

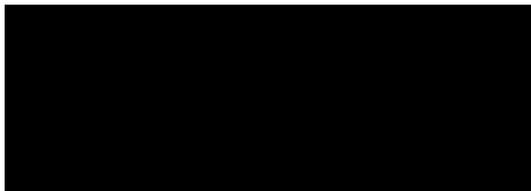
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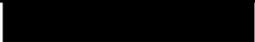
U.S. Citizenship  
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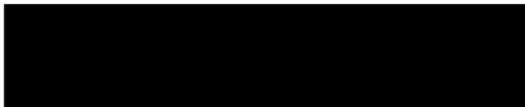
Office: CALIFORNIA SERVICE CENTER

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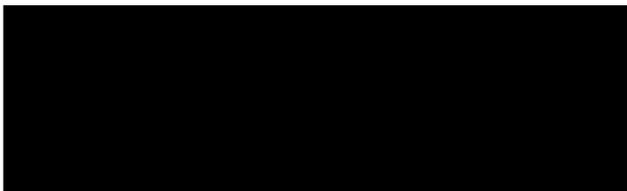
Petitioner:



Beneficiary:

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

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, California Service Center denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a television/film production and marketing firm. It seeks to employ the beneficiary permanently in the United States as an executive secretary and administrative assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

The record shows that the appeal is properly filed, timely 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 9, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. 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 [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the

employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 1, 2001. The proffered wage as stated on the Form ETA 750 is \$42,000 annually.

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>1</sup>. Relevant evidence submitted on appeal includes counsel's brief, a copy of an AAO non-precedent decision,<sup>2</sup> and a copy of a pay stub, issued by the petitioner, to the beneficiary for the pay period June 26, 2005 through July 9, 2005. Other relevant evidence includes copies of the petitioner's 2001 through 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of pay stubs, issued by the petitioner, to the beneficiary for the pay periods December 26, 2004 through April 2, 2005, copies of the petitioner's Employer's Quarterly State Report of Wages Paid to Each Employee for the quarters ending in December 31, 2003, March 31, 2004, September 30, 2004, December 31, 2004, and March 31, 2005, a letter from [REDACTED] Certified Public Accountant (CPA) with [REDACTED], and an unaudited Profit and Loss Statement for the petitioner for the period January 2005 through March 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 Forms 1120S reflect ordinary incomes or net incomes of \$89,090 (Schedule K),<sup>3</sup> -\$59,561, -\$71,292, and -\$2,314, respectively. The petitioner's 2001 through 2004 Forms 1120S also reflect net current assets of \$169,974, \$10,393, -\$27,418 and -\$13,020, respectively.

The petitioner's 2005 unaudited profit and loss statement<sup>4</sup> reflects total income of \$184,768.32, wages paid of \$40,102.57, and a net income of \$9,812.18.

<sup>1</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).

<sup>2</sup> 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

<sup>4</sup> 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to

The beneficiary's pay stubs for the pay periods December 26, 2004 through April 2, 2005 and June 26, 2005 through July 9, 2005 reflect wages earned each pay period of \$1,615.40 and year-to-date wages of \$21,807.90 as of July 9, 2005.

The petitioner's Employer's Quarterly State Report of Wages Paid to Each Employee for the quarters ending in December 31, 2003, March 31, 2004, September 30, 2004, December 31, 2004, and March 31, 2005 reflect no wages paid to the beneficiary until the quarter ending March 31, 2005. At that time, the beneficiary's year-to-date earnings were \$8,884.70.

The letter from the CPA states:

I am familiar with both the personal and professional financial status of the petitioner and can attest that the corporation and sole shareholder have sufficient cash flow and assets to fund all current and future payroll requirements.

Furthermore, recent negative net income amounts have been due to corporate accounting deductions related to the "S" corporation which include depreciation of equipment and distributions to the company principal. Years 2002-2004 include additional one-time expenses related to the expansion of office space and the purchase of additional capital equipment that the company has undertaken over the past three years in order to expand the business. Many of the capital debts will be retired in 2005 freeing more cash to fund planned personnel hiring.

For example: In 2004, there are deductions of \$23,084 for equipment depreciation; however the cash for these items has been paid out in previous years. Excluding depreciation, Net Income would equal \$21,162. Further, the company has previously taxed Retained Earnings equaling \$41,176 (See Sched M-2).

On appeal, counsel alleges that officers' compensation, the petitioner's election as an S Corporation, the lengthy adjudication time taken by the Department of Labor (DOL) in approving the labor certification, the September 11, 2001 tragedy, the 2001-2003 recession, and the petitioner's ability to put beneficiaries on salary as soon as such beneficiaries were authorized to do so upon their receipt of employment authorization should be considered when determining the petitioner's ability to pay the proffered wage of \$42,000.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner submitted copies of the beneficiary's pay stubs for the pay periods December 26, 2004 through April 2, 2005 and June 26, 2005 through July 9, 2005. Each pay period reflected wages paid to the beneficiary of \$1,615.40. If the petitioner continued to compensate the beneficiary at that rate for the entire year, the beneficiary would have earned \$42,000.40. However,

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demonstrate the ability to pay the proffered wage. Therefore, the petitioner's 2005 profit and loss statement will not be considered when determining the petitioner's ability to pay the proffered wage of \$42,000.

the petitioner is obligated to show that it had sufficient funds to pay the proffered wage of \$42,000 from the priority date of October 1, 2001 and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

In the instant case, the petitioner's 2001 through 2004 net incomes from Schedule K were \$89,090, -\$59,561, -\$71,292, and -\$2,314, respectively. The petitioner could have paid the proffered wage of \$42,000 from its net income in 2001, but not in 2002 through 2004.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *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>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's 2001 through 2004 tax returns reflect net current assets of \$169,974, \$10,393, -\$27,418 and -\$13,020, respectively. The petitioner could have paid the proffered wage of \$42,000 from its net current assets in 2001, but not in 2002 through 2004.

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<sup>5</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel contends that officers' compensation, the petitioner's election as an S Corporation, the lengthy adjudication time taken by the Department of Labor (DOL) in approving the labor certification, the September 11, 2001 tragedy, the 2001-2003 recession, and the petitioner's ability to put beneficiaries on salary as soon as such beneficiaries were authorized to do so upon their receipt of employment authorization should be considered when determining the petitioner's ability to pay the proffered wage of \$42,000.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, in the instant case, counsel has not provided a notarized affidavit from the petitioner's owner stating that he would be able and willing to forego the officers' compensation in order to pay the beneficiary's salary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, even if the petitioner's owner were willing to forego the officers' compensation in order to pay the beneficiary's salary, the petitioner would still be unable to pay the proffered wage of \$42,000 in 2003 by \$500 and in 2004 by \$11,300.<sup>6</sup>

The petitioner's CPA claims that the years 2002-2004 "include one-time expenses related to the expansion of office space and the purchase of additional capital equipment that the company has undertaken over the past three years in order to expand the business." However, the CPA has failed to specify the amount of those expenses or what they include. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The CPA's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D.

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<sup>6</sup> The compensation of officers was \$41,500 in 2003 and \$30,700 in 2004. \$42,000 proffered wage - \$41,500 compensation of officers = \$500 less than the proffered wage in 2003. \$42,000 proffered wage - \$30,700 compensation of officers = \$11,300 less than the proffered wage in 2004.

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. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

Counsel states that the lengthy adjudication time taken by the DOL in approving the labor certification should be taken into consideration when determining the petitioner's ability to pay the proffered wage of \$42,000. However, CIS has no authority over DOL's adjudication of labor certification applications, and whether the approval of the labor certification was timely or not has no bearing on the adjudication of the Form I-140. CIS must abide by the guidelines established by Congress in the Act and CIS in the regulations which state that the petitioner is obligated to establish its ability to pay the proffered wage from the priority date of the labor certification, October 1, 2001, and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The fact that the petitioner did not file the Form I-140 with the director until August 3, 2004 does not alleviate the petitioner's responsibility to demonstrate its continuing ability to pay the proffered wage from the priority date of October 1, 2001.

Counsel also claims that the effects of September 11, 2001 and the 2001-2003 recession should be considered when determining the petitioner's ability to pay the proffered wage of \$42,000. However, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO also notes that the petitioner's tax returns suggest that 2001 was one of its best years in the context of its gross receipts, net income, and net current assets reported from 2001 through 2004.

Counsel's statement concerning the petitioner's ability to put the beneficiary on salary as soon as she receives employment authorization is unclear. The fact that the petitioner is filing for the beneficiary indicates that it should be able to put the beneficiary on salary upon employment authorization. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner's CPA suggests that the petitioner's retained earnings should also be considered in support of its financial ability to pay the beneficiary's wage offer. Counsel cites no authority for this proposition. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its 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 and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific

uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage. It is also noted that the court in *Sitar Restaurant v. Ashcroft*, 2003 WL 22203717 at 4 (D. Mass) specifically rejected using unappropriated retained earnings and common stock to pay the proffered wage, concluding that CIS had sufficiently considered the petitioner's assets as reflected on the Schedule L balance sheet. In addition, retained earnings are often non-cash in nature and can represent income spent on investments into the petitioner's business as opposed to being distributed among shareholders or shown as profit. The AAO generally won't credit monies spent during the normal course of business to be available to show the ability to pay the proffered wage.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided four tax returns, 2001 through 2004, only one of which establishes the petitioner's ability to pay the proffered wage of \$42,000. These returns are also not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry.

The petitioner's 2001 tax return reflects an ordinary income or net income of \$89,090 (Schedule K) and net current assets of \$169,974. The petitioner could have paid the proffered wage of \$42,000 from either its net income or net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of -\$59,561 (Schedule K) and net current assets of \$10,393. The petitioner could not have paid the proffered wage of \$42,000 from either its net income or net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of -\$71,292 (Schedule K) and net current assets of -\$27,418. The petitioner could not have paid the proffered wage of \$42,000 from either its net income or net current assets in 2003.

The petitioner's 2004 tax return reflects an ordinary income or net income of -\$2,314 (Schedule K) and net current assets of -\$13,020. The petitioner could not have paid the proffered wage of \$42,000 from either its net income or net current assets in 2004.

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 sustained that burden. Accordingly, the previous decision of the director will be affirmed, and the petition will be denied.

**ORDER:** The appeal is dismissed.