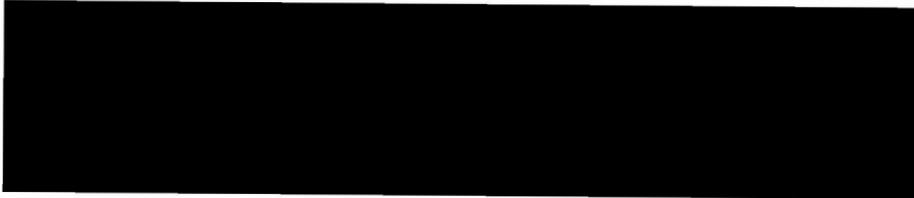


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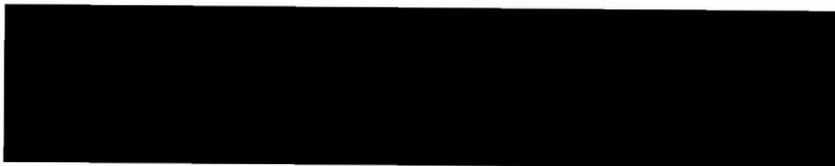
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 16 2007
WAC 05 071 50259

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a telecommunications company. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2002 priority date of the visa petition through 2003 based on the petitioner's net income or net current assets, or based on the petitioner's line of credit. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 8, 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. On appeal, counsel asserts, for the first time, that the portability provisions of the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, apply to this petition. The AAO will address this issue more fully further in these proceedings.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. 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 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

Here, the Form ETA 750 was accepted on January 8, 2002. The proffered wage as stated on the Form ETA 750 is \$27.64 per hour (\$57,491.20 per year). The Form ETA 750 states that the position requires two years of work experience in the job offered or in the related occupation of market development coordinator.

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 appeal¹. On appeal, **counsel** submits a state of California form SI-200C, Statement of Information. This document lists a company called Total Communication Solution, Inc., at 3470 Wilshire Boulevard, Suite 510, Los Angeles, California, along with articles of incorporation dated August 8, 2005 and tax registration certificates. The officer and director of the company are identified as [REDACTED], also at 3470 Wilshire Boulevard, Suite 510, Los Angeles. The Statement of Information is dated August 16, 2005. Counsel also submits checks from the account of Total Communication Solution, Inc. D/B/A Maxtel Group 3470 Wilshire Boulevard, Suite 510, for the beneficiary dated September 16, 2005 to December 9, 2005. Other checks from A & JJ Communications, Inc. D/B/A/ Maxtel Group to the beneficiary with dates ranging from November 2004 to **August 8, 2005 are found in the record. Counsel also submits a letter dated January 1, 2006 from [REDACTED]** Chief Executive Officer, Maxtel Group, that states the beneficiary is currently employed with the Maxtel Group. The letter states that the beneficiary's previous salary was \$18.00 an hour and that the salary would be increased to \$27.64 an hour, effective January 1, 2006. Counsel also submits two interoffice memoranda written by [REDACTED] former Acting Executive Associate Commissioner, Office of Programs, of Citizenship and Immigration Services (CIS) and William R. Yates, Former CIS Associate Director for Operations. Both memos, in pertinent part, discuss guidance for processing I-140 employment-based petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) Public Law 106-313. Counsel also submits a copy of a document entitled "Minutes of a Meeting April 3rd with Bill Yates" that discusses, in pertinent part, procedural issues with regard to I-140 petitions involving changes of employment. Finally counsel submits the petitioner's Forms 1120 for tax years 2001 and 2004 to the record for the first time.

Counsel on appeal also resubmits copies of the petitioner's Forms 1120 for tax years 2002 and 2003 that were initially submitted with the I-140 petition, a copy of an unpublished AAO decision. *In Re X*, taken from the Nexis Lexis database, and a general information sheet on the petitioner. In this document, [REDACTED] identified as Chief Executive Officer, states that A & JJ Communications, Inc. D/B/A/ **Maxtel Group** was established in June 1996 and is engaged in telecommunication business. [REDACTED] further states that in August 2005 the company changed its corporate name to Total Communication Solution but kept the assumed business name of Maxtel Group. [REDACTED] states that the new company maintained the same tools and equipment, facilities, inventory, personnel and customers. [REDACTED] also states that in November of 2004, Maxtel Group acquired a new and major account, and he describes the petitioner's plans for expansion and the hire of more personnel.

On appeal, counsel on the Form I-290B states that the instant I-140 petition remains "valid" because the beneficiary changed employment under the American Competitiveness in the 21st Century Act, and that the beneficiary's new employer is not required to show ability to pay the proffered wage. Counsel also states that the petitioner submitted proof of the initial employer's ability to pay the proffered wage. In the accompanying

¹ 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).

brief, counsel states that on August 16, 2005, the initial petitioner A & JJ Communications Inc. changed its corporate name and ownership, and that the beneficiary's new employer is Total Communication Solution Inc. D/B/A/ Maxtel Group. Counsel states that shares of the initial corporation were transferred from [REDACTED] to [REDACTED] the president of the new employer. Counsel asserts that the new company maintained the same tools, equipment, facilities, inventory, personnel and customers.

Counsel also asserts that new facts arose after the filing of the instant petition, namely that the beneficiary changed employment under the terms of Section 106(c) of the American Competitiveness in the Twenty-First Century Act, INA 204(j), which does not require the filing of a new I-140 petition. Counsel asserts that the beneficiary's change of employment is documented by the offer of employment submitted by the new employer, Total Communication Solution Inc. D/B/A/ Maxtel Group, Inc. Counsel states that based on AC21, when the application for adjustment of status is pending for more than 180 days and the new job is in the same occupational classification, Congress provided that the original I-140 petition shall remain valid, and that further there is no requirement that the beneficiary be paid the salary offered by the previous employer. Counsel further asserts that the only action that the applicant is required to take is to submit a letter from the new employer containing the new job title, job description, and salary. Counsel also states that since the beneficiary's employer has changed, the new employer did not have to file a new petition, under INA 204(j), or provide documentation of its ability to pay the proffered wage.

Counsel also states that even if the new employer under AC21 is required to show the previous employer's ability to pay the proffered wage, the new employer meets this requirement. Counsel refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel then states that in *Sonogawa*, the commissioner determined that when the petitioner had a reasonable expectation of a continued increase in business and increasing profits, the petitioner established its ability to pay the proffered wage even if it was not able to show a net profit exceeding the proffered wage. Counsel states that the original employer had increasing gross profits from tax years 2001 to 2004, as well as increasing salaries. Counsel refers to the unpublished AAO decision, *In Re X*, and states the AAO determined that an increase in gross receipts and payroll reflects the petitioner's expectation of a continued increase in business and increasing profits.

Counsel also states that the fact the original petitioner was able to obtain a line of credit for \$100,000 from Saehan Bank reflects that the bank considered the petitioner to be a firm of significant potential. Finally, counsel states that the new employer's expansion plan as described by [REDACTED] in his statement, which noted the current employer's 80 percent market share of the Koreatown business telephone systems also reflect the initial petitioner's continuing expectation of increase in business. The record also contains a letter from Saehan Bank, Los Angeles, California dated November 9, 2004, that states A & JJ Communication, Inc has a business line of credit in the amount of \$100,000.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on August 18, 1988, to have a gross annual income of \$469,924, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In

evaluating whether a job offer is realistic, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel asserts, for the first time, that the beneficiary has changed his employment and due to the lengthy time taken to adjudicate his I-140 petition, he is eligible for I-140 portability as outlined in the AC 21 legislation, and the petitioner is still "valid". The AAO does not find this assertion to be persuasive for various reasons. First, counsel brings up the AC21 portability issue for the first time on appeal. The record contains no evidence that the beneficiary notified CIS of his change in employment during the adjudication of the I-140 petition, or at any point in time after the petition was filed on December 3, 2004 and its denial on November 21, 2005. Thus, the raising of the AC21 issue on appeal based on the beneficiary's claimed employment change is questionable.

Second, the AAO does not agree that the terms of AC21 make it so that the instant immigrant petition can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an application for adjustment of status² to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petitioner for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 be approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term

² The AAO notes that after the enactment of AC21, CIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. *See Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the bona fides of the new prospective employer. Since this consideration takes place in the context of an the adjudication of an alien's application for adjustment of status, the proper venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment.

"remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

Finally, the record is inconsistent as to whether the new company is actually a new employer, or is simply the initial petitioner with a new name. The materials submitted to the record on appeal do not clarify this issue. The articles of incorporation submitted on appeal simply identify a company named Total Communications Inc. There is no legal documentation as to this company doing business under the assumed name of Maxtel Group. Second, contrary to counsel's assertions, the AAO finds no evidence of any transfer of the shares of the initial petitioner's stock from [REDACTED] to [REDACTED]. It is also noted that such documentation may or may not establish the second company's separate corporate identity as distinct from the initial petitioner. It is further noted that the statement from [REDACTED] submitted to the record on appeal simply asserts that the company previously known as A & JJ Communications, Inc. D/B/A Maxtel Group changed its name in August of 2005, to Total Communication Solution, Inc., and kept the assumed name of Maxtel Group. [REDACTED] further stated that the new company maintained the same tools, equipment, facilities, inventory, personnel and customers.

The AAO notes that if counsel wishes to establish that the current company is a different company from the initial company while maintaining the same tools and equipment, facilities, inventory, personnel and customers, counsel would have to establish that the current employer is the successor in interest to the initial petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company, and would entail the successor in interest petitioner filing a new I-140 petition. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

For purposes of these proceedings, the AAO will consider the new claimed employer of the beneficiary to be the initial petitioner operating under a new name. As a result the AAO will only consider the initial petitioner's ability to pay the proffered wage. The AAO will not examine any further in these proceedings the issue of AC21 portability raised by counsel on appeal. The AAO will review the basis for the director's decision that the petitioner has not established its ability to pay the proffered wage, and will also examine the totality of the petitioner's circumstances, in accordance with *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The AAO notes that counsel references a line of credit extended to the petitioner by [REDACTED] as evidence of the petitioner's ability to pay the proffered wage. However, in evaluating the petitioner's ability to pay the proffered wage, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm.

1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary as of the 2002 priority date and until the beneficiary obtained lawful permanent residence. The petitioner provided documentary evidence, namely, copies of the beneficiary's paychecks, for wages paid to the beneficiary during tax years 2004 and 2005. In tax year 2004, the beneficiary received four biweekly checks for \$1,200, with total wages of \$4,800 during tax year 2004. During tax year 2005, the beneficiary received fourteen biweekly paychecks in the amount of \$1,200, with total wages of \$16,800.³ The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2003, and the difference between the beneficiary's actual wages and the proffered wage in 2004.⁴

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, contrary to counsel's assertion in his statement submitted with the initial petition, 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

³ The beneficiary's hourly wage, if based on a two week eighty hour period of work, would be \$15 an hour.

⁴ It is noted that the record of proceeding closed on December 30, 2004. At that time, neither the petitioner's 2004 or 2005 income tax returns would have been available; however, the petitioner did submit its 2004 tax return on appeal. Therefore, while the AAO will examine the petitioner's 2004 tax return, it will not examine whether the petitioner had sufficient net income or net current assets to pay the difference between the beneficiary's actual 2005 wages and the proffered wage.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

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

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

On appeal, the petitioner submitted its Form 1120 for tax year 2001. However, the priority date for the instant petition is January 2002. Therefore the petitioner's tax return for 2001 is not dispositive in these proceedings. The AAO will not examine the petitioner's 2001 tax return in these proceedings. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$57,491 per year from the priority date:

- In 2002, the Form 1120 stated a net income of \$20,485.
- In 2003, the Form 1120 stated a net income of \$24,807.
- In 2004, the Form 1120 stated a net income of \$31,144.

Therefore, for the years 2002 to 2003, the petitioner did not have sufficient net income to pay the entire proffered wage of \$57,491.20, and for tax year 2004, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages of \$4,800 and the proffered wage of \$57,491.20.

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.⁵ 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 the total of a corporation's end-of-year net current assets and

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2002 were -\$13,161.⁶
- The petitioner's net current assets during 2003 were -\$30,151.
- The petitioner's net current assets during 2004 were -\$40,445.

Therefore, for the years 2002 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that as with the petitioner in *Matter of Sonogawa*, the petitioner has reasonable expectations of an increase in its business. Counsel also looks at the petitioner's gross profits and level of salaries during the years 2002 to 2004 as evidence of the petitioner's reasonable expectations of current and future business viability. However, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 the 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 the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2002, 2002, and 2004 were uncharacteristically unprofitable years for the petitioner. All three tax years examined in these proceedings indicated negative net current assets, and insufficient net income to pay the proffered wage. While the petitioner's net gross and salaries paid do show modest increases from tax year 2002 to 2004, this factor is insufficient to establish the petitioner's business viability, within the context of the petitioner's overall circumstances.

On appeal, counsel also refers to *In Re X*, a decision issued by the AAO that examined a petitioner's reasonable expectations of future growth, but does not provide its published citation. 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

⁶ In his decision, the director erroneously indicated the petitioner's net current assets for tax year 2002 were -\$21,161. This error does not affect the ultimate outcome of the appeal.

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). Thus, CIS is not bound by the findings in the referenced unpublished decision.

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

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.