵ 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.

Counsel's argument that the petitioner's gross receipts and its total annual wage expenses, in themselves, show the petitioner's continuing ability to pay the proffered wage beginning on the priority date are unconvincing. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁶ or otherwise increased its net income,⁷ the petitioner is generally obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged

⁵ 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.

⁶ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁷ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

Counsel and the accountant argue that the petitioner was able to pay the proffered wage by reducing its compensation of officers. Counsel implies that the petitioner's owner's payment of the varying amounts of compensation was based on the goal of reducing corporate tax liability, rather than on the petitioner's owner's need for any particular amount.

During 1996 the petitioner's owner paid himself \$108,052, which resulted in the petitioner declaring a loss of \$17,066 as its taxable income. During 1997 the petitioner's owner paid himself \$152,177, which resulted in the petitioner declaring a loss of \$8,804 as its taxable income. During 1998, the petitioner's owner paid himself \$161,031, which resulted in taxable income of \$4,536. During 1999, the petitioner's owner paid himself \$149,760, and the petitioner had taxable income of \$3,446. During 2000 the petitioner's owner paid himself \$173,960, resulting in a loss of \$67,675 as the petitioner's taxable income. During 2001 the petitioner's owner paid himself \$201,900, resulting in the petitioner declaring a loss of \$31,477 as its taxable income.

Despite counsel's statements, counsel has submitted no evidence that the petitioner's owner was willing or able to forego the compensation he awarded himself, in whole or in part, and the evidence appears to indicate that his compensation was determined on some basis different from that urged by counsel and the accountant, reduction of corporate taxation. As such, counsel has not demonstrated, therefore, that the amounts shown on the petitioner's tax returns for the salient years as Line 12 Compensation of officers were available, in whole or in part, to pay additional wages. Those amounts will not be included, in whole or in part, in the calculations pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 a given 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).

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 \$38,380. The priority date is October 22, 1996.

During 1996 the petitioner declared taxable income before net operating loss deduction and special deductions of \$28,749.⁸ That amount is insufficient to pay the proffered wage. The petitioner's tax return does not demonstrate that it had any net current assets at the end of that year. The petitioner is unable, therefore, 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 1996 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1996.

During 1997 the petitioner declared a loss of \$8,804 as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net income during that year. The petitioner's tax return shows only \$5,774 in net current assets at the end of that year. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 1997 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

During 1998 the petitioner declared taxable income before net operating loss deduction and special deductions of \$15,405. That amount is insufficient to pay the proffered wage. The petitioner's tax return does not demonstrate that it had any net current assets at the end of that year. The petitioner is unable, therefore, 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 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

⁸ Taxable income may be reduced by net operating loss deductions, a carryforward of losses from a previous year that are entirely unrelated to the petitioner's present performance. Therefore, this office considers taxable income before net operating loss deduction and special deductions, rather than taxable income, to be the more appropriate line item for showing a petitioner's ability to pay the proffered wage during a given year.

During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,446. That amount is insufficient to pay the proffered wage. The petitioner's tax return does not demonstrate that it had any net current assets at the end of that year. The petitioner is unable, therefore, 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 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared a loss of \$67,675 as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net income during that year. The petitioner's tax return shows only \$5,527 in net current assets at the end of that year. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss of \$31,477 as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net income during that year. The petitioner's tax return shows only \$3,983 in net current assets at the end of that year. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The Notice of Intent to Deny in this matter was issued on November 6, 2003, stating that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2002 tax return should have been available. Counsel did not provide that return and did not give any reason for that omission. The petitioner has not demonstrated 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 1996, 1997, 1998, 1999, 2000, 2001, 2002, out of its net income, its net current assets, or any other source of funds available to the petitioner to pay additional wages during those years.

Counsel urges, however, that notwithstanding the inadequacy of the petitioner's taxable income before net operating loss deduction and special deductions and the inadequacy of its net current assets to show its ability to pay the proffered wage during the salient years, the magnitude of the petitioner's operations shows its continuing ability to pay the proffered wage beginning on the priority date.

This argument concerning the petitioner's payroll expense, its gross receipts, and the recent growth of its gross receipts cannot be ignored. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner was incorporated during in 1989. The petitioner's 2002 Form DE-6 wage reports show that the petitioner employed between 27 and 30 employees during those four quarters. When the petition was filed during 2003 the petitioner stated that it then employed 32 workers. Its gross receipts rose from \$1,152,180 during 1996 to \$2,674,155 during 2001. Over that same period the petitioner's total wage expense rose from \$460,071 to \$1,440,411. All indices show that the petitioner continues to grow and thrive. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and that it has the ability to pay the proffered wage.

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 demonstrated the ability to pay the proffered wage during the salient years, and thus met that burden. The appeal will be sustained. The petition will be approved.

ORDER: The appeal is sustained. The petition is approved.