

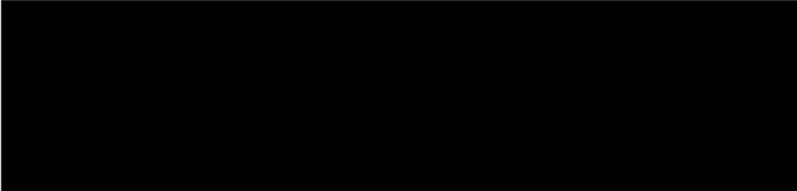
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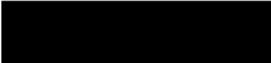


**U.S. Citizenship
and Immigration
Services**

B6



FILE:



EAC 04 075 51004

Office: VERMONT SERVICE CENTER

Date:

SEP 26 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 Director, Vermont Service Center, denied the instant preference visa petition. Pursuant to a motion the director subsequently reopened the matter and denied it again. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a host. 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 submitted a letter 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.

8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$8.88 per hour, which equals \$18,470.40 per year.

On the petition, which was submitted on June 16, 2004, the petitioner stated that it was established during 1988 and that it employs 17 workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1999. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Arlington, Virginia.

In support of the petition, counsel submitted (1) copies of the 2000 and 2001 Form 1120, U.S. Corporation Income Tax Returns of Campbell Holding Company, Incorporated (CHC), (2) the 2000, 2001, and 2002 Form 1040A U.S. Individual Income Tax Return of the beneficiary and his spouse, including 2001, and 2002 Form W-2 Wage and Tax Statements issued by the petitioner, (3) a letter dated January 9, 2004 from the petitioner's accountant, and (4) a letter dated October 8, 2003 from counsel.

The tax returns submitted show that CHC is a corporation, that it incorporated on September 30, 1991, and that it reports taxes pursuant to accrual basis accounting and a fiscal year running from October 1 of the nominal year to September 30 of the following year. Nothing provided with the initial submission explained the relationship between the petitioner and CHC.

The 2000 return, which covers the fiscal year running from October 1, 2000 to September 30, 2001,¹ shows that CHC declared taxable income before net operating loss deductions and special deductions of \$40,184 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year CHC's current liabilities exceeded its current assets.

The 2001 return, which covers the fiscal year running from October 1, 2001 to September 30, 2002, shows that CHC declared a loss of \$9,881 as its taxable income before net operating loss deductions and special deductions during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year CHC's current liabilities exceeded its current assets.

The petitioner's accountant's January 9, 2004 letter cited the petitioner's fiscal year 2001 gross revenue, annual payroll expense, and annual payroll tax amount as evidence of the petitioner's ability to pay the proffered wage. The accountant stated that the petitioner's gross revenue during fiscal year 2001 was \$936,876 and that its payroll expense was \$225,690. The gross revenue shown on CHC's fiscal year 2001 tax return is \$1,484,123 and its Line 13 Salaries and Wages were \$299,533. This demonstrates that CHC and the petitioner are not identical. Although the accountant stated that he had prepared the petitioner's fiscal year 2001 tax return he did not provide a copy of that return. Nor did he, or anyone else, provide the petitioner's annual reports, federal tax returns, or audited financial statements for any other period.²

The petitioner's 2001 and 2002 W-2 forms show that the beneficiary received \$5,452.59 and \$14,471 during those years, respectively.

In his October 8, 2003 letter counsel suggested that the petitioner's gross revenues and its cost of labor and wage expense show the petitioner's ability to pay the proffered wage. In that letter, however, the amounts counsel cites as the petitioner's gross revenues and wage and labor expenses are taken from the tax return of CHC, and are not those of the petitioner in this matter.

¹ In the case of calendar year reporting a 2000 tax return would have no direct relevance to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, as the priority date was during 2001. Because the CHC reports taxes pursuant to a fiscal year ending September 30, however, the priority date fell within the petitioner's 2000 fiscal year. A return based on such a fiscal year could, therefore, be directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² None of the petitioner's annual reports, tax returns, or audited financial statements is in the record even on the date of this decision.

Counsel further stated, "The petitioner has a favorable enough ratio of current assets to total current liabilities."³ Further still, counsel stated, "We must consider the fact that for taxable income determination there are many items such as depreciation, special deductions and credits that reduce the taxable income but do not decrease the company's cash flow. These deductions affect the taxable income of a corporation but do not affect the company's ability to pay the offered 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 October 4, 2004, denied the petition.

Subsequently counsel submitted a motion to reopen/reconsider the decision of denial. With that motion counsel submitted the beneficiary's 2003 W-2 form and photocopies of 2004 earnings statements issued by the petitioner to the beneficiary.

In the motion counsel argued that the petitioner's gross receipts, salary and wage expenses, total assets, retained earnings, the number of workers it employs, and its overall financial condition show its ability to pay the proffered wage. Counsel reiterated the argument that the petitioner's special deductions, tax credits, and depreciation deduction reduce its tax liability without affecting its ability to pay additional wages. Counsel cited the accountant's letter, and specifically the accountant's opinion that the petitioner is able to pay the proffered wage, as evidence of that ability.

Finally, counsel stated, "The fact that the parent holding company [an apparent reference to CHC] had a loss of \$9,881 for the fiscal years 2002, [sic] is not conclusive evidence that the employer has no financial ability to pay the offered wage."

The 2003 W-2 form submitted shows that Potomac Minute Maids Incorporated paid the beneficiary \$15,915 during that year. The relationship between Potomac Minute Maids and the petitioner is unknown, as is the proposition the submission of that W-2 form was intended to support and its relevance to the instant proceeding. Whether the beneficiary worked for the petitioner during 2003 is unclear. If so, why the petitioner did not provide the beneficiary's 2003 W-2 form issued by the petitioner is unknown to this office.

Counsel states that the pay statements submitted show that the beneficiary has been paid more than \$11,950 as of October 13, 2004. All of the pay statements submitted were issued during 2004. The most recent of those statements is for the pay period from September 30, 2004 to October 13, 2004. That statement shows that the petitioner paid the beneficiary year-to-date earnings of \$3,335.18. It also shows that the beneficiary had received year-to-date "Other Comp" "Cash Tips" of \$8,615.

The director reopened the matter, reviewed the evidence and counsel's arguments, and denied the petition again on January 26, 2003.

³ The record contains no evidence pertinent to the petitioner's current assets or current liabilities.

On appeal, counsel submitted a letter dated February 22, 2005. In that letter counsel reiterated his arguments pertinent to the petitioner's gross receipts, salaries and wages, total assets, depreciation deductions, retained earnings, and the accountant's letter. Counsel again stated, "The fact that the parent holding company had a loss of \$9,881.00 for the fiscal years 2002, [sic] is not conclusive evidence that the employer has no financial ability to pay the offered wage." Counsel again states that, "The petitioner has a favorable enough ratio of current assets to total current liabilities."

Counsel also stated, "Most corporation try to lower the taxable income to avoid paying taxes, so the income in most cases are very low but the company is financially capable of paying additional salary." [Errors in the original.]

Whether most companies are capable of paying additional wages to additional employees is inapposite. Counsel is obliged by 8 C.F.R. § 204.5(g)(2) to show that the instant petitioner, CJCafes Incorporated, is able to pay the wage it has offered to the beneficiary.

In noting that a loss during a given year is not conclusive proof of inability to pay the proffered wage counsel appears to be inverting the standard of proof. CIS is not obliged to demonstrate conclusively that the petitioner is unable to pay the proffered wage. Rather, the petitioner is obliged to demonstrate that it is able to pay that wage.

The accountant's opinion is unpersuasive because it is based on the petitioner's gross receipts, annual payroll and payroll tax expense, and the fact that the petitioner has more than 15 employees. The regulation at 8 C.F.R. § 204.5(g)(2) contains a provision that CIS may accept a statement from a financial officer of a company that employs 100 or more employees as sufficient evidence of that petitioner's ability to pay the proffered wage. No such provision is made for a petitioner who employs more than 15 employees but less than 100, and none will be construed. This office is unable to see any link between the amount of the petitioner's payroll tax expense, or its other expenses, and its ability to pay additional wages. The relevance, or lack of relevance, of the petitioner's total wage expense is addressed below.

Counsel further urges that the petitioner's current ratio, the ratio of its current assets to its current liabilities, shows its ability to pay the proffered wage. This office is not convinced by counsel's argument that the petitioner's current ratio shows its ability to pay the proffered wage for several reasons.

In a November 16, 1994 transcript the Director, Vermont Service Center, stated that a sufficiently favorable ratio of current assets to current liabilities would lead the Service Center to the assumption that the petitioner is able to pay a proffered wage. Notwithstanding the opinion of the director,⁴ however, the current ratio is a measure of a petitioner's ability to cover its existing short-term debts with its existing liquidity. It is not a measure of the ability to absorb additional expenses. Unlike the petitioner's current ratio, the amount of its net current assets is an index of the ability to absorb additional expenses, such as additional wages.

⁴ This office is not bound by the opinion of the Director, Vermont Service Center.

This office considers net current assets greater than the annual amount of the proffered wage to be a valid indicator of a petitioner's ability to pay the proffered wage during a given year, as is explained in detail below. This office will not, however, consider a petitioner's current ratio.

Counsel argues that the petitioner's depreciation, special deductions and tax credits reduce taxable income decrease its taxable income, but do not affect cash flow, and should therefore be included in the determination of the petitioner's ability to pay the proffered wage.

This office notes that it uses, as analogous to the corporate petitioner's net income, its taxable income **before** net operating loss deductions and special deductions. That amount has not been reduced by the amount of the petitioner's special deductions. Further, tax credits are not a deduction and do not, contrary to counsel's assertion, reduce a taxpayer's taxable income. Further, they do not reduce a taxpayer's taxable income before net operating loss deductions and special deductions. They merely reduce the income tax due.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis 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 cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow a 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.

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.⁵ 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 funds available to the beneficiary. Such a scenario is unacceptable. The petitioner's depreciation deductions will not be added back to net income or otherwise considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this

⁵ Counsel does not urge, for instance, that the purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the ability to pay additional wages.

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 a petitioner's continuing ability to pay a proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on 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 taxpayer to pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

Showing that a petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that a petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

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 established that it has employed and paid the beneficiary during some of the salient years.

The 2001 and 2002 W-2 forms show that the beneficiary received \$5,452.59 and \$14,471 during those calendar years, respectively. The most recent of the pay statements provided shows that by October 13, 2004 the petitioner had paid the beneficiary had received year-to-date gross pay of \$3,335.18. The beneficiary had also received tips of \$8,615 by that date.

The regulation at 20 C.F.R. § 656.20(c)(3) states that the proffered wage may not include commissions, bonuses or other incentives, except in an amount guaranteed by the petitioner. The record contains no evidence that the petitioner guaranteed any tips to the beneficiary. The petitioner may not, therefore, count any portion of the tips the beneficiary received during the salient years as evidence of its own ability to pay the proffered wage.

The October 13, 2004 pay statement shows that the beneficiary had received a total of \$11,950.18. Of that amount, however, only \$3,335.18, or approximately 30%, was salary paid by the petitioner. The petitioner has demonstrated that it was able to pay that portion of the proffered wage. The balance consisted of tips paid to the beneficiary by the petitioner's customers and cannot be included in the determination of the funds available to the petitioner to pay the proffered wage.

The 2001 and 2002 W-2 forms show that the beneficiary received \$5,452.59 and \$14,471 during those years. The W-2 forms state that those amounts include "Wages, tips, [and] other compensation." No evidence was submitted, however, to demonstrate what portion of those amounts consisted of wages paid to the beneficiary by the petitioner, rather than tips. Further, nothing in the record indicates that the beneficiary changed jobs

between 2001 and 2004. This office will assume that the percentage of the beneficiary's Form W-2 income derived from wages and the percentage derived from tips were the same during 2001 and 2002 as they were during 2004.⁶

The petitioner has, therefore, shown that it paid the beneficiary \$1,636.78 during 2001⁷ and \$4,341.30 during 2002.⁸ The petitioner has not demonstrated that it paid any amount to the beneficiary during any of the other salient years, other than 2004.

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). See also 8 C.F.R. § 204.5(g)(2).

A petitioner's net income is not the only statistic that may be used to show its 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 that 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, 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 taxpayer's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁹ 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.

⁶ If this office is incorrect, and the percentage of the beneficiary's gross pay that was comprised of tips was considerable different during 2001 and 2002 from the percentage during 2004, and the contrary assumption prejudiced the petitioner's case, this may be addressed on motion.

⁷ \$5,452.59 x 30%

⁸ \$14,471 x 30%

⁹ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

Counsel submitted the tax returns of CHC, rather than tax returns of the petitioner, CJCafes Incorporated dba Cowboy South. Counsel asserts, or at least implies, that CHC owns the petitioner. The record contains no evidence, however, to substantiate that assertion.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Even if counsel had established that CHC owns the petitioner, that would be insufficient to show that CHC's income and assets are available to pay the wage proffered in the instant case. 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). A corporation's owners and shareholders are not obliged to pay the debts of the corporation, and the assets of its shareholders or of other enterprises or corporations cannot, therefore, 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).

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 or owners cannot correctly be included as a fund available to the petitioner to pay the proffered wage.¹⁰

Further still, even if the income and assets of CHC were available to pay the proffered wage, the record indicates that they were insufficient. This calculation is complicated by the fact that CHC reports taxes pursuant to a fiscal year, whereas wages are reported on W-2 forms pursuant to the calendar year.

The proffered wage is \$18,470.40 per year. The priority date is April 19, 2001, which fell within the petitioner's 2000 fiscal year.

Approximately 25% of the \$1,638.78 that the petitioner has demonstrated that it paid to the beneficiary during the 2001 calendar year is attributable to CHC's 2001 fiscal year. That amount is \$409.70. The remaining 75%, or \$1,229.09, is attributable to its 2002 fiscal year.

Similarly, approximately 25% of the \$4,341.30 that the petitioner demonstrated that it paid to the beneficiary during 2002 is attributable to the CHC's 2002 fiscal year. That amount is \$1,085.33. The remaining 75%, or \$3,255.98, is attributable to CHC's 2003 fiscal year.

During its 2000 fiscal year CHC declared \$40,184 of taxable income before net operating loss deductions and special deductions. That amount is sufficient to pay the proffered wage. Assuming that CHC's income and assets are available to the petitioner, the petitioner has demonstrated that it was able to pay the proffered wage during 2000.¹¹

¹⁰ This is so whether the owner or owners are one or more individuals, one or more corporations, some other entity or entities, or some combination.

¹¹ As was noted above, this calculation is based on the assumption, made only *arguendo* as it is not supported by the

The petitioner has demonstrated that it paid the beneficiary approximately \$409.70 during CHC's 2001 fiscal year. The petitioner is obliged to demonstrate its ability to pay the remaining \$18,060.70 during that year. During its 2001 fiscal year CHC declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of CHC's income during that year. At the end of that year CHC had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during CHC's 2001 fiscal year with which the petitioner could have paid the proffered wage. Even assuming that CHC's income and assets are available to the petitioner, the petitioner has not shown the ability to pay the proffered wage during CHC's 2001 fiscal year.

The petitioner has demonstrated that it paid the beneficiary approximately \$2,314.42 during CHC's 2002 fiscal year.¹² The petitioner is obliged to demonstrate its ability to pay the remaining \$16,155.98 during that year. The petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to show the ability to pay that amount with copies of annual reports, federal tax returns, or audited financial statements. The petitioner, however, submitted none of those three types of documents as evidence of its ability to pay the proffered wage during CHC's 2002 fiscal year, although the fiscal year 2002 return should have been available.¹³ The petitioner submitted no other reliable evidence of its ability to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during CHC's 2002 fiscal year.

The petition in this matter was submitted on June 16, 2004, which fell within the petitioner's 2003 fiscal year. The 2003 tax return of CHC, and that of the petitioner if it reports pursuant to the same fiscal year, therefore, was unavailable on that date. Further, a 2003 return was never subsequently requested. The petitioner is not obliged to show its ability to pay the proffered wage during CHC's fiscal year 2003 or during subsequent fiscal years.

The evidence submitted shows that as of October 13, 2004 the petitioner had paid the beneficiary year-to-date wages of \$3,335.18.¹⁴ The record does not indicate that the petitioner paid any additional wages to the beneficiary during that calendar year. The petitioner submitted no other reliable evidence of its ability to pay the proffered wage during that year. Calendar year 2004, however, fell within the petitioner's 2004 and 2005 fiscal years. As was noted above the petitioner is not obliged to show its ability to pay the proffered wage during either of those fiscal years.

Even assuming that CHC's income and assets were available to the petitioner, CHC's tax returns fail to demonstrate that the petitioner had the ability to pay the proffered wage during CHC's 2001 and 2002 fiscal years.

evidence, that the income and assets of CHC are available to the petitioner. Without this assumption, of course, analysis of CHC's finances would be unnecessary.

¹² Of that amount, \$1,229.09 was paid during calendar year 2001 and \$1,085.33 during calendar year 2002.

¹³ Absent an extension that return should have been submitted to IRS by January 15, 2004. The petitioner did not submit that document nor explain that omission.

¹⁴ This amount is net of tips.

Counsel asserts, however, that the evidence submitted shows that the petitioner's overall financial condition is favorable enough to show its ability to pay the proffered wage, notwithstanding that it may have been unable to pay the proffered wage out of its net income or net current assets during some years. Counsel is correct that approval may not be precluded by the fact that a petitioner suffered a loss during a given year or its net income was less than the annual amount of the proffered wage during a given year. The seminal case on this issue is *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on that 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. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that fiscal years 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.

Further, as was noted above, scant evidence of the petitioner's finances is in the record. The bulk of the evidence pertains to the finances of CHC, which has not been shown to be relevant. Only the figures on the accountant's letter pertain to the beneficiary. The statements of the accountant are not reliable, absent supporting evidence, to demonstrate the petitioner's ability to pay the proffered wage. Further, those figures relate to only one fiscal year since the priority date, and could not show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further still, even if accepted as relevant and accurate, and even if information were provided for all of the salient years, the petitioner's gross receipts, total payroll expense, and payroll tax are insufficient to demonstrate the petitioner's ability to pay the proffered wage during a given year for reasons explained in detail above.

The petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition may not be approved.

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

ORDER: The appeal is dismissed.