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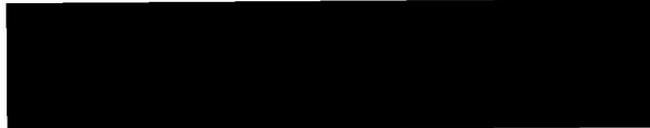
Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner manufactures and repairs cabinets and furniture. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

The record shows that the instant motion was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. 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 issues in this case are whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether the petitioner has demonstrated that the beneficiary has the requisite qualifications as stated on the Form ETA 750 labor certification application.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director and the AAO incorrectly applied the pertinent law.

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.

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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. 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 April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$17.16 per hour, which equals \$35,692.80 per year. The Form ETA 750 states that the position requires four years of experience in the job offered.

The Form I-140 petition in this matter was submitted on May 14, 2003. On the petition, the petitioner did not state the date it was established or the number of workers it employs in the spaces provided for those purposes. The petition states that the petitioner's gross annual income is \$391,302 and that its net annual income is \$79,870. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Las Vegas, Nevada.

On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary claimed to have worked for the petitioner since September of 1999. The beneficiary also claimed to have been employed as a cabinetmaker for Showcase Cabinets, another company in Las Vegas, from June 1997 to June 1998.

The Form ETA 750B instructs the beneficiary to,

List all jobs held during the last three (3) years [and] any other jobs related to the occupation for which the alien is seeking certification . . . .

The beneficiary, however, listed no other employment.

The AAO reviews *de novo* issues raised in decisions challenged on appeal or motion. *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 or motion.<sup>1</sup>

In the instant case the record contains (1) the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, (2) two versions of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, (3) 2000, 2001, 2002, and 2003 Form W-2 Wage and Tax Statements showing payments by the petitioner to the beneficiary, (4) 2001, 2002, and 2003 W-2 forms showing wage payments to [REDACTED] (5) 2001, 2002, and 2003 W-2 forms showing wage payments to [REDACTED] (6) copies of statements pertinent to the petitioner's bank account, (7) a letter dated April 28, 2004 from the petitioner's accountant, and (8) web content from various sites stating that the economy of Las Vegas suffered from the tragic events of September 11, 2001. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record contains other evidence of the petitioner's existence and of business the petitioner transacted; a Sales Agreement showing that on May 21, 2003 the petitioner contracted to pay \$36,900 for a Brandt Edgebander; a letter showing that, on April 2, 2004 the petitioner acquired a PIN number that allows it to transact business with the Defense Logistics Agency; a flyer pertinent to a seminar pertinent to the Pratih 48, a newly released Nested-Based Machining Center; Articles of Incorporation, a space lease, et cetera. These other items are not closely related to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and the proposition they were intended to support is unknown to this office.

The record also contains employment verification letters dated February 18, 2004, March 9, 2004, and September 23, 2005, and photocopies of check stubs. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

The petitioner's tax returns show that it is a corporation, that it incorporated on June 29, 2000,<sup>3</sup> and that it reports taxes pursuant to modified accrual convention accounting and the calendar year.

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<sup>1</sup> The submission of additional evidence on appeal or motion 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 or motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

An employment verification letter provided shows that Mr. [REDACTED] is the former owner of Closets and Things.

<sup>3</sup> If the petitioner incorporated during 2000, then the beneficiary cannot have worked for the petitioner, the specific corporate entity that proposes to employ him, since 1999. The beneficiary apparently means that he worked for the predecessor of the corporate petitioner prior to the petitioner's incorporation. In the instant

The petitioner's 2001 tax return shows that the petitioner declared a loss of \$35,880 as its taxable income before net operating loss deductions and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$5,608 and no current liabilities, which yields net current assets of \$4,608. That Schedule L also shows that at the beginning of that year the petitioner owed no money to its shareholders, and at the end of the year it owed them \$75,000, which shows that it borrowed \$75,000 from its shareholders during that year.

One version of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return was signed on April 8, 2003. That version shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$79,870 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$8,131 and no current liabilities, which yields net current assets of \$8,131. That Schedule L also shows that at the beginning of that year the petitioner owed its shareholders no money and at the end of the year it owed them no money. This office notes that the beginning-of-year figure on that 2002 return is inconsistent with the end-of-year figure on the 2001 return.

The other version of the petitioner's 2002 tax return appears to be identical<sup>4</sup> except that the depreciation deduction claimed was increased from \$9,450 to \$19,200, resulting in a decrease in taxable income before net operating loss deductions and special deductions from \$79,870 to \$70,120. That return was signed on March 4, 2004 and was stamped to indicate that IRS received it on March 5, 2004. A receipt for a bank check showing that the petitioner paid the amount shown on Line 34, Tax Due, accompanied the return, on that return to IRS. That Schedule L also shows that at the beginning of that year the petitioner owed its shareholders \$75,000 and at the end of the year it owed them \$14,419, which purports to show that it repaid \$60,581 during that year.

The W-2 forms show that the petitioner paid the beneficiary \$8,000, \$29,120, \$35,360, and \$35,360 during 2000, 2001, 2002, and 2003.

The petitioner's accountant's April 28, 2004 letter states that, "[The petitioner's] inability to generate a profit [during 2001] in no way predicts [in]ability to pay wages." The accountant observes that the failure of a company to post a profit does not demonstrate inability to meet its payroll obligations.

The accountant further noted that the petitioner did, in fact, meet its payroll obligations during the salient years, and that its total wage expense exceeded the annual amount of the total aggregate wages proffered to each of the three aliens for whom the petitioner petitioned adding, "Naturally, payment of the wages in full offers a nearly indisputable demonstration of ability to pay."

The accountant stated that companies do not generally post a profit during their first years, but that the petitioner was able to borrow from its shareholders as necessary. The accountant urged that the petitioner's

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case, however, because the priority date is April 19, 2001, the distinction between those two entities prior to that date is not relevant to any material issue.

<sup>4</sup> The figures for the petitioner's current assets and current liabilities are unchanged on the second 2002 tax return.

ability to borrow \$75,000 during 2001 and its ability to pay back \$60,581 during 2002<sup>5</sup> both demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

The accountant stated that during 2002 the petitioner generated a profit of \$75,120. The April 8, 2003 version of the petitioner's tax return shows taxable income before net operating loss deductions and special deductions of \$79,870. The March 4, 2004 version shows taxable income before net operating loss deductions and special deductions of \$70,120. The provenance of the accountant's figure is unknown.

The February 18, 2004 employment verification letter is from Showcase Commercial and Gaming Cabinets of Las Vegas, Nevada and states that the beneficiary worked as a cabinetmaker for that company from June 1997 to June 1998. That letter is signed by Shanon Bush whose relationship to that company, if any, is unstated.

The check stub photocopies show wages, gross and net, paid to the beneficiary for work performed for Showcase Cabinets of Las Vegas from December 30, 1998 to February 23, 1999. The most recent of those check stubs shows 1999 year-to-date gross wages of \$2,125 for work performed as of February 23, 1999.<sup>6</sup>

The March 9, 2004 employment verification letter is from [REDACTED] who states that he is the former owner of Closets and Good Things. He states that he employed the beneficiary as a full-time cabinetmaker from June 1998 to June 2000, when the business closed, and that because of the closure he is unable to locate contemporaneous documentary evidence of the beneficiary's employment.

The September 23, 2005 letter is also from [REDACTED]. It reiterates but amends the claim pertinent to the beneficiary's employment at Closets and Good Things that Mr. [REDACTED] stated in his previous letter. According to this second letter the beneficiary worked for Closets and Good Things when he left Showcase Cabinets in June 1998, then returned to work for Showcase during December 1998 while continuing to work part-time for Closets and Good Things. The letter continues that the beneficiary resumed full-time employment with Closets and Good Things when he left Showcase during February 1999. Finally, the letter states that Mr. [REDACTED] sold his interest in Closets and Good Things and the new owner changed the name to [REDACTED] and [REDACTED] the instant petitioner, for whom the beneficiary continues to work. That letter does not state the date that the business changed hands.

The director denied the petition on April 2, 2004. In the decision the director noted that the petitioner had petitioned for two additional aliens with proffered wages of \$41,600 and \$35,692.80, and that the petitioner must show the ability to pay the wage proffered to the instant beneficiary and to those two other beneficiaries, a total of \$112,985.60.<sup>7</sup>

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<sup>5</sup> The accountant is apparently relying on the March 4, 2004 version of the petitioner's 2002 tax return in stating that it repaid that amount.

<sup>6</sup> The pay stubs reflect that the beneficiary worked part-time for Showcase Cabinets for four out of the seven reported pay periods.

<sup>7</sup> \$41,600 + (\$35,692.80 x 2).

The director also noted that adjudication of the instant petition was complicated by the fact that the record did not establish that Cabinets, Closets, and Good Things, and the beneficiary's previous employer, Cabinets and Good Things, were the same business.

The appeal in this matter was submitted on April 29, 2004. On appeal, counsel asserted that the petitioner had demonstrated its ability to pay the proffered wage and would submit additional evidence of the beneficiary's qualifying employment experience. No additional evidence was received and the AAO dismissed the appeal, based on the evidence then in the record, on August 26, 2005.

On the motion counsel asserts that the tragic events of September 11, 2001 affected the economy of Las Vegas in general and depressed the petitioner's business in particular and were responsible, therefore, for the petitioner's losses and low profits during the salient years. Counsel argued that evidence in addition to the tax returns submitted should have been considered pursuant to the holding in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel also cited various non-precedent decisions of this office. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Neither on appeal nor on the motion did counsel address the finding in the decision of denial that the petitioner must show the ability to pay the wages proffered to all three of the beneficiaries for whom it has filed petitions in order for the instant petition to be found approvable.

Preliminarily, this office finds that the evidence submitted on the motion clarifies the relationship between the petitioner, Cabinets, Closets, and Good Things, and the beneficiary's previous employer, Cabinets and Good Things.<sup>8</sup> The evidence shows that Cabinets and Good Things employed the beneficiary during some period prior to its sale on an unstated date, when it became the instant petitioner, Cabinets, Closets, and Good Things. The 2000 W-2 form issued to the beneficiary, however, was issued by the instant petitioner, Cabinets, Closets, and Good Things, thus demonstrating that it **acquired the business either sometime during 2000 or previously**. The employment verification letters from Mr. [REDACTED] indicate that his business closed during June 2000, by which he may have meant that he sold the business on that date.

The decision of denial found that the petitioner had failed to demonstrate that the beneficiary has the requisite experience as shown on the approved labor certification, to wit, four years of experience in the job offered. The petition was denied on this basis, in addition to the petitioner having failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The decision on appeal affirmed both bases. Counsel, however, has not addressed the beneficiary's qualifications, either on appeal or in the brief of the instant motion. Absent any argument, the beneficiary's qualifications must be assessed based on the evidence of record.

The February 18, 2004 employment verification letter from Showcase Commercial and Gaming Cabinets of Las Vegas, Nevada states that the beneficiary worked from June 1997 to June 1998, a period of roughly a

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<sup>8</sup> Counsel submitted Mr. [REDACTED] September 23, 2005 employment verification letter on motion.

year. The check stubs, which are the only contemporaneous documentation pertinent to that employment claim, however, demonstrate that Showcase paid wages to the beneficiary for employment from December 30, 1998 to February 23, 1999.

The first letter from [REDACTED] dated March 9, 2004, stated that he employed the beneficiary full-time at Closets and Good Things from June 1998 to June 2000, when the business closed.

The second letter from [REDACTED] September 23, 2005, contains an amended version of the beneficiary's employment history. According to this second letter the beneficiary worked for Closets and Good Things beginning in June 1998 when he left Showcase Cabinets. The letter further states that the beneficiary returned to work for Showcase Cabinets during December 1998 but continued to work part-time for Closets and Good Things. Finally, the letter indicates that the beneficiary left his employment with Showcase and resumed full-time employment with Closets and Good Things during February 1999, which employment continued through the sale of the business to the current owner, through the priority date, and through the date of the letter.

The letter from Showcase, although it is dated February 18, 2004, does not mention the beneficiary working for it from December 1998 to February 1999. The first letter from [REDACTED] states that the beneficiary worked for Closets and Good Things full-time from June 1998 to June 2000, and the second letter from [REDACTED] states that he did not. Finally, neither of the versions of the beneficiary's employment history attested to by [REDACTED] accords with the beneficiary's version of his own employment history as stated on the Form ETA 750B, in which he asserted that he began working for either the petitioner or for [REDACTED] predecessor corporation during September of 1999.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Even if the employment verification letter from Showcase and the first letter from Mr. [REDACTED] are believed, they do not show that the beneficiary has the requisite four years of employment in the job offered. Rather, they show that the beneficiary worked approximately one year for Showcase and approximately two years at Closets and Good Things.

If the expanded version of the beneficiary's employment and the letter from Showcase are believed, then the beneficiary worked (1) full-time from June 1997 to June 1998 for Showcase, (2) full-time from June 1998 to December 1998 for Closets and Good Things, (3) part-time for Closets and Good Things from December 1998 to February 1999, (4) either full-time or part-time for Showcase from December 1998 to February 1999, and (5) full-time for Closets and Good Things and its successor, Cabinets, Closets, and Good Things, from February 1999 through April 19, 2001, the priority date of the petition.<sup>9</sup>

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<sup>9</sup> Experience gained after the priority date may not be used to show that the beneficiary is qualified for the proffered position. See *Matter of Wing's Tea House*, 16 I&N Dec. 158.

Although the amount of employment experience those documents attest to is unclear, they appear, even if believed, to claim less than four years of qualifying employment experience.<sup>10</sup>

The letter from Showcase does not mention employment from December 1998 to February 1999. This casts doubt on the reliability of both the letter and the check stubs showing employment during that period. The two letters from [REDACTED] give contradictory versions of the beneficiary's employment history, which casts doubt on the reliability of both letters. The beneficiary indicates a third version of his employment with Cabinets, Closets and Good Things on the Form ETA 750B. In view of the inconsistencies and contradictions in the evidence, this office does not accept the employment verification letters as reliable evidence of employment.

Both because the employment verification evidence is unreliable and because it does not establish four years of experience, the petitioner has not shown that the beneficiary has the requisite four years of experience. The petition was correctly denied on that basis which has not been overcome on appeal or on the motion.

If the petitioner attempts, in a subsequent motion, to establish that the beneficiary has the experience listed as requisite on the approved labor certification it shall, in accordance with the requirements of *Matter of Ho*, 19 I&N Dec. 582, provide contemporaneous documentary evidence of the employment it intends to rely upon. It must also provide a competent explanation for the discrepancies noted.

Counsel noted that the economy of Las Vegas suffered from the events of September 11, 2001 and implied that this recession caused the petitioner's business to suffer, resulting in the petitioner's losses and low profits during the salient years. Counsel urged that, therefore, additional evidence should be considered of the petitioner's reasonable expectation of future profits, and the petition should be approved pursuant to the decision in *Matter of Sonogawa*, 12 I&N Dec. 612.

*Sonogawa* 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 *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been

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<sup>10</sup> The letter from Showcase states that the beneficiary worked for the company from some unstated date during June 1997 to some unstated date during June 1998, a period of approximately one year. The letter from Mr. [REDACTED] states that the beneficiary worked for him from some unstated date in June 1998 to some unstated date in December 1998, a period of approximately six months; then for him and Showcase from some unstated date in December 1998 to some unstated date in February 1999, a period of approximately two months; and then for Mr. [REDACTED] and his successor from some unstated date in February to at least the priority date, April 19, 2001, a period of approximately two years and two months. This appears to be a period of, at most, three years and eleven months, rather than the requisite four years.

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. Counsel was free to demonstrate that the petitioner's losses or low profits were due to the exigencies of September 11, 2001 or that it was due to the petitioner's status as a start-up business, and that its losses and low profits are unlikely to recur. Instead, counsel has merely demonstrated that the business's present owners acquired it sometime during 2000 and that the events of September 11, 2001 adversely affected the economy of Las Vegas in general. That is insufficient.

Here, the record contains no evidence that the petitioner has ever posted a large profit. The record contains no evidence that the events of September 11, 2001 affected the petitioner's business, specifically. And the record contains little evidence to show that the petitioner reasonably expects better performance in the future. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner's accountant noted that a lack of profit during a given year does not demonstrate that a company is unable to pay wages. The director is not obliged to demonstrate that the petitioner is unable to pay the proffered wage in order to deny the petition. Rather, the petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate that it is able to pay the proffered wage, and that it has been able to do so since the priority date. If it does not meet this requirement of 8 C.F.R. § 204.5(g)(2), then the petition may not be approved. Unless the petitioner has affirmatively demonstrated the continuing ability to pay the proffered wage beginning on the priority date the petition will be denied.

The accountant also noted that start-up companies routinely fail to return an immediate profit. While this statement may be true, it does not release the petitioner from the obligation of showing the continuing ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner paid all of the wages due during the salient years, and that its total wage expense exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. 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<sup>11</sup> or otherwise increased its net income,<sup>12</sup> the petitioner is obliged to show the ability to pay the

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<sup>11</sup> 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. In this case, the petitioner has neither demonstrated nor even alleged that the beneficiary will replace any of the petitioner's current employees.

<sup>12</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary

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<sup>13</sup> 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.

The accountant's reliance on the petitioner's ability to borrow money from its shareholders is misplaced. The ability to borrow from shareholders, or 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 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 its shareholders or another lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

That the petitioner was able, during 2002, to pay back a large portion of the funds it borrowed from its shareholders during 2001 indicates better performance during the subsequent year. It does not, however, relieve the petitioner of the obligation of showing that it was able, during both of the salient years, to pay the additional wages proffered to the three aliens for whom it has petitioned.

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 Sonogawa*, 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 established that it employed the beneficiary during 2000, 2001, 2002, and 2003 and paid him \$8,000, \$29,120, \$35,360, and \$35,360 during those years, respectively. Because the priority date is April 19, 2001, evidence of wages paid during 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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would contribute more to the petitioner's revenue than the amount of the proffered wage.

<sup>13</sup> In the instant case, as was noted above, the petitioner is obliged to show the ability to pay the wages proffered to all three beneficiaries, rather than merely to the beneficiary of the instant petition.

The petitioner is also obliged to show its ability to pay the wages proffered to the other two aliens for whom it has petitioned. Although the petitioner provided W-2 forms for two other employees, including the company's former owner, the record does not demonstrate whether or not either of them is one of the two other alien workers for whom the petitioner also petitioned.

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, 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). Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's 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 the 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, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>14</sup> 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 \$35,692.80 per year. The priority date is April 19, 2001. As was noted above, because the petitioner has recently filed three alien worker petitions, the petitioner must show the ability to pay \$112,985.60, which is the aggregate amount it proposes to pay to all three prospective employees.

During 2001 the petitioner paid the beneficiary \$29,120 and must show the ability to pay the remaining \$83,865.60 balance of the aggregate proffered wage during that year. During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage

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<sup>14</sup> The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

out of its profits during that year. At the end of that year the petitioner had net current assets of \$4,608. That amount is insufficient to pay the balance of the aggregate amount of the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The record contains two competing versions of the petitioner's 2002 tax return. Those returns appear to be an original return and an amended return. The second return, signed March 4, 2004, was acknowledged by IRS and a check the petitioner drew to IRS shows that it paid the taxes shown on that second 2002 return. This office finds that second return to be the petitioner's 2002 tax return.

During 2002 the petitioner paid the beneficiary \$35,360 and must show the ability to pay the remaining \$77,625.60 balance of the aggregate proffered wage during that year. During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$70,120. That amount is insufficient to pay the balance of the aggregate proffered wage during that year. At the end of that year the petitioner had net current assets of \$8,131. That amount is insufficient to pay the balance of the aggregate proffered wage. The petitioner has submitted no reliable evidence of any other funds 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 paid the beneficiary \$35,360 in wages. Ordinarily the petitioner would be obliged to show the ability to pay the remaining \$77,625.60 balance of the aggregate proffered wage.

The petition, however, was submitted on May 14, 2003. On that date the petitioner's 2003 tax return was unavailable. No evidence pertinent to 2003 was subsequently requested. The petitioner is excused from the obligation to show its ability to pay the balance of the aggregate proffered wage during 2003 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal or on motion.

As was noted above, the petition was also correctly denied based on the petitioner failing to show that the beneficiary is qualified for the proffered position, which basis has also not been overcome.

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 motion is granted. The AAO's decision of August 26, 2005 is affirmed. The petition is denied.