U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 28 2007
SRC 06 013 50799

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) 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 chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 1, 2002. The proffered wage as stated on the Form ETA 750 is $1,800 per month, which equals $21,600 per year.

The Form I-140 petition in this matter was submitted on October 18, 2005. On the petition, the petitioner stated that it was established on December 19, 1994 and that it employs five workers. The petition states that the petitioner's gross annual income is $469,924 and that its net annual income is $17,551. On the Form ETA

750, Part B, signed by the beneficiary on September 25, 2002, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Houston, Texas.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains the petitioner's 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns. The record does not contain any other evidence directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on May 26, 1994,[2] and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of $0. The petitioner paid salaries and wages of $13,505 during that year and Compensation of officers of $16,747. At the end of that year the petitioner's current liabilities were $13,758 and its current assets were $19,158, which yields $5,760 in net current assets. The petitioner had total end-of-year assets of $573,447.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of $28,159. The petitioner paid salaries and wages of $55,449 during that year and Compensation of officers of $23,510. At the end of that year the petitioner's current liabilities were $23,624 and exceeded its current assets, which were <$7,128>. The petitioner had total end-of-year assets of $561,685.

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of $17,551. At the end of that year the petitioner's current liabilities were $73,379 and exceeded its current assets, which were <$14,103>.The petitioner paid salaries and wages of $60,118 during that year and compensation of officers of $12,740. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner had total end-of-year assets of $585,239.

The director denied the petition on December 7, 2005. On appeal, counsel asserted,

> [CIS] misappropriates or misinterprets the standard in [*Elatos Restaurant Corp. v. Sava*], 632 F. Supp. 1049 (S.D.N.Y. 1986) and [*K.C.P. Food Co., Inc. v. Sava*], 623 F.Supp. 1080 (S.D.N.Y. 1985). [CIS] should follow the guideline set forth by Vermont Service Center interpretation of evidence for a company able to pay proffered wages. [sic] [*Matter of*

---

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

[2] Although this is not the same date the petitioner stated on the Form I-140 that it was established, the petitioner may have incorporated some months prior to commencing operations.

> *Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967)], also consider [sic] evidence outside "income tax return" as evidence for [sic] ability to pay the proffered wages.

In a brief filed to supplement that appeal counsel argued: (1) that the petitioner paid $5,063 in advertising during 2002 and that this shows that it has a realistic expectation of future growth, (2) that lines of credit should be considered in assessing a petitioner's continuing ability to pay the proffered wage beginning on the priority date, (3) that tax returns may be a poor index of the ability of a small start-up company to pay the proffered wage, (4) that the fact that the petitioner has been in business for ten years demonstrates that it is able to pay the proffered wage, (5) that *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 does not indicate that CIS may rely exclusively on tax returns in assessing ability to pay the proffered wage, (6) that *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080, 1083 indicates that showing a substantial potential for growth may overcome a loss suffered in a given year, (7) that *Matter of Sonegawa*, 12 I&N Dec. 612 requires CIS to consider other evidence in addition to the tax return, (8) that the service center did not, therefore, correctly consider all of the evidence before it, (9) that the petitioner's gross income and depreciation deductions are evidence of its ability to pay the proffered wage during the salient years, (10) that the petitioner's total wage expense and officer compensation demonstrate its ability to pay the proffered wage, and (11) that the petitioner's inventory turnover, "net sales to average assets ratio," and current ratio are indices of its ability to pay the proffered wage.

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion 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 gross income 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.

As to the beneficiary's ability to generate income counsel asked, "How can [CIS] assume the [beneficiary] generates no income at all to the restaurant when she [works] as a chef for [the petitioner]?" and asserted that the beneficiary's ability to generate income should be considered. Counsel is attempting to invert the burden of proof in this matter. The burden is on the petitioner to demonstrate, rather than imply or allege, that the beneficiary will generate additional profits. As the petitioner's restaurant is in operation it presumably already has a chef. That replacing the current chef with the beneficiary would result in such manifestly superior food that the petitioner's profits would soar, or even marginally improve, has not been demonstrated. Had counsel demonstrated that hiring the beneficiary would increase the petitioner's profits this office would have considered the amount of that increase as demonstrated by the evidence. This office does not assume that the beneficiary will not produce additional profits, but finds that the petitioner has failed to demonstrate that she will.

Counsel's reliance on the petitioner's total wage and salary expense and its gross receipts is misplaced. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient.[3] 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[4] or otherwise increased its net income,[5] 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.

Counsel urges that the petitioner's Form 1120, Line 12, Compensation of Officers should be considered in assessing its continuing ability to pay the proffered wage beginning on the priority date. Counsel provides no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay additional wages.

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. This office is aware 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 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.

---

[3] Even if paying total annual salaries and wages in excess of the annual amount of the proffered wage were considered conclusive evidence of ability to pay the additional amount of the proffered wage during a given year, this office notes that the petitioner paid total salaries and wages of only $13,505 during 2002, an amount less than the annual amount of the proffered wage.

[4] 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.

[5] 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.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See 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.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.[6] 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 petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel appeared to assert that the petitioner's available credit should be considered in assessing its ability to pay extra wages, but provided no evidence of that available credit. In any event, a line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner, even if it were demonstrated, would not be part of the calculation of the funds available to pay the proffered wage.

Counsel states that "[CIS] misses the point in" *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080, 1083, which counsel cites for the proposition that,

> . . . a showing of a "substantial potential for growth" . . . can overcome negative taxable income and provide sufficient evidence of the ability to pay.

In fact, *K.C.P. Food Co.* does not make the assertion that counsel attributes to it, either explicitly or by implication, either at 1083 or elsewhere.[7] Further, the phrase "substantial potential for growth" which counsel attributes as a direct quote from *K.C.P. Food Co.* does not occur in that opinion.

The more popular, and accurate, citation for the proposition that losses or low profits during a given year do not preclude approval of a petition is *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Pursuant to the reasoning of *Sonegawa,* if the petitioner could demonstrate a reasonable anticipation of significant growth that would demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

---

[6] Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

[7] Even if the decision in *K.C.P. Food Co.* made the assertion counsel attributes to it, that assertion would likely be dictum, as the court found for the government in that case.

Sonegawa, 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 also suffered large moving costs and a period of time during which it 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 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. Here the record contains no evidence that the petitioner has ever posted a large profit. The only evidence cited to show that the petitioner has a reasonable expectation of increased profits is that the petitioner spent $5,063 on advertising during 2002.

In fact, the petitioner spent $5,603 on advertising during 2002, $12,481 during 2003, and $7,044 during 2004. During those same years the petitioner's net profit was $0, $28,159, and $17,551, respectively. The petitioner's gross receipts similarly rose and fell. While this fluctuation may have been due to the increased advertising,[8] the record contains no evidence of a continuing trend toward profitability. The record contains no evidence that the petitioner's profitability will continue to improve based either on past or prospective advertising, or any other factor.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that any of the salient years were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel argued that tax returns are a poor index of the financial health of a start-up business. Counsel also argues, on the other hand, that the fact that the petitioner has been in business for ten years is an index of its ability to pay the proffered wage. Although those positions appear to conflict, in that they posit that the petitioner is a start-up and that it has been in business for a long time, this office will address them both.

Counsel cited case law for the proposition that CIS is required to consider other evidence in addition to tax returns, and argued that, in basing his decision solely on the tax returns in the record the director failed to consider all of the evidence correctly before her.

---

[8] The fluctuation in the petitioner's advertising budget may have been the result of the fluctuation in the petitioner's profits during the salient years, rather than the cause. That is, the petitioner may have spent more money on advertising during 2003 because it had more disposable income.

The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted no copies of annual reports or audited financial statements, nor any evidence relevant to its ability to pay the proffered wage other than its federal tax returns. By considering those returns the director considered all of the relevant evidence before her.

Having elected to demonstrate its ability to pay the proffered wage with its tax returns rather than with copies of annual reports or audited financial statements, the petitioner is bound by those returns. If the tax returns fail to show the ability to pay the proffered wage, then the petitioner has failed to show its ability to pay the proffered wage unless it submits reliable evidence of additional funds available to the petitioner. The assertion that the petitioner's tax returns are poor indices of its ability to pay the proffered wage neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability.

The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage, but has submitted no other relevant evidence. This office is obliged to rely exclusively on the petitioner's tax returns because the petitioner submitted no other reliable evidence relevant to its continuing ability to pay the proffered wage beginning on the priority date. *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 indicates, at 1084, that when the only evidence the petitioner submits pertinent to its ability to pay the proffered wage is its tax returns, CIS does not abuse its discretion by considering only those tax returns in assessing the petitioner's ability to pay the proffered wage.

That the petitioner has continued in business for ten years demonstrates that it has paid its debts and obligations sufficiently well to avoid bankruptcy. It has also likely returned a sufficient profit during those years, or shown sufficient promise of doing so in the future, that its owners have elected to continue its operation. Its continued existence for over ten years is not, however, an indication that the petitioner is able to pay any additional amount of wages per year.

The regulation at 8 C.F.R. § 204.5(g)(2) generally requires petitioners to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. If a petitioner has 100 or more employees, the statement of a financial officer may suffice to show that ability. No such exception or exemption exists for companies in existence for ten or more years. The petitioner is not excused from its obligations under the regulations based on its longevity.

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

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will 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.[9]

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).

Counsel cites various financial statistics, Inventory Turnover, Net Sales to Assets Ratio, and Current Ratio, as indices of the petitioner's ability to pay the proffered wage.[10] Whether counsel meant that these statistics show the petitioner's ability to pay the proffered wage during 2002, 2003, and 2004, or whether counsel intended to argue that they show an upward trend that demonstrates that the petitioner will be able to pay the proffered wage in the future, is unclear.

The petitioner's tax returns, from which the statistics cited were calculated, were prepared pursuant to cash basis accounting. Preparation of statistics from cash basis figures increases the likelihood that results, trends, or developments suggested by those cash basis statistics might not, in fact, reflect actual results, trends or developments in the underlying business.

In the instant case, however, the petitioner is a small restaurant. Sales by such businesses are typically cash transactions, and restaurant supply houses are typically paid COD or, in any event, in the short term. Although the figures would be more reliable if prepared from figures derived from audited financial statements prepared under Generally Accepted Accounting Principles promulgated by the American Institute of Certified Public Accountants, this office accepts, based on the assumptions that the petitioner is consistently applying a particular cash method of accounting and the petitioner operates consistently from year to year, that the statistics presented are roughly the same as they would have been if taken from audited data.

---

[9] In fact, in a letter dated November 22, 2005 the petitioner's president stated that the petitioner had never employed the beneficiary.

[10] For an analysis of financial performance statistics see any introductory accounting text. Although citation to textbooks is unusual, information pertinent to financial ratios is most readily available from accounting, finance, and business and management texts, as no standards for financial statistics exist in the Generally Accepted Accounting Principles promulgated by the American Institute of Certified Public Accountants, or in the IRS code, or in any similar authoritative source.

Counsel stated that the petitioner's inventory turnover,[11] calculated by dividing its average daily Cost of Goods Sold[12] by its average inventory[13], decreased from 28 days during 2002 to 15.3 days during 2003.[14] Counsel states that, "This measure indicates a continuity of the operations for the years 2002 and 2003." This office does not contest that the petitioner continued operations. As was noted above, however, that is insufficient to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

Based on an analysis of its computation, turnover does not appear to be an index of profitable operations. It is a measure of how often, on the average, the petitioner will sell the inventory it keeps on hand and may be, therefore, indicative of the efficiency with which a company's inventory is being managed. A company that turns over its inventory faster would likely receive more return on the amount of inventory it has on hand.[15] This would generally be indicative of more efficient inventory management.

This office does not perceive that a company's turnover figure for a given year, in itself, would have much meaning. It might acquire meaning when compared to typical rates for other similar companies, in the same line of business and of the same approximate size.[16] In the instant case, no figures for other small specialty restaurants were provided. It might also be meaningful to compare a company's turnover during consecutive years, to see whether the company's management of inventory is improving or deteriorating.

According to the figures on the petitioner's tax returns, the petitioner's turnover was 155.5 days during 2002,[17] 17.8 days during 2003,[18] and 16.2 days during 2004.[19] For any business, but especially for a

---

[11] For a discussion of the computation and interpretation of inventory turnover rate, see, for example, Horngren's *Accounting* 6th Ed. (2005) at 203, 204.

[12] Average daily Cost of Goods Sold, as that name implies, is derived by dividing annual Cost of Goods Sold by 365.

[13] Average inventory is typically derived by adding beginning of year Inventory and end-of-year inventory and dividing by two. In a business in which inventory fluctuates dramatically and monthly figures are available, use of monthly inventory figures is more appropriate. In the instant case only beginning-of-year and end-of-year figures are available.

[14] Actually, turnover is typically expressed as the number of times inventory will "turn over" during the course of a given accounting period, generally one year, and is derived by dividing average daily Cost of Goods Sold by Average Inventory for that same period. In the instant case, counsel has chosen to divide Average Inventory by Cost of Goods Sold and to express turnover in terms of number of days per turnover, and no reason exists not to conform the statistics used in this decision to counsel's chosen convention.

[15] The introductory text at hand at the time of this writing, Horngren's Accounting 6th Ed., details the computation and interpretation of inventory turnover on pages 203 and 204.

[16] An analyst must also view the raw figures from which the turnover was computed. If in a given year a company reduced its inventory by 50%, which reduced its sales and, therefore, its Cost of Goods Sold by 40%, its turnover would be somewhat improved, although it would almost certainly be a bad management decision and result in decreased net profits.

[17] [($86,280 + $8,642)/2] / ($111,432/365) or, simplified, $47,461 / $305.29.

restaurant, turning over inventory every 150 days indicates incredibly dismal inventory management. The petitioner appears to have gotten whatever factor[20] caused that poor turnover under control. The record contains no evidence, however, that the exponential difference between 2002 and 2003 continued or will continue, or that a turnover of 16 days is exceptionally good for a small restaurant, whose inventory is likely comprised largely of perishable items.

Further, turnover, by itself, does not appear to this office to show the ability, past, present, or future, to meet some additional obligation, such as additional wages. It does not appear to be a measure of profitability or a quantification of funds on hand. Based on analysis of the computation that yields it, turnover does not appear to show that a petitioner had in the past, or now has, or will in the future have funds available to pay additional wages. This office sees no indication that the petitioner's turnover, in itself, could ever show continuing ability to pay the proffered wage beginning on the priority date and cannot, in itself, demonstrate an actual or anticipated increase in profitability.

This office notes that counsel cited no authority to support the assertion that the turnover values yielded by the petitioner's tax returns show that it was able to pay additional wages, nor to support the more general proposition that turnover may, under some circumstances, show the ability to absorb additional wage expense. Counsel has failed to demonstrate that the turnover statistic shows or could show a petitioner's ability to pay the proffered wage.[21]

Counsel also cited the petitioner's Net Sales to Average Assets ratio. This is derived by dividing net sales (gross receipts less returns, allowances, and discounts) by average assets.[22] It is a measure of the sales generated by a given asset/investment level and pricing strategy.

Again, a company's Net Sales to Average Assets ratio appears to have very little meaning in isolation. It is meaningful when compared to figures for various similar companies, in which case it would show whether

---

[18] [($8,642 + $6,503)/2] / ($154,961 / 365) or, simplified, $7,572.50 / $424.55.

[19] [($6,503 + $6,780)/2] / ($149,589 / 365) or, simplified, $6,641.50 / $409.83.

[20] In this case the factor was clearly beginning-of-year inventory. The petitioner's 2002 Schedule L indicates that the petitioner had beginning-of-year inventory of $86,280 and end-of-year inventory of $8,642. This is a much greater than unusual variation. The beginning-of-year figure may have been the result of a typographical error. If that figure were actually $8,628, for instance, then the petitioner's turnover during that year would have been 28.2 days, a more plausible figure.

[21] This office notes that the burden of proof it on the petitioner in this matter. That is; the petitioner is obliged to demonstrate that the evidence in this matter supports that the petitioner is able to pay the proffered wage. The burden is not on CIS to demonstrate that the evidence is irrelevant or even that it is insufficient.

[22] For a discussion of the computation and interpretation of the Net Sales to Average Assets Ratio, also called Total Asset Turnover, see http://www.crfonline.org/orc/cro/cro-16.html and http://www.investopedia.com/terms/a/assetturnover.asp. Again, this office notes that no more authoritative source appears to exist.

more or less sales were being generated than one would expect based on the value of the company's assets. Net Sales to Average Assets could also be compared to the same statistic for the same company during other years. In that event it would show whether the ratio was improving or worsening.

In the instant case the petitioner did not provide data for other small specialty restaurants. The only meaning that may be derived from the petitioner's Net Sales to Average Assets ratio would ensue from comparing various years to see if a pattern of improved or worsening business practice is indicated, or whether the company's management is producing a static return.

Finally, Sales to Assets, as the computation implies, is only a sales measure. It does not appear to be a measure of profitability, past, present, or projected. If the sales are high but the gross profit margin is low, it will not translate into high gross profit, let alone net profit.[23] If the profit margin is acceptable but the administration of the business is inefficiently handled and operating expenses are high, then it will result in high gross profits, but low net profits or even losses. Additionally, a company might have a good sales to assets ratio, a good profit margin, and very low administrative costs and operating expenses, but operate at a very low volume.[24] In such a case all of the company's statistics, other than net income, might be favorable, but it would have insufficient earnings to pay any additional wages.

Sales to assets ratios do not appear to be able, by themselves, to demonstrate that a petitioner is able to take on an additional obligation, which is the focus of today's inquiry. Again, counsel cited no authority to support the assertion that the sales to assets ratio values in the instant case show that it was able to pay additional wages, nor to support the proposition that sales to assets ratios may, under some circumstances, show the ability to absorb additional wage expense. Counsel has failed to demonstrate that the sales to assets ratio statistic does or could show a petitioner's ability to pay the proffered wage

Counsel also cited the petitioner's current ratio,[25] which he described, correctly, as "a general measure of a firms ability to meet **current** . . . obligations." [Emphasis supplied.]

This office is not convinced, however, by counsel's argument that the petitioner's current ratio, the ratio of its end-of-year current assets to its end-of-year current liabilities, shows the petitioner's ability to pay the proffered wage. The current ratio is the ratio of the petitioner's current assets, those assets expected to be converted to cash or cash equivalent within a year, and its current obligations, those obligations due within a year. The current ratio appears, therefore, to describe the petitioner's ability to pay its **existing** short-term debts and obligations as they come due. It appears to be a measure of a company's ability, if operations remain static, to maintain its operations with its existing liquidity.

---

[23] To illustrate the concept with an extreme, a company might sell products below cost. In that event it would likely generate very high gross receipts, but would be unable to generate either gross or net profit.

[24] The petitioner's gross receipts, for instance, ranged from $379,644 during 2002 to $518, 961 during 2003, then decreased somewhat during 2004.

[25] For a discussion of the calculation and interpretation of the current ratio, see, for example, Horngren's *Accounting*, Ibid. at 154, 155.

The expected range of that statistic varies from one type of business to another, but generally the norm, to the extent that a norm can be derived from such abstract data, is a current ratio of 1.5. A current ratio of 1.8 would demonstrate that a company is typically strong, and a current ratio of 2.0 or greater is typically very strong.[26]

Counsel is incorrect in stating that the petitioner had a favorable current ratio during the salient years. At the end of 2002 the petitioner had current assets of $19,518 and current liabilities of $13,758, which yields a current ratio of 1.42. In many, and perhaps most, business types, that is a barely acceptable ratio.

At the end of both 2003 and 2004, however, the petitioner had negative end-of-year current assets. No meaningful ratio can be derived from a comparison of negative current assets and positive current liabilities. Those negative current assets show that the petitioner was unable to cover any portion of its current liabilities with its current assets at the end of that year. That is a worse current asset to current liability balance than is contemplated by the current ratio statistic.

In any event, a current ratio, as explained above, is a measure of a company's short-term ability to remain in business by covering its current liabilities with its current assets. Based on an analysis of its computation, it does not appear to be a measure of profitability or of a company's ability to pay **additional** wages.[27] The appropriate comparison of current assets to current liabilities to show the ability to pay **additional** wages is the petitioner's net current assets; that is, the **difference** between, rather than the ratio of, current assets and current liabilities. That difference is a measure of a taxpayer's ability to absorb **additional** expense, rather than merely to meet its existing debts and obligations.

As is explained in more detail below, 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. This office will not, however, consider a petitioner's current ratio.

Counsel asserted that as a consequence of the petitioner's allegedly good current ratio CIS "should have found this to be an 'appropriate case' to accept petitioner's unaudited financial statements as reliable evidence, since a tax return or [an] audited [financial] statement was obviously not available," citing 8 C.F.R. § 204.5(g)(2). Even if counsel had shown that the petitioner had a good current ratio, counsel's reasoning would not convince this office.

First, tax returns obviously were available, as they were presented. Second, whether audited financial statements were available is unknown to this office. Third, counsel presented no unaudited financial statements and, therefore, this office is unable to consider them.

---

[26] Horngren's *Accounting, Ibid.* at 154.

[27] 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. For the reasons explained above this office does not agree, and notes that the opinion of the Director, Vermont Service Center, does not bind this office.

Even if counsel had presented unaudited financial statements, this office would not, absent a compelling reason, consider them. The regulation at 8 C.F.R. § 204.5(g)(2)[28] 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.

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 minus 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[29] 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 $21,600 per year. The priority date is October 1, 2002.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of $0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had $5,760 in net current assets. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence to demonstrate that any other funds were available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of $28,159. That amount is greater than the annual amount of the proffered wage. The petitioner has demonstrated that it was able to pay the proffered wage during 2003.

---

[28] 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.

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

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of $17,551. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner 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 to demonstrate that any other funds were available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on October 18, 2005. On that date the petitioner's 2005 tax return was unavailable. No evidence pertinent to 2005 was subsequently requested. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002 and 2004. Therefore, the petitioner has not 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 not met that burden.

ORDER: The appeal is dismissed.