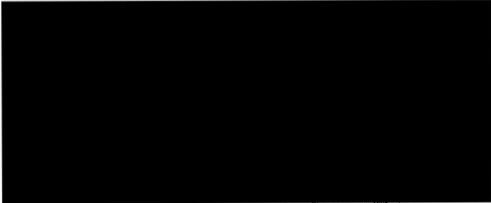


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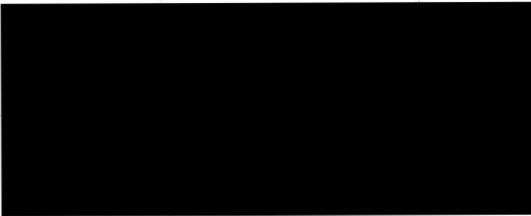
Date: JUL 13 2006

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a manager, hotel, or motel. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director denied the case based on a determination that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence. As set forth in the director's September 14, 2004, denial, the sole issue in this case is whether or not the petitioner has the ability to pay the proffered wage.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on January 20, 1998. The proffered wage as stated on the Form ETA 750 is \$20,000 per year. The Form ETA 750 states that the position requires two years of experience in the job offered, as a manager, hotel, or motel ("night manager").<sup>1</sup> The Form ETA 750 was certified on February 22, 2001, on behalf of a beneficiary, [REDACTED] and, the present beneficiary's ETA 750B was substituted at the I-140 filing stage.<sup>2, 3</sup> The I-140 was filed on September 24, 2003, and subsequently denied on September 14, 2004.

<sup>1</sup> DOT code: 187.117-038 Manager, Hotel, or Motel (hotel & restaurant).

<sup>2</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries is permitted by the DOL. DOL had published an interim final rule, October 23, 1991, which limited

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>4</sup>.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the I-140 petition, the petitioner lists that it was established in 1981. The petitioner failed to list the other required information on the form, including gross annual income, net annual income, and its current number of employees. According to the tax returns in the record, the petitioner's fiscal year ends on April 30 of the year. The petitioner initially submitted its 1999, and 2000 tax returns with the I-140 petition.

In the director's September 14, 2004, denial, the director notes that since the priority date based on the filing of the labor certification was January 20, 1998, that the petitioner should have submitted tax returns for the years 1998, 2001, 2002, and 2003 to demonstrate its continuing ability to pay the prevailing wage. Further, the director notes that the 1999 tax return submitted demonstrated the petitioner's loss of \$152,823 for that year, a negative cash balance on schedule L, and also that the petitioner's assets were less than the petitioner's liabilities.

On appeal, counsel properly submitted Form I-290B, along with an addendum in which counsel asserts that a number of factors should be considered to establish the petitioner's ability to pay: (1) the petitioner has been in business for seventeen years; (2) at the time that the I-140 petition was filed, the petitioner's 1998 tax

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the validity of an approved labor certification to the specific alien named on the labor certification application (See 56 FR 54925, 54930). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to the Service based on a Memorandum of Understanding. Procedures for the Service were then set forth in a memorandum from Louis Crocetti, INS Associate Commissioner, Substitution of Labor Certification Beneficiaries, File No. HQ 204.25P (March 7, 1996).

<sup>3</sup> The ETA 750B was signed by the present beneficiary on August 15, 2003. Further, we note that the ETA 750B signed by the beneficiary lists that he entered in B-1/B-2 status in February 1993, and his status would accordingly have expired. In the absence of contrary information, the beneficiary would appear to be out of status and working without authorization. We note further that under 8 CFR 245.10 (j), discussing adjustment under 245(i), that the beneficiary would not be eligible to adjust under 245(i) as: "an alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien." As the beneficiary's Form ETA 750B was signed on August 15, 2003, he would not be "grandfathered" on the basis of that document, and receive the benefit of adjustment under 245(i).

<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

return was not available<sup>5</sup>; (3) that a number of financial circumstances should be considered: that [REDACTED] Inc. realized gross income of \$3,017,247, a gross profit of \$2,956,701, paid out \$709,387 in salaries. Further, that [REDACTED] experienced substantial depreciation, and utilizes an accrual based accounting system; (4) that the petitioner declared "Loans to Shareholders" in the amount of \$258,811, which counsel asserts could serve as an asset and discretionary fund from which the Petitioner could pay the beneficiary's wage; (5) that while the petitioner had a negative gross income in 1999, the petitioner experienced a positive gross income in the year 2000; (6) that the beneficiary's employment will enhance the petitioner's business and result in increased profits; (7) counsel cites to *Matter of Sonogawa*, and that the business has sustained growth in each continual year; (8) counsel further cites to *In re X*, and *Matter of Oriental Pearl Restaurant*. Additionally, counsel submitted a brief on appeal with attachments, which included the petitioner's 1998, 2001, and 2002 tax returns. Counsel also submitted a statement from a certified public accountant that counsel retained to review the petitioner's financial documents in an effort to determine the petitioner's continuing ability to pay the proffered wage from the priority date until the date that the beneficiary obtains permanent residence. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. Next, we will examine net income, and net current assets, and will then address the petitioner's additional arguments raised.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages. CIS will consider the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Further, the petitioner has not submitted evidence that it 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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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.*

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<sup>5</sup> The petitioner offers no reason or explanation why the 1998 tax return was unavailable at the time of filing, or why the 1998 tax return could not be submitted at the time of filing. The petitioner was able to submit the 1999 tax return at the time of filing.

*Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubèda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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. (Emphasis in original.) *Chi-Feng* at 537.

CIS considers net income to be the figure for ordinary income, shown on line 28 of page one of the petitioner's Form 1120. The Form 1120 tax returns state the petitioner's net income as follows:

<u>Year</u>	<u>Amount</u>
1998	\$750
1999	\$(152,823)
2000	\$387,203
2001	\$(483,512)
2002	\$(176,465)

Based on the above, the petitioner can demonstrate sufficient net income in only one year, 2000, to pay the proffered wage of \$20,000 per year from the time of the priority date onward. In the remaining years of 1998, 1999, 2001, and 2002, the petitioner did not have sufficient net income to pay the proffered wage.

Next, we will consider the petitioner's 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.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. A review of the relevant submitted tax returns, shows the following:

<u>Year</u>	<u>Amount</u>
1998	\$(880,651)
1999	\$(884,808)
2000	\$(2,047,322)
2001	*(unable to calculate as the relevant page of the tax return only includes line 1 through 6, and not the remainder of the page, which would exhibit lines 16 through 18 and allow for a calculation of the liabilities).
2002	\$(1,133,152)

Under the test for net current assets, the petitioner did not have sufficient net current assets in any of the years to pay the proffered wage, and in fact, showed significant negative figures in all the years, particularly in the years 2000, and 2002 under this test.

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<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

To address the petitioner’s additional arguments, the petitioner has selected various items and cites to the positive number for that category depending on the year. For example, the petitioner cites to gross receipts as reaching \$3,017,247 for the year 1998, which would initially look positive. However, if we examined the petitioner’s gross receipts from the federal tax returns submitted from the priority date, continuing to the present, the gross receipts would appear as follows:

**Gross receipts**

<u>Year</u>	<u>Amount</u>
1998	\$3,017,247
1999	\$2,433,131
2000	\$1,739,004
2001	\$1,242,534
2002	\$587,392

According to precedent, reliance on the petitioner’s gross sales and profits is generally misplaced. Showing that the petitioner’s gross sales and profits exceeded the proffered wage is insufficient to determine the ability to pay the proffered wage. Even arguably, if we were to consider gross receipts, the above figures demonstrate a significant decline over the time period examined.

Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. We note further that the wages paid have declined substantially as well.

**Wages paid**

<u>Year</u>	<u>Amount</u>
1998	\$709,387
1999	\$475,777
2000	\$477,467
2001	\$148,022
2002	\$58,149

Further, should we consider other items, such as compensation of officers, this would show a significant decline as well;<sup>7</sup>

**Compensation of Officers**

<u>Year</u>	<u>Amount</u>
1998	\$0
1999	\$95,788
2000	\$30,000
2001	\$0
2002	\$6,894

Counsel cites to *Matter of Sonogawa* (12 I&N Dec. 612 Reg. Comm. 1967), for the proposition that the visa petition was approved despite the fact that the petitioner’s net profit was small. Counsel further notes that *Sonogawa* may allow for approval where the petitioner shows a loss, if the petitioner’s expectations of a

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<sup>7</sup> We note that the record of proceeding does not demonstrate or contain any evidence or statement that the petitioner’s shareholder would be willing to forego officer compensation in order to show the ability to pay the proffered wage to the beneficiary.

continued increase in business and increasing profits are reasonable. Counsel then asserts that in its I-290B addendum, that in the “instant case the petitioner generates significant income and has experienced continual business growth with each passing year.” Examining the gross receipts, wages paid, and compensation to officers, based on the tax returns that the petitioner submitted demonstrates, in fact, the reverse, that the petitioner’s business has experienced a substantial decline. Counsel has provided no information to demonstrate that the significant decline is reversible, or attributable to short term circumstances, which will soon pass or be remediated. Accordingly, we find counsel’s *Sonegawa* analysis flawed. Examining a totality of the circumstances shows a business in decline, and a lack of ability to pay the proffered wage on a continued basis from 1998 until the present.

Counsel cites to *Matter of Oriental Pearl Restaurant*, 92 INA 59 (BALCA 1993), and *In Re: X*, (EAC-92-096-51031), 11 Immig. Rptr. B-3-43, 1993, for the proposition that cases may be approved where the employer’s business showed a loss for federal income tax purposes.

The decision in *Oriental Pearl* is not binding on CIS. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding.<sup>8</sup> In *Oriental Pearl*, the Board cited evidence, which included a list of all of the employer’s employees, with the monthly salary and job title for each employee. The Board also cited a very favorable review of the employer in a guide to restaurants in the City of Atlanta, where the employer was located. The Board further cited information from the employer’s federal tax return for 1990, which was its initial return. According to the Board, the petitioner’s return showed gross receipts of \$756,501.03, a loss of \$29,406.08, a total of \$14,445.67 in cash and inventories, and “minimal” current liabilities. *The Matter of Oriental Pearl Restaurant*, 92 INA 59 \*2 (BALCA 1993).

In the case at hand, the petitioner has not supplied any information regarding how many people the company employs, monthly salaries, or job titles. Further, the tax returns supplied, in contrast to *Oriental Pearl*, evidence substantial liabilities from the years 2000 and 2002 of over one and two million dollars. The petitioner has offered no reason why its liabilities have increased so dramatically.

Similarly, counsel also cites to *In Re: X*.<sup>9</sup> The critical aspect noted in that case was that the petitioner was able to show a substantial increase in gross receipts and net profits over the prior tax year. Further, similar to *In Re Sonegawa*, counsel submitted several articles showing that the petitioner had a strong expectation of growth. As noted above, the petitioner’s business appears to be in decline, so that examining a totality of the circumstances, would not persuade us that the petitioner expects to increase his business profits, or that the decision of the director should be reversed.

The petitioner contends that it had and reported substantial depreciation expenses, which would represent a non-cash expense to be added to the petitioner’s net income, and available to pay the proffered wage. Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. The depreciation argument has previously been addressed by courts. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

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<sup>8</sup> Counsel cites to *Matter of Oriental Pearl Restaurant* (12 Immig. Rptr. B-3-43, 1993). However, we believe counsel is referring to the *Matter of Oriental Pearl Restaurant*, BALCA case 92 INA 59 (BALCA 1993), as there is no case available at 12 Immig. Rptr. B-3-43 (1993).

<sup>9</sup> Similarly, we note that we are not bound by prior AAO decisions, but instead may look to prior non-precedent decisions as guidance.

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner notes in its appeal that in 2001 the petitioner declared "loans to shareholders" in the amount of \$285,811, which would otherwise serve as an asset and allow for payment of the proffered wage. While this, if considered, might account for the year 2001, this amount, or any amount for "loans to shareholders" does not appear consistently throughout all the tax returns submitted. The petitioner notes in 2001 that "loans from shareholders" also appears on the tax return in the amount of \$202,598, which would likewise be usable as a discretionary fund. Similarly, the "loans from shareholders" entry does not appear consistently through all tax years for availability as a discretionary fund for use. Further, loans are listed as a long-term asset or liability, as opposed to a current asset, readily available, or convertible to cash. Thus, the record of proceedings does not demonstrate that funds in payment for loans would be readily available for use as a current asset to pay the proffered wage.

The petitioner notes that it uses an accrual basis accounting system, where "expenses intended to benefit the next accounting period but made payable in the current year are recorded and included," and that the petitioner declared "next year" expenses as current liabilities (Schedule L, line 18) in the amount of \$351,642, in the beginning of fiscal year, and \$57,829 at the end of the fiscal year for 2001, and that this amount would be available to pay the proffered wage. Line 18 liabilities are factored into the net current assets evaluation discussed above, and would not need to be further considered under theories of accrual. Further, this office is not 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 than seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the accrual method, then the petitioner 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 pursuant to the accountant's adjustments.

The petitioner additionally points to unappropriated retained earnings as an additional or alternative source from which it might pay the proffered wage. Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on a corporate tax return on Schedule L and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of stockholders' equity and represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Finally, the petitioner has additionally provided an accountant's statement to attempt to explain the petitioner's ability to pay the proffered wage. The accountant's statement references several exhibits (which were not attached to the two page accountant statement provided). The accountant's statement refers to available income that the petitioner has to pay the proffered wages. The numbers do not readily correspond with any information in the tax return, and he does not explain how he calculates the money available to pay the proffered wages. Based on the accountant's analysis, he asserts that Haman Inc. had sufficient funds to pay the proffered wage for the years 1997, 1998, 1999, and 2000, but a negative balance for 2001, and 2002 (how he arrived at this determination is again, not clear). The accountant asserts that under *Sonegawa* that an employer has demonstrated its ability to pay the proffered wage if it shows readily available cash on hand sufficient to pay the proffered wage, and that Haman, Inc. has maintained a bank balance of \$516,701, and \$431,167, for the years 2002, and 2003 respectively (presumably from a bank statement referenced, but not attached).

Bank statements, however, are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. While this regulation allows for consideration of 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 does not provide an accurate financial picture of the petitioner. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that is considered in determining the petitioner's net current assets.

While we may have been persuaded by consistent gross receipts of, or around, \$3 million and based on the petitioner's length of time in business, considering the totality of the circumstances, a test of net income, a test of net current assets, examining gross receipts, and other factors which show a significant decrease, we cannot find that the petitioner has established its continued ability to pay the proffered wage from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, until the time that the beneficiary obtains permanent residence.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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

**ORDER:** The appeal is dismissed.