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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC-02-092-50574 Office: CALIFORNIA SERVICE CENTER Date: NOV 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider[1]. The motion will be granted. The prior decision of the AAO will be withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is a horse ranch. It seeks to employ the beneficiary permanently in the United States as a barn boss. 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 AAO affirmed the director's decision.

The petitioner substituted counsel subsequent to the AAO's decision. On motion, new counsel submits additional evidence, and a supplemental brief and correspondence. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel asserts that the AAO erroneously applied precedent and should consider the petitioner's owner's assets and the totality of circumstances in determining the petitioner's ability to pay the proffered wage based on a number of cases he cites to in his brief. Counsel submits affidavits and other new evidence for consideration. Thus, the motion qualifies for consideration as a motion to reopen and a motion to reconsider.

Counsel's motion is considerably late, however, in violation of the time restriction cited in 8 C.F.R. § 103.5(a)(1)(i). Counsel acknowledges the tardiness of the motion and requests that the time restriction be waived since the petitioner has "unusual circumstances" excusing the late filing. Counsel submits an affidavit from [redacted] the "Director of Human Resources of Lexington Commercial Holdings and General Manager of [the petitioner] (companies owned by Mr [redacted]." She states that the petitioner's former counsel told her that the AAO's decision was final and "no further action" could be taken. She also states that she was skeptical and contacted CIS directly to ask if there was anything that could be done. She stated that she was informed that "there is nothing you can do, the decision is final," and "reluctantly accepted" the advice since it came from CIS. Approximately two months after that, she was referred to current counsel of record who stated there was possible recourse in this matter. Counsel also states that "[t]here was ineffective assistance of counsel and misinformation provided by [CIS] to Ms [redacted] both unusual circumstances which should not prejudice Mr. [redacted] and [the petitioner] from seeking reconsideration of the erroneous denial."

An affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider a proceeding before CIS. 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three days is added to the proscribed period. 8 C.F.R. § 103.5a(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner's motion was not timely filed. The AAO mailed its decision to the petitioner on April 21, 2004. CIS received the petitioner's motion 89 days later on July 19, 2004. Counsel does not present evidence

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[1] Although the initial motion filed was only titled a motion to reconsider, counsel refers to the motion as a motion to reopen and reconsider in subsequent correspondence. The motion will be considered as both a motion to reopen and reconsider.

supporting his claim that ineffective assistance of counsel impacted the petitioner's ability to file a timely motion. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Thus, counsel's reliance upon ineffective assistance provided by former counsel as a reason for the petitioner's late motion filing is not accepted.

There is also no evidence concerning Ms. [redacted] purported conversation with CIS and the "misinformation" she received. Regardless, CIS is not tasked with providing legal advice to the public. Thus, the petitioner's excuse is not the type of demonstration of a "reasonable delay beyond the control of the petitioner" envisioned by the regulation at 8 C.F.R. § 103.5(a)(1)(i) to excuse a late motion filing. However, the AAO will exercise favorable discretion and adjudicate the motion's substantive merits despite the late filing.[2]

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on January 6, 1998. The proffered wage as stated on the Form ETA 750 is $14.54 per hour, which amounts to $30,243.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on November 30, 1995 and to currently employ 21 workers. The petitioner left blank the boxes requesting the petitioner's gross and net income. In support of the petition, the petitioner submitted no evidence of its ability to pay the proffered wage.

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[2] The AAO is not determining that the motion's tardiness is excused as reasonable and beyond the control of the petitioner.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 26, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Form 1120S corporate tax returns for the years 1998 through 2001. An accompanying letter from the petitioner's vice president states that although the petitioner has been operating at a loss, "its balance sheet reflects substantial assets ($2.5 million)," and "the shareholder personally guarantees the operations of the farm, and makes capital contributions to [the petitioner] as needed."

The petitioner's tax returns reflect the following information for the following years:

	1998	1999	2000	2001
Gross receipts or sales	$124,914	$317,844	$180,591	$279,439
Salaries and wages	$146,250	$182,811	$458,676	$867,574
Net income[3]	-$1,720,656	-$1,691,372	-$2,628,717	-$2,306,996
Current Assets	$472,488	$147,611	$39,844	$108,584
Current Liabilities	$93	$803	$55,013	$413
Net current assets	$472,395	$146,808	-$15,169	$108,171

Citing the consistent significant losses reported by the petitioner, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 21, 2002, denied the petition.

On appeal, former counsel asserted that the petitioner's major shareholder [redacted] is "one of the wealthiest persons in the United States. According to Forbes magazine, Mr [redacted] ranks as one of the one hundred richest persons in the country. . . . His estimated worth is currently at $1.8 billion." Evidence submitted on appeal includes a copy of a print out from what appears to be Forbes's website and the search results in 2002 of the 400 richest Americans, including [redacted] on the list. Also included is a copy of an Internet article on wealthy Americans despite the current economic recession, and [redacted] is mentioned, along with his wife, as the founders of Century City-based aircraft leasing company International Lease Finance Corp. Both [redacted] and his wife are mentioned as billionaires. Counsel also submits a letter from Ms [redacted] General Manager of the petitioner, stating that the beneficiary has been provided with a compensation package including a salary in excess of $40,000 per year, free housing worth $1,700 per month, and a mobile phone. This statement indicates that the beneficiary is already being paid in excess of the proffered wage.

A letter from [redacted] accompanied the appeal stating that CIS correctly noted the petitioner's losses, however, failed to see the complete financial picture, as follows:

> There are several other horse and livestock farms in the United States that strive to produce Olympic level competition horses, that operate in a similar fashion as [the petitioner]. These farms, such as my own, are funded by private owners and for several years may not show

[3] Ordinary income (loss) from trade or business activities on Line 21 .

> positive numbers in the Ordinary Income column on their tax returns due to the high cost of producing Olympic horses and riders.
>
> In light of that and in support of [the beneficiary], I, [redacted] hereby confirm to [CIS] that my wife and I are the sole owners of [the petitioner], a family and livestock farm, and that I have, and continue to, provide the funds necessary for [the petitioner] to operate from my personal resources.

Also accompanying the appeal is a letter from [redacted] president of Gettleson, Witzer & Co., Mr. [redacted] ccountants and business managers. Mr. [redacted] states that Mr. [redacted] net worth is in excess of $250,000,000.

The AAO dismissed the appeal after reviewing the figures reflected in the petitioner's tax returns and the evidence submitted on appeal. The AAO determined that since the petitioner is structured as a corporation, it is a separate entity from Mr. [redacted] and thus Mr. [redacted] personal assets may not be considered in support of the petitioner's ability to pay the proffered wage. The AAO determined that the proffered wage could have been paid out of the petitioner's net current assets for every year but 2000, but since the petitioner must prove its continuing ability to pay the proffered wage from the date of the priority date, the failure to show enough net income or net current assets in every year resulted in the petitioner's failure to establish its ability to pay the proffered wage and a denial of the petition.

On motion, counsel states that the petitioner is:

> [o]ne of the premier jumper equestrian training farms in the U.S. with horses competing at the Olympic level. [The petitioner] employs [redacted] and her husband [redacted] internationally recognized jumping riders and trainers. The Simpsons have won and placed at the top in hundreds of Grand Prix and other jumping events worldwide, riding on [the petitioner's] horses.

The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). However, articles attached to the appeal corroborate counsel's statements. Ms. [redacted] the petitioner's employee, has placed in the world championships riding a horse owned by the petitioner. Also, a letter from Mr. [redacted] Chairman of the USA Equestrian's Show Jumping Active Competitors Committee, also accompanying the motion, states that:

> [redacted] [petitioning entity's farm] is a leading American jumper sport horse training stable that competes worldwide at the Olympic level. [The petitioner] has leading Grand Prix horses which are shown in the U.S., Canada, and Europe by Nicole Shanihian Simpson and her husband [redacted] famous Olympic level equestrian trainers and riders...

Counsel restates Mr. [redacted] appellate statement that he continues to fund the petitioner against losses and that his farm is run like many "horse and livestock farms in the United States that strive to produce Olympic level competition horses." Mr. [redacted] letter also states that many businesses like the petitioner's business involve unusual circumstances like international travel for competitions involving horses, riders, trainers, and other staff. Counsel quotes Mr. [redacted] letter that:

> It costs hundreds of thousands of dollars for such a trip. Usually only a farm owned by a very wealthy individual can afford to compete at this level. Thus, our premiere farms usually operate at a loss and are funded by personal assets and income, as [redacted] funds [the petitioner].
>
> The prize money for the Grand Prix winners however, only provides an offset of some expenses. There are few prize money events above $30,000 and that money is divided by the top 10 places. Even the best top prize money winning horses can break even or earn a small to moderate profit. The farm earns the increased value of the horses which when sold creates profits. But owners of great Grand Prix horses are reluctant to sell them because they are so rare and difficult to replace and training young horses takes years and whether they will make it in Grand prix competitions is unknown.

Mr. [redacted] goes on to state that the industry the petitioner is involved in does not generate sufficient profits and requires supplemental funds out of their owner's pockets. He states that product endorsements and services do not generate much revenue. Then Mr [redacted] states that "to hold [the petitioner] to a standard applied to a restaurant, software company, or other for-profit enterprise is inappropriate for it does not take into account the unique nature of the international sport horse industry at the Olympic level." Mr [redacted] also states the following:

> A sports horse business funded with the assets/income of a wealthy owner's assets and income to pay expenses, including salaries, is far more secure than a horse business dependent on earnings. Businesses reliant on earned income have a much higher failure rate than businesses run by wealthy benefactors.
>
> Businesses reliant on income are subject to losses due to market fluxuations [sic], poor management decisions, inadequate capitalization, poor marketing, and other business problems. Mr [redacted] [petitioning entity's farm] is not affected by these factors because of his vast resources.

On motion, counsel states that the AAO misstated and misapplied the law pertinent to a petitioning entity's ability to pay the proffered wage. He states that the assets and income of funders of many types of organizations have been accepted to show ability to pay the proffered wage for religious organizations, sole proprietors, and corporations. Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (D.D.C. 1998) for the premise that the assets of the parent's not-for-profit organization should be considered in determining a separate petitioner's ability to pay its music teacher's proffered wage. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a not-for-profit church's ability to pay the wages of a piano teacher. Here, counsel asserts that the assets of the owner of a for-profit corporation should be considered. The facts are just not comparable.

Additionally, counsel cites case law supporting the premise that a sole proprietor owner's assets should be considered in determining a sole proprietorship's ability to pay the proffered wage.[4] The AAO concurs, however,

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[4] He also submits subsequent correspondence, dated June 29, 2004, citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. *Ranchito Coletero* deals with a

not based upon counsel's case citations. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary,* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The AAO consistently holds that a sole proprietor's owner's assets may be considered and in fact stated so in its decision dated April 21, 2004 for the instant petition. However, the petitioning entity in the instant petition is not a sole proprietor. The petitioner is a corporation and thus sole proprietorship precedent is not directly applicable and does not support counsel's arguments.

Counsel states that a Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the $4 million personal assets of the corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. Counsel does not state how DOL precedent is binding in these proceedings.[5]

Counsel also references language from cases previously cited by the AAO that states that "other evidence may be submitted." The regulations and case law do in fact state that if a petitioning entity's tax returns, annual statements, or audited financial statements reflect a deficiency or are unavailable, the petitioner may submit other credible and probative evidence of its ability to pay the proffered wage. What is credible and probative depends upon case law and regulatory requirements. The regulations provide for profit/loss statements, bank statements, or personnel records as evidence that "in appropriate cases" may be submitted to CIS.[6] Nothing in the regulations or case law make it a mandatory requirement that CIS consider alternative evidence of the petitioner's ability to pay the proffered wage other than its financial situation as reflected in its annual reports, federal tax returns, or audited financial statements.[7]

Counsel's citation to language that "other evidence may be submitted" that he found within cases that hold against the petitioner's overall situation[8] was put forth to support his argument that Mr. [redacted] personal assets should be considered to support the petitioner's ability to pay the proffered wage. He also references parent and subsidiary relationships. Counsel's reliance on the assets of Mr. [redacted] is not persuasive and simply impermissible under the law. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17

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sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

[5] Counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner shows continuous and increasing losses, and higher salaries paid out than revenue received so an increase in operating losses as well. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

[6] The language referencing such evidence uses the term "may" in 8 C.F.R. § 204.5(g)(2).

[7] The language referencing such evidence uses the term "shall" in 8 C.F.R. § 204.5(g)(2).

[8] For example, he cites to *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) and *Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003), both which will be cited below in the decision.

I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). While counsel attempts to distinguish the facts of these cases from the instant petition, the impermissibility of intertwining a corporate identity with its owners is a basic tenet of the law.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it actually employed and paid the beneficiary wages in excess of $40,000. Thus, this indicates that the petitioner can pay the proffered wage since it already is paying in excess of the proffered wage.

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 established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's 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 petitioner's net income is negative for every year and thus, the petitioner cannot show its ability to pay the proffered wage out of its net income.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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. It is notable that the petitioner's total liabilities equaled its total assets in every relevant year.

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

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[9] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

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. As noted in the AAO's prior decision, the petitioner has sufficient net current assets in every year except 2000 from which to pay the proffered wage. The petitioner's net current assets during the year in question, 2000, however, were negative.

On motion, counsel submits a supplemental brief, dated July 30, 2004, with a letter from [redacted] the petitioner's vice president of finance. Ms [redacted] states that the deficient net current assets in 2000 were the result of shifting money around. She states that "[d]ue to an accounting adjustment, a due to affiliate (liability) in the amount of $55,013 was recorded on the book." This explanation does not overcome the negative balance.

With the supplemental brief, counsel also submits Schedule L of the petitioner's 2002 corporate tax return but does not provide a complete tax filing. Schedule L of the 2002 return shows that the petitioner's net current assets are positive. Also, counsel submits an unaudited statement of assets and liabilities for the period ending December 31, 2003. The unaudited financial statement is 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. Thus, the unaudited financial statement submitted with the supplemental brief on motion will not be considered.

Counsel's final argument is that *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), is applicable to the petitioner. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The totality of circumstances weighs in the petitioner's favor based upon the limited facts of this case. It has substantial net current assets every year but one from which to pay the proffered wage. Like *Sonegawa*, the petitioner has a good reputation, as evidenced by Mr. [redacted] letter attesting to the breeding and equestrian accomplishments which is further corroborated by newspaper articles contained in the record of proceeding. The petitioner, which is involved in an unusual industry with less focus on regular profiting like businesses in other industries and more emphasis on winning sporting competitions, shows evidence of substantial capitalization in

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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.

the millions of dollars and its taxes reflect ample wages paid to its employees. Based upon Mr. [redacted] assessment, the petitioner has the potential to earn significant income upon the sale of its winning horses. Additionally, the petitioner has demonstrated that it is already paying the actual wages to the [beneficiary or former barn boss,] which shows an ability to pay the proffered since it already [is/has paid {substantial portions of} the proffered wage]. Thus, based upon these limited circumstances and the evidence contained in the record of proceeding, many of which parallel the facts in *Sonegawa,* the AAO will exercise its discretion in the petitioner's favor.

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 motion is granted. The prior decision of the AAO, dated April 21, 2004, is withdrawn. The appeal is sustained. The petition is approved.