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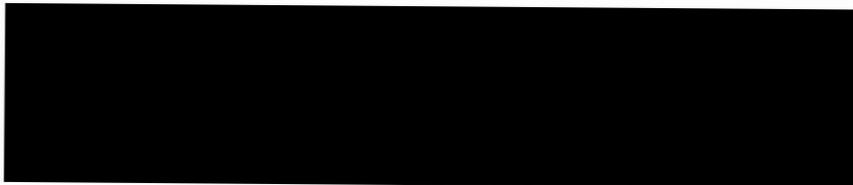
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U.S. Citizenship  
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Services

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FILE: [REDACTED]  
EAC 04 037 53227

Office: VERMONT SERVICE CENTER

Date: MAY 09 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 Acting Director, Vermont Service Center, denied the instant preference visa petition. The matter was reopened pursuant to a motion and denied again. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an international steel trading firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$20,000 per year.

On the petition, the petitioner stated that it was established on May 19, 1997 and that it employs three workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner, but did not provide the date that employment commenced in the space provided for that information. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Philadelphia, Pennsylvania.

In support of the petition, counsel submitted (1) copies of the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the petitioner's November 10, 2003 trial balance, (3) portions of the joint 2002 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, and (4) an undated letter from counsel.

The petitioner's tax returns show that it is a subchapter S corporation, that it incorporated on May 19, 1997, and that it reports taxes pursuant to the calendar year and accrual basis accounting.

The 2001 return shows that the petitioner declared a loss of \$1,781,526 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that the petitioner declared a loss of \$1,119,099 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In his letter counsel cited the petitioner's total assets,<sup>1</sup> year-end cash, its total salary and wage expense, its shareholder distributions, its interest income, and the petitioner's owner's income from another company as indices of the petitioner's ability to pay the proffered wage.

Counsel asserted that a subchapter S corporation and its owner "are one and the same." Later in that letter counsel, relying on the pass-through nature of earnings from an S corporation,<sup>2</sup> states that, "For tax purposes, the 'S' corporation and the individual are one and the same."<sup>3</sup> Those assertions are addressed at length below.

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 January 28, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements.<sup>4</sup> The service center also specifically requested that, if it employed the beneficiary, the petitioner submit copies of W-2 forms showing wages it paid to her.

In response, counsel submitted (1) an undated letter from the petitioner's chief financial officer (CFO), (2) monthly statements pertinent to the petitioner's bank account, (3) the petitioner's unaudited December 31, 2003 and March 22, 2004 trial balances, (4) the petitioner's unaudited 2003 profit and loss statement and its end-of-year 2003 balance sheet, (5) the petitioner's unaudited January 1, 2004 to March 22, 2004 profit and loss statement and its March 22, 2004 balance sheet, (6) the consolidated financial statements of another company owned by the petitioner's owner, (7) the petitioner's Federal and Pennsylvania state 2003 statements

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<sup>1</sup> In that letter counsel states that the petitioner had 2001 year-end assets of nearly \$3.8 million. Counsel also states that the petitioner had assets totaling "over \$11M." The tax return submitted more closely supports the \$3.8 million figure. The provenance of the "over \$11M" figure is unknown.

<sup>2</sup> Counsel provides printouts of web content explaining the concept of pass-throughs.

<sup>3</sup> A subchapter S corporation reports taxes on a return separate from those of its owners they cannot accurately be said to be a single entity, or "one and the same," for tax purposes. Thus, this office infers that counsel is relying on the pass-throughs of a subchapter S corporation in making that statement.

<sup>4</sup> In that request for evidence the service center incorrectly stated that the petitioner might prove its ability to pay the proffered wage with reviewed financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that a petitioner is obliged to provide copies of annual reports, federal tax returns, or audited financial statements.

of deposits and filings, prepared by its payroll service, (8) the petitioner's 2003 W-3 transmittal, (9) the petitioner's payroll summaries for six two week pay periods and (10) a letter dated April 12, 2004.

In her undated letter the petitioner's CFO states that the petitioner is a development company in the business of acquiring steel mills, which are then operated as separate entities. That letter also attests to the petitioner's owner's interest in other companies and states that the petitioner is able to pay the proffered wage.

The petitioner's Federal statement of deposits and filings shows that the petitioner paid total salaries and wages of \$116,350 during that year. The petitioner's W-3 transmittal confirms that figure.

The payroll summaries provided were prepared by the petitioner's payroll service and cover the two-week pay periods ending January 9, 2004, January 23, 2004, February 6, 2004, February 20, 2004, March 6, 2004, and March 19, 2004. They show that the petitioner paid gross wages of \$4,475 during each of those pay periods, but do not show that it employed the beneficiary.

In his April 12, 2004 letter counsel noted that the regulations do not require a petitioner to show a net profit in order to demonstrate its ability to pay the proffered wage. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petitioner need not, in fact, show a profit to demonstrate its ability to pay the proffered wage. Counsel also cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), though the proposition for which he cites that case is unclear.

Counsel again notes that an S corporation differs from a C corporation in that S corporation profits are not taxed at the corporate level. Again, counsel cites the petitioner's owner's interest in other companies as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also notes the amount of the petitioner's owner's 2003 capital contribution to the petitioner and his total capital contribution and notes that the petitioner's owner is obviously able to make those contributions.

Counsel states that the unaudited financial statements provided "[were] prepared by [the petitioner's accountant] and [are] reliable." Counsel states that the request for evidence asserted that the petitioner's tax return shows that its liabilities exceeded its assets. The request referred, not to total assets, but to net current assets. The distinction is discussed below.

Counsel stated that the beneficiary has not worked for the petitioner. Counsel did not explain the entry on the Form ETA 750B indicating that the petitioner was the beneficiary's current employer. Finally, counsel stated that the petitioner is a not-for-profit company.

The acting 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 June 9, 2004, denied the petition.

In a motion to reopen or reconsider counsel submitted (1) the petitioner's unaudited profit and loss statement for January through June 2004, (2) its unaudited balance sheet as of June 30, 2004, and (3) a brief.

In the brief counsel again characterizes the petitioner as a “not-for-profit company.” Counsel reiterates the argument that the petitioner is not obliged to show a net profit in order to meet the test of 8 C.F.R. § 204.5(g)(2). Counsel urges, instead, a totality of circumstances test, citing *Sonegawa, supra*. Counsel notes that since its inception the petitioner has paid its employees and continued operations. Counsel again insists that the assets of the petitioner’s owner, who continues to fund the company, are available to the petitioner. Counsel also cites the income of a “related entity” as an index of the petitioner’s ability to pay additional wages. Further counsel notes that the petitioner has paid substantial returns to its owner, \$89,655 during 2001 and \$61,558 during 2002.

Counsel notes that the decision of denial relied on the reasoning from *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986), a District Court Decision,<sup>5</sup> and asserts that the decision in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) directly contradicts it,<sup>6</sup> and should be followed. Counsel did not specifically indicate what portions of those decisions he believes conflict.

Counsel cites a May 4, 2004 memorandum from a CIS Associate Director of Operations for the proposition that a petitioner’s net current assets should be considered in determining its ability to pay the proffered wage. In an argument pertinent to net current assets counsel again confused net current assets with total assets. The distinction is explained at length below. The petitioner’s net current assets will be considered.

Counsel again notes that an S corporation is different from a C corporation for tax purposes and states that an S corporation and its owner or owners<sup>7</sup> are “one and the same.” Counsel urges that, because they are different from each other for tax purposes, C corporations and S corporations should be treated differently in the assessment of their ability to pay a proffered wage. Counsel acknowledges, “a shareholder in an S corporation does derive some limitation of liability from third parties,” but states “that is not the issue.” Counsel urges that the issue in this matter is whether the assets of the petitioner’s owner are available to the petitioner.

Counsel argues that an S corporation should be treated like a sole proprietorship in determining its ability to pay the proffered wage, that is; that the petitioner’s owner’s personal income and assets should be considered funds available to pay the proffered wage. The distinction between the treatment of an S corporation and a sole proprietorship is addressed below, as is the basis for that distinction.

On September 27, 2004 the Acting Director, Vermont Service Center, ruled on the petitioner’s motion. The acting director found that the evidence did not demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date and affirmed the previous decision, denying the petition again.

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<sup>5</sup> Counsel correctly observes that CIS is not bound by the holding in District Court cases. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

<sup>6</sup> Although counsel does not explicitly so state, he appears to be asserting that the finding pertinent to a petitioner’s ability to pay the proffered wage should not be based solely on its net profit.

<sup>7</sup> Counsel did not, in stating, “an S corporation and its shareholder are one and the same,” address the possibility of multiple owners.

On appeal, counsel submits (1) a portion of the text of an October 8, 2004 presidential debate, (2) the text of several non-precedent decisions of this office, and (3) a brief.

In the brief counsel reiterates his assertion that the difference between C corporations and S corporations for tax purposes is essentially dispositive of the issue of how to determine their ability to pay a proffered wage. Counsel also reiterates the various other arguments previously interposed. Counsel cites the petitioner's working capital as an index of its ability to pay the proffered wage.

Counsel asserts that rejection of the petitioner's unaudited financial statements as evidence of the petitioner's ability to pay the proffered wage was "plain error," and that although not audited those financial statements are reliable evidence. In that context counsel notes that tax returns and even audited financial statements are also largely the representations of management.

Counsel again cites *Masonry Masters* for the proposition that mechanical reliance on a petitioner's net income is impermissible in the face of a totality of circumstances demonstrating that the petitioner is able to pay the proffered wage. Counsel further cites non-precedent decisions of this office; the facts of which he asserts are analogous to those of the instant case, to support the proposition that the instant petition should be approved.

Finally, counsel cited the text of the presidential debate for the proposition that the position of the current President of the United States, and hence of the government as a whole, "made clear that in an S corporation there is no distinction between the individual [owner] and the entity."

Whether that statement, had the president made it in that debate, would have the force of law and be dispositive of the instant case is an issue this decision need not reach. The text of the debate, provided by counsel, contains no such statement, nor any statement from which that assertion could readily be deduced or inferred.

Further, 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. If counsel had argued that the reasoning of the non-precedent decisions submitted was sound and presented that reasoning, this office would have considered that reasoning. Counsel's mere citation of non-precedent decisions, however, is of no effect.

This office concurs with counsel's assertion that the petitioner's working capital is an index of its ability to pay the proffered wage. Working Capital is synonymous with net current assets, which are addressed below. Counsel appears in argument, however, to be confusing Working Capital with an owner's Capital Contribution.

The argument that an owner's capital contribution is an index of a petitioner's ability to pay the proffered wage is unconvincing; as is counsel's previous argument that retained earnings are such an index. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, an appropriate index of a company's ability to pay additional wages.

Similarly, an owner's capital contribution may be tied up in assets and unavailable to pay wages. No justification exists for considering an owner's capital contribution as an index of a company's ability to pay additional wages.

Counsel's assertion that the petitioner is a not-for-profit corporation (NFP) is manifestly incorrect. To be a NFP, a corporation is subject to various tests, the subject matter of which is beyond the scope of today's decision. Merely noting that a NFP does not report taxes on a Form 1120, U.S. Corporation Income Tax Return, as the petitioner does, is sufficient.

This office does not read the decisions in *Elatos, supra*, and *Masonry Masters, supra* to contradict each other as counsel does. In relevant part, the decision in *Elatos* indicates that CIS may rely on federal income tax returns and consider a petitioner's net income, rather than its gross receipts, to assess a petitioner's ability to pay a proffered wage.

Although, as noted above, counsel does not state what portion of the decision in *Masonry Masters* he is asserting to be inconsistent with the decision in *Elatos*, this office suspects, based on context, that he is referring to the last paragraph of that decision, in which the court urged that the beneficiary's ability to generate additional profit for the petitioner should be considered.

That portion of the decision 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 revenue 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 revenue generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

Further still, as was noted above, the beneficiary claimed, on the Form ETA 750B, to have worked for the petitioner, but did not state the starting date of that employment. Pertinent to the period, if any,<sup>8</sup> during which the petitioner employed the beneficiary the argument that hiring the beneficiary would have contributed to the petitioner's profits is especially unconvincing.

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.<sup>9</sup> 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 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.

Counsel asserts that the financial statements and other financial documents submitted, although unaudited, are reliable. Counsel's assertion, of course, is not evidence. . See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Further, that the accountant did not audit the financial statements indicates that he declined to express any assurance, or even an opinion, pertinent to their accuracy. No special circumstances exist in this case that render the unaudited financial statements reliable.

Although it is not a financial statement, per se, the petitioner's trial balance is not reliable evidence for the same reason. Absent an audit, the accountant or bookkeeper who prepared it provided no assurance of its reliability. In the absence of any such assurance this office will not merely assume that the evidence is reliable.

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<sup>8</sup> The beneficiary's statement on the Form ETA 750B that he worked for the petitioner conflicts with counsel's statement in his April 12, 2004 letter that the beneficiary did not work for the petitioner. Those conflicting assertions have never been reconciled.

<sup>9</sup> 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 during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The undated letter from the petitioner's CFO might suffice to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date if the petitioner employed 100 or more employees. See 8 C.F.R. § 204.5(g)(2). In the instant case, however, the petitioner employs only two or three people. That letter is of little probative value.

At various times during the pendency of this petition counsel has appeared to argue that the size of the petitioner's existing payroll shows its ability to pay additional wages. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, however, 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 expenses<sup>10</sup> or otherwise increased its net income,<sup>11</sup> the petitioner is 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 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.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations are not available to it and cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Counsel appears to argue that this distinction does not apply to a subchapter S corporation because its income is passed through to its owner or owners, rather than being taxed at the corporate level. That distinction is entirely inapposite to the determination of whether the petitioner has demonstrated the ability to pay the proffered wage.

Counsel argues, however, that in the case of an S corporation, or at least in the instant case, the owner's assets are, in fact, available to the petitioner for its disposition. Although historically the petitioner has routinely invested in the petitioner as necessary to fund its operations in the past, he is not obliged to continue to do so at such time as this arrangement becomes unprofitable to him. The petitioner is not entitled to its owner's funds as a matter of law. Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.

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<sup>10</sup> 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.

<sup>11</sup> 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.

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.<sup>12</sup> 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). See also 8 C.F.R. § 204.5(g)(2).

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, the petitioner's year-end cash and those assets expected to be consumed or 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,<sup>13</sup> 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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>14</sup> shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$20,000 per year. The priority date is April 17, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner

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<sup>12</sup> 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.

<sup>13</sup> For this reason the petitioner's year-end cash as reported on the Schedule L is not, in itself, an index of the petitioner's ability to pay the proffered wage, but only as included in the calculation of net current assets.

<sup>14</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

had negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year.

This office must, however, consider counsel's arguments pertinent to the "totality of circumstances" of the petitioner. Initially, this office notes that *Matter of Sonegawa, supra*, is not convincing precedent. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case 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 *Sonegawa*, 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 *Sonegawa* 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 demonstrably 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 to demonstrate that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

This office notes, however, that, as counsel previously stated, the petitioner paid its owner income of \$89,655 during 2001 and \$61,558 during 2002. Absent evidence that the petitioner's owner could forego payments his income from the petitioner this office would not consider those amounts to have been available to pay the proffered wage. In the instant case, however, the petitioner's owner had adjusted gross income of \$403,365 during 2002. Given that level of income, this office declines to believe that the petitioner's owner was dependent upon receiving those relatively modest payments during the two salient years. Those modest payments, however, were sufficient to pay the proffered wage.

The petitioner has demonstrated the ability to pay the proffered wage during both of the salient years.<sup>15</sup> Therefore, the petitioner has 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 met that burden.

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

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<sup>15</sup> The request for evidence in this matter was issued on January 23, 2004. On that date the petitioner's 2003 tax return was unlikely to be available. The petitioner is therefore excused from providing its returns for 2003 and subsequent years.