

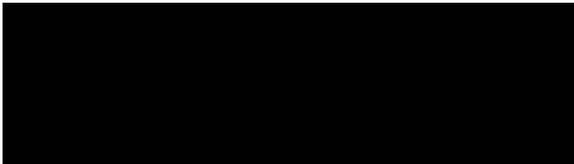
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED]
EAC 05 172 53822

Office: VERMONT SERVICE CENTER

Date: JUN 07 2007

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

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 preference visa petition was denied by the Director, Vermont Service Center, and 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 an H&R cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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 original September 22, 2006 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.

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 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.84 per hour or \$24,627.20 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 appeal¹. Relevant evidence submitted on appeal includes counsel's brief and copies of previously submitted documentation which include copies of bank statements, an undated letter from [REDACTED] and Tax Director of Yampolsky + Mandelott + Silver + Ryan, a copy of an Interoffice Memorandum, dated May 4, 2004, from William R. Yates, Associate Director for Operations for CIS, entitled *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)*, and copies of payroll stubs, issued by the petitioner for the beneficiary, for the pay periods February 26, 2005 through March 11, 2005, March 25 through March 31, 2005, April 1, 2005 through April 7, 2005, and April 8, 2005 through April 14, 2005. Other relevant evidence includes copies of the petitioner's 2000² through 2004 Forms 1120, U.S. Corporation Income Tax Returns, a menu from the petitioner giving its choices of meals, an affidavit from [REDACTED], owner of the petitioner, a copy of a letter from [REDACTED] Accountant, from Bestways Accounting Office, and copies of bank statements for 2001 and parts of 2003, 2004, and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2000 through 2004 Forms 1120 reflect taxable income before net operating loss deduction and special deductions or net income of \$1,020, -\$490, -\$3,291, -\$6,257, and \$6,709, respectively. The petitioner's 2000 through 2004 Forms 1120 also reflect net current assets of \$3,597, \$3,907, (Schedule L was not submitted for 2002), \$5,359, and \$2,068, respectively.

The beneficiary's pay stubs reflect wages paid of \$960 for pay period February 26, 2005 through March 11, 2005, \$480 for pay period March 25, 2005 through March 31, 2005, \$480 for pay period April 1, 2005 through April 7, 2005, and \$480 for pay period April 8, 2005 through April 14, 2005.

The petitioner's 2001 bank statements reflect balances ranging from a low of \$41.98 to a high of \$5,186.51. The petitioner's 2003 bank statements for the period January 1, 2003 through July 31, 2003 reflect balances ranging from a low of \$3,843.56 to a high of \$16,357.34. The petitioner's 2004 bank statements for the period September 1, 2004 through October 31, 2004 reflect balances ranging from a low of -\$821.94 to a high of \$9,102.95. The petitioner's 2005 bank statements for the period March 1, 2005 through March 31, 2005 reflect balances ranging from a low of \$10,020.40 to a high of \$12,455.54.

The letter from [REDACTED] states:

Based on our review of the applicant/petitioner's available bank statements and conversations with the parties, it appears that sufficient funds have existed from April 30, 2001 to the present to allow for the payment of the proffered annual wage of \$24,627.20 to [the beneficiary].

Due to a series of bank mergers it was not possible to retrieve copies of all of the applicant/petitioner's bank statements. Those that were available reveal that O & M Halal,

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).

² It should be noted that the petitioner's 2000 federal tax returns are for the year prior to the filing date (priority date) of the visa petition and, therefore, have little evidentiary value when determining the petitioner's ability to pay the proffered wage from the priority date of April 30, 2001 and continuing to the present. Therefore, the petitioner's 2000 federal tax returns will not be considered when determining the petitioner's ability to pay the proffered wage with the exception when considering the totality of circumstances affecting the petitioning business.

Inc. had and continues to have sufficient excess funds that could have been and can continue to be paid to [the beneficiary] in the amount of \$2,052.27 a month.

The attached schedules and bank statements reflect sufficient wealth to accomplish the hiring and maintaining of [the beneficiary] as an employee. During 2001, O & M Halal, Inc.'s banks statements reflect a slight cash shortfall in 4 months. These shortfalls would have easily been cured by loans from the applicant/petitioner's owner's personal account if a payroll obligation to [the beneficiary] had existed.

No W-2, Wage and Tax Statement, was found for 2001.

The letter from [redacted] states:

O&M Halal, Inc. is a PA corporation which is conduction business since 1998 at 5015 Germantown Avenue, Philadelphia, PA. Currently, its business is mainly Halal Meat and Cold Cuts with a large section that is rented mainly to open a Middle Eastern Eat In Restaurant, but due to the lack of experienced chiefs [sic], part of this section is only used for Pizza Shop awaiting for the proper help in order to operate a full service Middle Eastern restaurant; which caused the company to pay an additional \$10,200 rent for the space for the last four years.

As of March 1st, 2004 the corporation hired [the beneficiary] for \$480.00/a week, {He just obtained his SS Card} who started preparing the restaurant to operate as it is planed [sic] and since then the business start[ed] improving toward realizing our projected income statement.³

The petitioner's owner's affidavit, dated August 30, 2004, states:

It has been our dream to open a Middle Eastern restaurant to cater to the expanding population of Middle Eastern and North African people in Philadelphia.

In 2000, we rented additional space near our pizza shop in order to carry out the expansion we have been planning.

Our tax records reflect our additional rental costs, which in the tax year of 2000 was \$30,000, in the tax year 2001 was \$30,000, and in the tax year of 2002 was \$40,200 which is what it remains today. . . .

In 2001, we offered the position of Middle Eastern cuisine chef to a young Moroccan man, [the beneficiary], who we met, with whom we were very much impressed and who had a background as a chef of Middle Eastern food.

³ The AAO notes that as evidence with a prior petition, [redacted] provided a letter, dated September 22, 2003, that stated that the beneficiary "has never been an employee of O & M Halal, Inc. and no W-2 has ever been issued to [the beneficiary]. Presently [the beneficiary], in exchange for a place to live and food to eat, volunteers in the restaurant. . . . Because the owner, [the petitioner], is concerned with [the beneficiary's] well-being, he has loaned him money on occasion which will have to be repaid once [the beneficiary] becomes employed."

Over the last few years, he has helped us with deliveries, and now that [the beneficiary] obtained his social security card and work authorization, we are moving full speed ahead to transform our extra space we have been renting into the Middle Eastern restaurant we have been envisioning.

[The beneficiary] is currently working for us full time and we are very hopeful that we can carry out a successful expansion with his help as our expert chef.

We are re-filing this form with the government because we do not believe our ability to pay [the beneficiary] in 2001 was clarified when our application (I-140) was previously prepared.

The funds which we used to rent additional space for our expansion could have been used to pay [the beneficiary], if we had employed him at the time, and we would not have continued renting that space. Also, we could have borrowed money using our property as collateral if we had been ready to open the Middle Eastern restaurant at that time. Instead, we opted to do long term planning to realize our dream, to increase our sales and to begin our new project of serving Middle Eastern cuisine (and changing the character of our operation) on a sound footing and with the expert chef we have in the person of [the beneficiary].

We hope to avoid borrowing money for our expansion because we anticipate a brisk business in light of our new enterprise.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage based on its bank statements. Counsel cites a non-precedent decision, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), a Board of Alien Labor Certification Appeals (BALCA) case, and the Yates Memorandum in support of her contention.

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).

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 instant case, on the Form ETA 750B, signed by the beneficiary on February 9, 2001, the beneficiary claims to have been employed by the petitioner from July 1999 to the present. In addition, counsel has provided copies of the beneficiary's payroll stubs for parts of March and April of 2005. Therefore, the petitioner has established that it employed the beneficiary in part of 2005. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$24,627.20 and the actual wages paid to the beneficiary in the pertinent years (2001 through 2005). In the instant case, however, counsel has not

submitted any Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary, for any of those years. Therefore, the petitioner must establish that it has sufficient funds to pay the entire proffered wage of \$24,627.20 from 2001 through 2005.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's 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. Tex. 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.*, the court held that 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. 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." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2000 through 2004 were \$1,020, -\$490, -\$3,291, -\$6,257, and \$6,709, respectively. The petitioner could not have paid the proffered wage of \$24,627.20 from its net income in 2000 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.⁴ 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 net current assets in 2000 through 2004 were \$3,597, \$3,907, (no Schedule L was submitted for 2002), \$5,359, and \$2,068, respectively. The petitioner could not have paid the proffered wage of \$24,627.20 from its net current assets in 2000 through 2004.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage based on its bank statements. Counsel cites a non-precedent decision, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), a BALCA case, and the Yates Memorandum in support of her contention.

From the outset, it should be noted that with regard to the BALCA precedent cited by counsel, counsel does not state how the Department of Labor's (DOL) BALCA precedent is binding on the AAO. 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). 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)).

Counsel's claim that since the petitioner has paid the beneficiary at the proffered wage rate since 2005, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel urges CIS to consider the wage rate paid in 2005 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2004. Demonstrating that the petitioner is paying the proffered wage

⁴ According 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.

in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$24,627.20 based on its bank statements. However, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

On appeal, the petitioner's owner and CPA state that any shortfall in paying the proffered wage could have been cured by loans from the owner's personal account or from loans obtained by using the owner's property as collateral. Contrary to the petitioner's owner's and CPA's assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In addition, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. Furthermore, the petitioner's 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. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm'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).

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, the petitioner's tax returns indicate it was incorporated in 1997. The petitioner has provided tax returns for the years 2000 through 2004. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of \$24,627.20. There also is 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. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petitioner's 2000 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$1,020 and net current assets of \$3,597. The petitioner could not have paid the proffered wage of \$24,627.20 from either its net income or its net current assets in 2000.

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$490 and net current assets of \$3,907. The petitioner could not have paid the proffered wage of \$24,627.20 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$3,291 and net current assets of (Schedule L was not submitted). The petitioner could not have paid the proffered wage of \$24,627.20 from either its net income or net current assets in 2002.

The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$6,257 and net current assets of \$5,359. The petitioner could not have paid the proffered wage of \$24,627.20 from either its net income or its net current assets in 2003.

The petitioner's 2004 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$6,709 and net current assets of \$2,068. The petitioner could not have paid the proffered wage of \$24,627.20 from either its net income or its net current assets in 2004.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.