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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 06 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

A Form G-28 Notice of Entry of Appearance submitted with the petition in this matter shows that the petitioner was represented by counsel. Subsequently, the petitioner executed another Form G-28 recognizing another attorney as its counsel-of-record. All representations submitted into the record will be considered but the decision in this matter will be provided only to the petitioner and to its current counsel.

The petitioner is a software development/data management firm. It seeks to employ the beneficiary permanently in the United States as a database marketing analyst/database design analyst. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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 December 16, 2002. The proffered wage as stated on the Form ETA 750 is $68,000 per year. The Form ETA 750 states that the position requires four years of college culminating in a bachelor's degree in engineering and five years of experience either in the proffered position (database design analyst/database marketing analyst) or five years experience as a business analyst.

The Form I-140 petition in this matter was submitted on December 13, 2004. On the petition, the petitioner stated that it was established during 2001 and that it employs seven workers. The petition states that the petitioner's gross annual income is $200,000. The word "Profitable" was entered in the space reserved for the petitioner to report its net annual income. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Easton, Connecticut. The Form I-140 visa petition indicates that the petitioner would employ the beneficiary in Bridgeport, Connecticut.[1]

The instructions to the Form ETA 750B require the beneficiary to list all jobs held during the last three years **and** to list all jobs previously held that were related to the proffered position. On that form, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have been employed (1) as a business analyst/project manager for Digital Lighthouse Corporation in Shelton, Connecticut from September 1998 to July 2001 and (2) as a business analyst/project manager for Crescendo Connections in Easton, Connecticut from August 2001 until at least December 10, 2002, the day he completed the Form ETA 750B. The beneficiary listed no other employment.

With the petition, as to the petitioner's ability to pay the proffered wage, the petitioner submitted (1) an unaudited balance sheet showing the petitioner's assets and liabilities as of October 31, 2004, (2) web content showing various account balances of an unidentified company as of November 8, 2004, and (3) a spreadsheet showing the petitioner's projected 2005 and 2006 quarterly revenues and expenses.

As to the beneficiary's qualifying employment experience counsel submitted an undated letter from the editorial coordinator of The Times of India Group stating that he had previously been an account manager at 4th Dimension and Beyond and, in that capacity, supervised the beneficiary's performance as an account executive there from July 27, 1995 to August 14, 1996. This office notes that the beneficiary did not include

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[1] As both Easton and Bridgeport are located in Fairfield County, the Form ETA 750 labor certification issued for employment in Easton, Connecticut is apparently valid for employment in Bridgeport, Connecticut.

this employment claim on the Form ETA 750B, which requested that the beneficiary list all experience related to the proffered position.

Counsel also submitted a letter dated July 17, 2001 from the managing director of Digital Lighthouse Corporation confirming that the beneficiary worked for that company as project manager in business intelligence and data warehousing from September 28, 1998 to July 17, 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite five years work experience, the Vermont Service Center, on January 27, 2005, requested evidence pertinent to both of those issues.

As to the beneficiary's employment history, the service center stated that the evidence provided demonstrates only three years and eleven months of experience. Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that the petitioner submit evidence that the beneficiary has five years of qualifying experience and stipulated that the evidence should be in the form of 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.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that the petitioner provide its 2002 and 2003 tax returns or, in the alternative, annual reports with audited or reviewed financial statements.[2]

In response, the petitioner's previous counsel submitted (1) the July 31, 2003 compiled financial statements of the petitioner and a subsidiary, (2) the petitioner's unaudited balance sheet as of March 31, 2005,[3] and (3) a letter dated April 12, 2005. Counsel did not provide the petitioner's 2002 or 2003 tax returns or audited or reviewed financial statements as the service center specifically requested.

In his April 12, 2005 letter the petitioner's previous counsel stated that the beneficiary worked for 4th Dimension and Beyond from July 1995 to August 1996, for Digital Lighthouse from September 1998 to July 2001, and for Crescendo Ventures from August 1, 2001 to December 31, 2001. Previous counsel stated that the petitioner has therefore demonstrated that the beneficiary has the requisite five years of experience.

This office notes that no employment verification letter confirming the beneficiary's claim of employment for Crescendo Ventures had previously been provided. In his letter previous counsel stated that he was then

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[2] This request, as stated, does not accurately mirror the requirements of 8 C.F.R. § 204.5(g)(2). That regulation requires a petitioner to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. Reviewed financial statements would not meet the requirements of the regulations. Because the petitioner did not submit reviewed financial statements, however, this aspect of the request for evidence need not be explored further.

[3] The corresponding accountant's report did not accompany that balance sheet.

providing an employment verification letter in support of that employment claim. No such employment verification letter, however, accompanied that letter and none has since been provided.

Previous counsel also stated, "The [petitioner's] CPA has provided an explanation letter along with [the unaudited returns.]" The accountant's report provided with the petitioner's July 31, 2003 financial statements is the only explanation provided. Previous counsel further stated that the financial statements show the petitioner's ability to pay the proffered wage.

The director denied the petition on May 16, 2005, finding 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite five years of qualifying work experience.

On appeal, counsel submitted (1) the petitioner's 2002, 2003, and 2004 Form 1065 U.S. Returns of Partnership Income, (2) The petitioner's Form 941 Quarterly Federal Tax Returns for the first quarter of 2005, (3) documents pertinent to the petitioner's status as an LLC, (4) documents describing the various services the petitioner is able to provide, (5) various contracts, letters of intent, letters of recommendation, etc. showing that the petitioner is conducting an on-going business, (6) pay stubs showing wage payments to the beneficiary, (7) 2002, 2003, and 2004 Form W-2 Wage and Tax Statements showing wages paid to the beneficiary, (8) a copy of a May 4, 2004 memorandum from the Associate Director for Operations of CIS, and (9) a letter dated July 12, 2005.

The petitioner's tax returns show that it is a limited liability company (LLC), that it started business on January 1, 2002, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2002 the petitioner declared a loss of $125,659 as its ordinary income or net income. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner declared a loss of $284,117 as its ordinary income. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner declared a loss of $408,467 as its ordinary income. At the end of that year the petitioner had current assets of $165,669 and current liabilities of $140,543, which yields net current assets of $25,126.

The May 4, 2004 memorandum describes the various ways in which a petitioner may show its continuing ability to pay the proffered wage beginning on the priority date.

The W-2 forms provided show that the petitioner paid the beneficiary $34,749.24, and $49,442.50 during 2003 and 2004, respectively.[4] The pay stubs provided show that the petitioner paid the beneficiary $2,170.42

[4] The beneficiary's 2002 Form W-2 indicates that a previous employer, not the petitioner, Crescendo Connections, LLC, paid the beneficiary $24,104.12 during 2002. This form is not relevant to the petitioner's claim that it is able to pay the proffered wage.

in gross wages during the half-month pay periods with end dates from January 15, 2005 to June 30, 2005. The most recent of those pay statements shows that as of June 30, 2005 the petitioner had paid the beneficiary year-to-date gross wages of $26,045.04.

In his July 12, 2005 letter, counsel stated, "[the petitioner] can always use (when necessary) a small portion of" its partners' capital accounts, its advertising expenses, its contractor expenses, and its research and development costs " to pay the necessary portion of the proffered wage.

Counsel cited an unpublished BALCA decision for the proposition that a sole proprietor petitioner's financial circumstances should be considered in their entirety in determining ability to pay the proffered wage. Counsel further argues that because the petitioner in this instance is not a corporation, the reasoning of that decision should be extended. Counsel stated,

> It is well understood, that if and when there is a shortfall in income, the owners/members are willing to, and immediately do, fund the company so there will never be any interruption in business.[5]

Counsel asserted that the petitioner's income tax returns, quarterly tax returns, and evidence demonstrating that the petitioner is an actual entity engaged in business show that it is viable and the job offer in this matter is *bona fide*. Counsel also asserted that the petitioner, like other small business start-ups, had nonrecurring expenses during its first year and showed no profit for some years after commencing business.

Counsel stated that the petitioner's profitability will improve during the coming years. Counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petitioner's reasonable expectation of increasing income is evidence of ability to pay the proffered wage. Counsel cited the increase in the petitioner's gross receipts and in its current assets from 2002 to 2004 as evidence of that reasonable expectation.

Counsel observed that 8 C.F.R. § 204.5(g)(2) does not state that the petitioner must have the annual amount of the proffered wage in its bank account in order to show ability to pay the proffered wage during a given year, and that a company, especially a start-up, may have considerably less.

Counsel further stated, "We respectfully request you to not to [sic] apply the rule [that the petitioner must show its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.]

As to the beneficiary's qualifications for the proffered position counsel stated that the evidence shows that the beneficiary has the education and experience required by the proffered position.

Counsel stated that, as an alternative to the bachelor's degree and five years of experience shown at part 14 of the Form ETA 750 the petitioner would have accepted a master's degree. To support this point, counsel referred to part 13 of the Form ETA 750, ("[r]equires: BS w/ 5 yrs. exp. or MBA/MS") and explained that the

[5] Whether counsel is making this assertion as to all companies or only as to the petitioner is unclear. In either event, counsel did not provide any evidence in its support.

education and/or experience required for the job was mistakenly listed there in the job duties section of the form, rather than at part 14. Counsel also referred to the various announcements in various media as evidence that the master's degree with no prior experience would be acceptable and stated that those announcements were included with that letter as Exhibit 1. This office notes that those announcements did not accompany that letter.

Demonstrating that the petitioner *intended* to provide an alternative set of qualifications to render one eligible for the proffered position is not sufficient. In evaluating the beneficiary's qualifications, CIS must look to the portion of the labor certification, Form ETA 750 part 14, which defines the minimum education, training and experience needed for a worker to perform the job duties described at part 13 to determine the qualifications required for the position. CIS may not ignore a term of the labor certification, Form ETA 750 part 14, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.23d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner must demonstrate that as of the priority date the beneficiary was qualified for the proffered position pursuant to the requirements listed on the approved Form ETA 750 at part 14. In this case the Form ETA 750 shows that the position requires a bachelor's degree and five years of experience. The petitioner has demonstrated that the beneficiary has the requisite bachelor's degree. The petitioner must also demonstrate that the beneficiary has the requisite five years of qualifying experience as a database design analyst, database marketing analyst, or business analyst.[6]

On the Form ETA 750B the beneficiary claimed to have worked as a business analyst/project manager for [redacted] in Shelton, Connecticut from September 1998 to July 2001. The July 17, 2001 letter from [redacted] attests that the beneficiary worked for that company as project manager in business intelligence and data warehousing from September 28, 1998 to July 17, 2001. That claim encompasses approximately 34 months.

Whether "project manager in business intelligence and data warehousing" should be considered interchangeable with "database design analyst" or "business analyst," or whether the beneficiary's employment claim and his employment verification letter conflict, is unclear. Because this issue was not raised in the decision of denial this office does not base today's decision on that issue, even in part. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The beneficiary also claimed to have worked as a business analyst/project manager for [redacted] in Easton, Connecticut from August 2001 until December 10, 2002. That claim encompasses approximately 16 months of employment. No employment verification letter has been submitted to document that employment claim.

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[6] On appeal counsel did not reiterate and may have abandoned the assertion that the petitioner has demonstrated that the beneficiary has the requisite five years of experience. This office, however, will address the evidence pertinent to the beneficiary's qualifying experience.

The letter from the editorial coordinator of The Times of India Group attests to employment at 4th Dimension and Beyond as an account executive from July 27, 1995 to August 14, 1996. The beneficiary did not list this employment on the Form ETA 750B, despite being directed to list all employment related to the proffered position. This indicates that the beneficiary did not regard employment as an account executive to constitute qualifying employment as a database design analyst, database marketing analyst, or business analyst,[7] and did not view it as qualifying employment experience for the purpose of the instant case.

The beneficiary has claimed only 50 months of qualifying employment experience, which is less than five years. The petitioner submitted evidence in support of only 34 months of that employment, which is also less than five years. The petitioner has not demonstrated, and the beneficiary has not even alleged, that the beneficiary has the requisite five years of employment experience as a database design analyst, database marketing analyst, or business analyst. The petition was correctly denied on this basis, which basis the petitioner has not overcome.

The remaining issue is whether the petitioner has demonstrated that it has had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel is correct that the petitioner need not demonstrate that it has an amount on hand greater than the annual amount of the proffered wage. The petitioner must, however, in accordance with 8 C.F.R. § 204.5(g)(2), demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

Counsel's reliance on the account balances shown in this case is misplaced. First, account balances are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, account balances show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[8] Third, no evidence was submitted to demonstrate that the funds reported in the account balances somehow reflect additional available funds that were not reported on its tax returns. Finally, the evidence does not show that the evidence provided pertinent to account balances even relates to the petitioner's accounts.

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[7] If the petitioner attempts to overcome today's finding that it has not demonstrated that the beneficiary has the requisite employment experience it may address the issue of whether employment experience as an account executive should qualify as employment experience as a database design analyst, database marketing analyst, or business analyst.

[8] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Counsel's reliance on the unaudited financial statements submitted in this matter is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Reliance on projections of the petitioner's future performance is also misplaced. The assumptions upon which the projections were based is unknown. There is no evidence in the record to support the assumptions. Thus, whether those assumptions are reliable is unknown. Whether the conclusions drawn are reasonably likely to follow from those assumptions is unclear. In sum, whether the projections are reasonable and reliable is not documented for the record. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unsupported projections of future earnings will not be considered.

Counsel's assertion that the petitioner can always utilize funds from its partners' capital accounts, its advertising expenses, its contractor expenses, and its research and development costs to cover any shortfall in its ability to pay the proffered wage is unconvincing.

The total of the partners' capital accounts, shown at Line 21, Schedule L, are not a fund available to pay the proffered wage, nor even a fund at all. Partners' capital accounts is a term specific to partnerships and LLC that is equal to owner's equity, that is, the amount by which a partnership's or LLC's total assets exceed its total liabilities. The treatment of assets and liabilities is discussed in detail below.

In order for the petitioner to rely on its contractor expenses as evidence of its ability to pay the proffered wage in a given year the petitioner would be obliged to demonstrate that it paid contractors to perform the duties of the proffered position and the amount that it paid for this. In the instant case, the record contains no evidence that the petitioner even employed contractors during the salient years.[9] The assertions of counsel 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). Unsupported assertions of counsel are insufficient to sustain the burden of proof.

Counsel's argument that the petitioner could avoid its advertising expenses or research and development costs as necessary to pay the proffered wage is unconvincing. The record contains no evidence that the petitioner could merely decline to incur those expenses without otherwise affecting its business. Having spent those amounts on expenses the burden is on the petitioner to show that they were available to pay the proffered wage during that year.

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[9] The petitioner's 2002, 2003, and 2004 tax returns do not show any Schedule A, Line 3, Cost of Labor. Although contractor expense might be recorded elsewhere on those forms the record contains no evidence that it was.

The unpublished BALCA case is of no precedential value. While 8 C.F.R. § 103.3(c) provides that some decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding.

Counsel appeared to urge, however, that the reasoning in the unpublished BALCA case is compelling and should be extended to the instant case. Counsel noted that the petitioner in that case was a sole proprietorship and, suggested that because the instant petitioner is an LLC rather than a corporation, the same reasoning should apply. This office will address that argument.

The reason a sole proprietor's personal income and assets are considered in determining his company's ability to pay the proffered wage is because the income and those assets are available, as a matter of law, to the company. The sole proprietor is obliged, as necessary, to pay the company's debts and obligations out of his own funds.

The reason a corporation's owner's or owners' income and assets are not considered in determining the company's ability to pay the proffered wage is that a corporation's owners and shareholders are not obliged to pay the debts of the corporation. Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner(s), whether individual(s), a corporation(s), or some other entity or entities, cannot correctly be included as a fund available to the petitioner to pay the proffered wage.

In the case of a general partnership, the income and assets of the partners are available to the company, just as in the case of a sole proprietorship, and are properly included in the determination of the company's ability to pay the proffered wage.

In the case of a limited partnership the general partner or partners are personally liable for the debts and obligations of the company and the limited partner or partners are not. The personal income and assets of the general partners is correctly considered in assessing the company's ability to pay the proffered wage. The income and assets of the limited partners is not available as a matter of law and is not, therefore, considered.

The petitioner in this matter, however, is an LLC. Rather than general partners and limited partners its owners are member-managers and other LLC members. Like a corporation, none of its owners are obliged to pay the debts and obligations of the company out of their personal income and assets. Therefore, the income and assets of the owners of the petitioning LLC will not be considered in assessing petitioner's ability to pay the proffered wage.[10]

This office agrees with counsel that businesses generally endure losses and low profits during their early years. That observation, however, neither demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date nor releases it from the obligation of demonstrating that ability. It is an insufficient reason for this office to acquiesce to counsel's request that it disregard the obligation imposed by 8 C.F.R. § 204.5(g)(2).

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[10] Further, even if the income and assets of the members of this LLC were available to the company, the record contains scant evidence pertinent to them.

Counsel asserted that the petitioner's income tax returns, quarterly tax returns, and other evidence pertinent to its business transactions show that it is an ongoing business entity, that it is viable and that the job offer in this matter is *bona fide*. Counsel indicated that the petition is approvable on this basis alone because the petitioner has only been in business a short time. That argument is unconvincing. Even if the evidence in the record were sufficient to show that the petitioner is viable, that would not be sufficient. The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements, regardless of whether a petitioner is a start-up business or a long established entity. The tax returns and other evidence provided fail to demonstrate that the petitioner has had the ability to pay the wage from the priority date onwards.

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 did not establish that it employed and paid the beneficiary the full proffered wage. It did demonstrate that it paid the beneficiary $34,749.20 in 2003, $49,442.50 in 2004 and $26,045.04 in 2005.

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).

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 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See 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 minus 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[11] 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 $68,000 per year. The priority date is December 16, 2002.

The Vermont Service Center, on January 27, 2005, requested copies of the petitioner's 2002 and 2003 tax returns, annual reports, or audited or reviewed financial statements. Counsel submitted none of those documents in response to the request for evidence. On appeal counsel submitted the petitioner's 2002 and 2003 tax returns.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office need not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under these circumstances, this office need not consider the petitioner's 2002 and 2003 tax returns. This office, however, chooses to exercise its discretion and consider those returns, in addition to the petitioner's 2004 tax return.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal 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 declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of $19,207. That amount added to the amount that the petitioner paid the beneficiary in 2003, $34,749.24, is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of $25,126. That amount added to the amount that the petitioner paid the beneficiary in 2003, $49,442.50 is $75,568.50. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

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[11] The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The proffered wage breaks down to a salary of $2,615.38 every two weeks. Evidence in the record indicates that during the first six months of 2005, the petitioner paid the beneficiary $2170.42 every two weeks or a rate that is approximately 17% less than the rate needed to pay the full proffered wage over the course of a year. The petitioner submitted no reliable evidence of any other funds at its disposal during 2005 with which it could have paid the full proffered wage for the year. The petitioner has not demonstrated the ability to pay the proffered wage during 2005.

The petitioner is unable to directly demonstrate its ability to pay the proffered wage from the priority date onwards with its tax returns and copies of the beneficiary's Form W-2 for 2003 and 2004. Despite this, counsel urges that the totality of the petitioner's financial circumstances evinces a reasonable expectation of improved profits and that this demonstrates its ability to pay the proffered wage in accordance with *Matter of Sonegawa, supra.*

Sonegawa, however, 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 suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 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 do not preclude approval of the petition, but rather may be overlooked in determining the ability to pay the proffered wage. Here, the petitioner is a new business, and the record contains no evidence that it has ever posted a profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002, 2003, or 2005 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite five years of experience. Therefore, the petition may not be approved.

The record suggests an additional issue that was not addressed in the decision of denial. On January 27, 2005 the service center requested copies of the petitioner's 2002 and 2003 tax returns. The petitioner did not provide those returns in response to that request. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been

denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.