

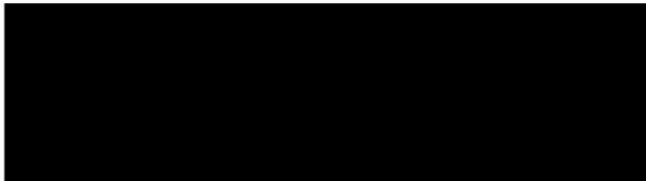


U.S. Citizenship
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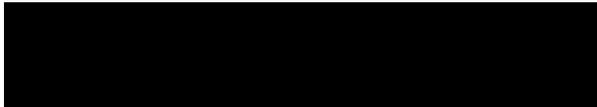
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FILE: EAC 06 098 52496 Office: NEBRASKA SERVICE CENTER Date: **SEP 04 2008**

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, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be sustained.

The petitioner is an accounting and auditing firm. It seeks to employ the beneficiary permanently in the United States as an audit supervisor. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent 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 December 29, 2005 priority date of the visa petition. 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 November 16, 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 2005 priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO acknowledges that the director's analysis in the initial decision is correct; however, evidence submitted on appeal (previously unavailable) provides sufficient weight to overcome the director's valid concerns as will be explained 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.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Service].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 Application for Permanent 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 9089 Application for Permanent 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 9089 was accepted on December 29, 2005. The proffered wage as stated on the Form ETA 750 is \$24.76 an hour, or \$51,500 per year.¹ The Form ETA 9089 states that the position requires a bachelor's degree in accounting, and one year of experience in the proffered job.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.² On appeal counsel submits a brief and the following evidence:

A letter from [REDACTED], New Jersey, dated December 14, 2006. The writer stated that he or she has examined the certain financial data of the petitioner, and that the petitioner reports its income and expenses for tax purposes on a cash basis. The writer states that it is typical of professional organizations that generally have very limited liabilities, but do have significant accounts receivable. The letter writer states that the petitioner, based on expenses on the cash basis and revenue on the accrual basis, had a net income of \$54,000 for tax year 2006. The writer also states that he or she had reviewed the petitioner's pro-forma revenues and expenses for the tax year 2007 which projected a net income of approximately \$65,000 on accrual basis. The writer concludes by stating the petitioner has sufficient net income available to pay the beneficiary the prevailing wage of \$52,000;

An affidavit from [REDACTED] the petitioner's co-owner and co-founder. In his letter, [REDACTED] states that the petitioner specializes in providing auditing and accounting services for municipalities, boards of education, authorities and related entities. [REDACTED] also states that the petitioner's income has grown in recent years but that in order to defer corporate taxes the petitioner defers excess income over expenses to the subsequent year. [REDACTED] adds that the petitioner has a positive net income on both an accrued and pro-forma basis.

A copy of a document that itemizes the petitioner's expenses for the period December 1, 2005 to November 30, 2006. This document states that the petitioner had a net income of \$54,000;

A copy of a document that lists the petitioner's Board of Education, municipalities, and other authorities clients;

A copy of the beneficiary's earnings statement for the period ending December 31, 2006 that indicates he earned \$52,499.98 in tax year 2006;

¹ In the Form ETA 9089, at Section G, Item 1, the petitioner indicated the offered wage was \$52,000. For purposes of these proceedings, the AAO will use the figure of \$51,500, since it is based on the prevailing hourly wage, stipulated on the Form ETA 9089.

² 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).

A copy of the beneficiary's W-2 Wage and Tax Statements for tax year 2006 that indicates he earned gross pay of \$52,499.98 and W-2 wages of \$51,044.98;

With the initial petition, the petitioner submitted its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2004.³ The petitioner also submitted a letter dated February 6, 2006, written by ██████████ C.P.A., Union, New Jersey. In his letter, ██████████ stated that he had been engaged by the petitioner to summarize its financial transactions, prepare tax returns and complete financial statements for internal use for an estimated 25 years. ██████████ stated that based on a review of the petitioner's recent financials for the years 2000 to 2005 and the petitioner's business activity in 2006, the petitioner has the ability to pay the beneficiary the proffered wage of \$52,000.

In response to the director's Request for Further Evidence (RFE) dated August 8, 2006, the petitioner submitted its Form 1120S for tax year 2005, a copy of the beneficiary's 2005 W-2 Form, and the beneficiary's biweekly Earnings Statements for the period of July 31, 2006 to August 30, 2006. The Beneficiary's W-2 form indicated he earned \$41,638 in gross pay and \$40,375.67 in W-2 wages in tax year 2005. The three Earnings Statements submitted to the record in response to the director's RFE indicate that the beneficiary earned a biweekly salary of \$2,000. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that Citizenship and Immigration Services (CIS) in the instant petition, interpreted the regulation at 8 C.F.R. § 204.5(g)(2) too narrowly. Counsel states that the CIS based its decision on the size of the petitioner's business operation. Counsel notes that the employment-based immigrant petition category does not place restrictions on the age or size of the petitioner. Counsel also notes that CIS failed to consider that in appropriate cases additional evidence such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner. Counsel refers to a publication "Employment-Based Immigration at the Millennium: EB Recommendations for the Future, Immigration Briefings I" (Jan. 2001).

Counsel then states that CIS failed to take into account that the petitioner is also free to submit whatever additional evidence it believes is helpful to demonstrate its ability to pay, including unaudited financial statements, W-2 Forms, and other relevant documentation. In support of this assertion, counsel refers to minutes from an American Immigration Lawyer Association (AILA) Liaison meeting with the Vermont Service Center, (April 30, 1993), 12 *AILA Monthly Mailing* 598, Exhibit 1 Q & A, \$5 and \$25 (July-Aug. 1993.)

Counsel states that CIS should be more flexible in terms of the evidence it accepts and should consider evidence supplied by individuals with personal knowledge of the petitioner's business and finances, such as affidavits by the employer's banks, an accountant, or shareholders. Counsel refers to a publication identified as *BALCA Deskbook*, Chapter 30, Section I.B.

Counsel points out that based on an analysis of the petitioner's business, the gross profit percentage has increased in each of the past three years. Counsel notes that the beneficiary's pay stubs submitted to the record indicate that the beneficiary is paid \$2,000 on a biweekly basis, namely the 15th and the last day of each month, which is the equivalent of \$48,000 per year. Counsel states that the petitioner's tax return reported a net income of \$6,221, and that the beneficiary's actual wages combined with the petitioner's net income equals \$54,221.

³ The AAO notes that the priority date year for the instant petition is 2005. Therefore, the petitioner's net income for 2004 is not dispositive of the petitioner's ability to pay the proffered wage.

Counsel then cites two unpublished AAO decisions. In the first AAO decision, it was determined that a sole proprietor or partner might establish the ability to pay where either is willing to waive compensation or to transfer personal funds for use to pay the proffered wage. According to counsel, the other unpublished AAO decision stands for the proposition that where an employer has been paying wages to subcontractors whose services will no longer be necessary when the beneficiary takes up the intended employment, CIS would likely accept the petitioner's ability to pay the proffered wage since this money would now be available for payment to the beneficiary as a full-time employee.

Counsel also refers to *Masonry Masters, Inc. v. Thornburgh* 875 F. 2d at 898 (D.D. Cir. 1989), and notes that the court criticized CIS because its evidentiary standards did not seem to take into account that the beneficiary was being petitioned precisely because he or she would presumably enhance the petitioner's economic condition. Counsel states that *Masonry Masters* established that CIS must consider the petitioner's intention to utilize money previously paid, and prospectively budgeted for officer's compensation and wage and salary expenses as valid evidence of the petitioner's ability to pay the proffered wage. Counsel states that based on *Masonry Masters*, CIS should consider that the beneficiary's fulltime contribution to generating revenue for the petitioner would more than cover the cost of his salary expense to the beneficiary, and that the beneficiary's services would aid in the expansion of the petitioner's existing customers and allow the company to expand its clientele.

Counsel then refers to a 1992 decision in which the AAO sustained the appeal of a petitioner where the petitioner had initially submitted unaudited financial statements to demonstrate its ability to pay the proffered wage and then on appeal, submitted its quarterly wage reports to demonstrate it had actually paid the beneficiary the proffered wage throughout the priority year. Counsel also refers to another unpublished AAO decision in which a petition was approved after the petitioner submitted W-2 Forms, after initially submitting its income tax return that showed a net loss deduction.

Counsel further notes that the letter from ██████████ did not take the beneficiary's fulltime services into consideration, but based on the analysis of the petitioner's income and expenses, determined the petitioner would be able to pay the additional salary in tax year 2005 and 2006. Counsel further notes that the *CIS Immigration Procedures Handbook* states that "depreciation expenses may be added back to the taxable income and the CIS will consider the sum of these two figures in evaluating the ability to pay question."

Counsel then cites to *Matter of Sonogawa*, 12 I&N Dec. 612, (Reg. Comm. 1967) and states that this decision held that the petitioner's expectation of a continued increase in business, if reasonable, could establish an ability to pay the proffered wage, in spite of circumstances that result in uncharacteristically unprofitable years. Counsel states that the petitioner in the instant petition has a reasonable expectation to continue to experience an increase in business and future profit. Counsel notes that the office building from which the petitioner operates is 50 percent owned by the petitioner's two founders. Counsel notes that, operating as a sale leaseback, this property indicates that the petitioner has significant cash flow and the ability to pay the proffered wage of \$52,000. Counsel again refers to the AILA liaison minutes that state the petitioner is free to submit whatever additional evidence it believes is helpful to demonstrate its ability to pay including unaudited financial statements, W-2 Forms and other relevant documentation.

In concluding, counsel reiterates his earlier assertion with regard to the director's decision being based on the petitioner's size. Counsel states that the petitioner is a small business, and that small businesses in America strengthen the economy and are the backbone of America's growing economy. Counsel states that a negative decision in the instant petition should not be based solely on the petitioner's size.

The AAO does not find counsel's assertions on appeal to be persuasive. On appeal, counsel refers to several decisions issued by the AAO concerning establishing the petitioner's ability to pay, but does not provide published citations. 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). Further, the AAO would note that the circumstances of the two petitioners as described by counsel are not analogous to the instant petitioner. For example, although the first unpublished AAO decision refers to sole proprietorships or partnerships, the petitioner is neither, but rather an S Corporation. In the second unpublished AAO decision, the issue of utilizing money paid to subcontractors for the beneficiary's wages is raised; however, the petitioner has not raised the issue of subcontractors within its business operations and has not identified any subcontractors and their present compensation that could be used to pay the beneficiary's wages.

On appeal, counsel also refers to other unpublished AAO decisions that concerned petitioners who submitted quarterly wage reports, or W-Forms to establish their ability to pay proffered wages apparently following the denial of the respective petitions, to apparently assert that such documentation can be utilized in employment-based petitions. If counsel is asserting that these types of evidence can be examined in these proceedings, the AAO agrees with counsel. The use of W-2 Forms or employer's quarterly tax reports have been utilized in employment-based petitions to establish the wages paid to beneficiaries and whether the beneficiary was employed by the petitioner, one method used to establish the petitioner's ability to pay the proffered wage, as will be discussed more fully further in these proceedings. Where found relevant and probative, petitions based on such additional evidentiary documentation can establish a petitioner's ability to pay the proffered wage. The AAO notes that such documentation does not obviate submission of the three types of documentation identified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, audited financial records, federal income tax returns, or annual reports.⁴

Counsel's reliance upon AILA's minutes from a 1993 AILA liaison meeting with the Vermont Service Center is also without merit. At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

It is not clear that the AILA teleconference notes are to be interpreted as counsel did. With regard to counsel's assertion that the Vermont Service Center has stated that the use of unaudited financial statements or the use of depreciation added back to the petitioner's net income is allowed in establishing the petitioner's ability to pay the proffered wage, these statements are incorrect and would constitute error. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). The regulation at 8 C.F.R. § 204.5(g)(2) specifically notes that audited financial statements can be submitted to establish the petitioner's ability to pay the proffered wage, and other federal cases, such as *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) support our interpretation that depreciation expenses cannot

⁴ The AAO notes that the same regulation states in pertinent part, that, 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 CIS.

be added back to the petitioner's net income in determining whether the petitioner has the ability to pay the proffered wage.⁵

It is also noted that the AAO's authority over a service center is similar to that of a court of appeals and a district court. Even if a service center director had previously approved immigrant petitions on behalf of other similarly unqualified beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On appeal, the petitioner submits its financial report listing expenses and revenues for the period of December 2005 to November 2006. The petitioner also submitted a letter from ██████████, its accountant, with regard to the petitioner's ability to pay the proffered wage. On appeal, counsel submits the statement from ██████████. Both accounting firms state that the petitioner has the ability to pay the proffered wage. However, as noted previously, the petitioner's financial report accompanied by the ██████████ letter is unaudited. The unaudited financial statements that counsel submits are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Further the ██████████ letter that the petitioner submits on appeal examines the petitioner's expenses on the cash basis and the petitioner's revenue on the accrual basis, thereby combining two accounting methods for the same financial data. The AAO notes that the petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purposes. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not satisfactorily demonstrated why changing from the cash to accrual method would make available tens of thousands of dollars that would otherwise not have appeared in any year.

In his letter, ██████████ states that he has reviewed the petitioner's financials for tax years 2000 to 2005 and its business activity in 2006, and that, based on this review, the petitioner has the ability to pay the proffered wage of \$52,000. However, ██████████'s letter is not probative evidence for two reasons. First, the period of time from tax year 2000 to tax year 2004 is prior to the 2005 priority date and is not dispositive of the petitioner's ability to pay the proffered wage in 2005 and onward. Second, if the petitioner was attempting to establish an historic overview with the objective of applying *Matter of Sonogawa* to the instant petition, ██████████ provides no further evidentiary documentation to further substantiate his assertions with regard to years preceding and following the 2005 priority year. Thus, the two statements by two accountants familiar with the petitioner's business operations are not sufficient to establish the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established in 1978, to have a gross annual income of \$1,350,000, and to currently have ten employees. The petitioner did not indicate its annual net income on the I-140 petition. On the Form ETA 9089, signed by the beneficiary on January 12, 2006, the beneficiary

⁵ The AAO will discuss how it calculates the petitioner's net income more fully further in these proceedings.

claimed to have worked for the petitioner fulltime as an audit supervisor from April 1, 2000 to December 28, 2005.⁶

Counsel's assertion with regard to the denial of the instant petition based on the petitioner's number of employees is without merit. The burden of proof is on the petitioner to establish that the petitioner has sufficient financial resources to add an additional employee, either based on the wages already being paid to the beneficiary, or the petitioner's net income or net current assets. There is no regulatory or statutory correlation between these factors and the size of the petitioner's work force.

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, 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 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 director in his request for further evidence dated August 8, 2006, requested that the petitioner submit W-2 Forms for the beneficiary for tax year 2005, which the petitioner provided. On appeal, the petitioner provides the beneficiary's W-2 Form for tax year 2006. These documents establish that the petitioner paid the beneficiary \$41,638.40 in tax year 2005 and \$52,499.98 in tax year 2006. Thus, the petitioner established its ability to pay the proffered wage in tax year 2006, but did not establish it paid the beneficiary a salary equal to or greater than the proffered wage of \$51,500 in tax year 2005. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2005, based on its net income or net current assets.⁷

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, 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 supported by federal case law. *See 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 receipts and wage expense is misplaced. Showing that the petitioner's

⁶ The beneficiary also claimed that he worked for Coldwell Banker from June 1, 2004 to December 28, 2005, working 20 hours a week.

⁷ The difference between the beneficiary's actual wages and the proffered wage are \$9,861.60 in tax year 2005.

gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 Chang*, 719 F. Supp. at 537.

The petitioner submitted its tax returns for tax year 2004 and 2005. Since 2004 is prior to the 2005 priority date, as previously stated, the petitioner's 2004 tax return is not dispositive in these proceedings. Thus, the AAO will only examine the petitioner's 2005 net income. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$51,500 per year from the priority date:

- In 2005, the Form 1120S stated a net income⁸ of \$1,971.

Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$9,861.60.

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, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become

⁸The AAO notes that the director erroneously identified the petitioner's net income in 2005 as \$6,221, based on line 21 of the Form 1120S. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for tax year 2005, the petitioner's net income is found on Schedule K of its tax return.

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.⁹ 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 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. Based on the information contained on the petitioner's Form 1120S for tax year 2005, its net current assets were -\$84,083. Thus, the petitioner cannot establish its ability to pay the difference between the beneficiary's actual wages in 2005 and the proffered wage, namely, \$9,861.60.

Therefore, from the date the Form ETA 750, was filed with the 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.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), a case that 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.

While counsel's assertions on appeal are not persuasive, we cannot ignore that, with the submission of the 2006 Form W-2, the petitioner now need only establish the ability to pay for three days in 2005. The AAO notes that the petitioner claims to have been established in 1978, or thirty years ago.¹⁰ The AAO also notes that the petitioner has established that it paid the proffered wage to the beneficiary in tax year 2006, which began three days after the 2005 priority date was established. In viewing the overall circumstances of the petitioner, including the petitioner's longevity and business operations, the AAO determines that the petitioner has a viable business operation and can offer the beneficiary a realistic job. Thus, the petitioner has established its ability to pay the proffered wage.

⁹According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹⁰ The I-140 petition and the Form ETA 989 both indicate the petitioner was established in 1978.

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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 met that burden.

ORDER: The appeal is sustained.