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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

B6

PUBLIC COPY

[redacted]

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

EAC 03 209 50919

IN RE: Petitioner:
Beneficiary: [redacted]

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The record will be returned to the director.

The petitioner is a marble design and setting firm. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and maintains that the evidence demonstrates that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, 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 March 13, 2001. The proffered wage as stated on the Form ETA 750 is $18.00 per hour, which amounts to $37,440 per annum. On the Form ETA 750B, signed by the beneficiary on March 3, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on June 23, 2003, the petitioner claims to have been established in 1999, to currently employ two workers, and to have a gross annual income of $452,805. With the petition, counsel provided copies of two of the petitioner's bank statements from March and April 2003, as well as a copy of the

petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It reflects that the petitioner uses a standard calendar year to file its taxes. The tax return contains the following information pertinent to ordinary income,[1] current assets and liabilities, and net current assets:

	2001
Ordinary Income	$6,607
Current Assets (Sched. L)	$3,834
Current Liabilities (Sched. L)	$none listed
Net current assets	$ 3,835

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.[2] Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets during a given period. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

On December 4, 2003, the director instructed the petitioner to provide additional evidence to support its ability to pay the proposed wage offer of $37,440. He requested the petitioner to submit its federal income tax return for 2002, as well as copies of any Wage and Tax Statements (W-2s) issued to the beneficiary during 2001 or 2002 petitioner employed him.

The director also advised the petitioner that CIS computer records indicated that the current petition is the second Immigrant Petition for Alien Worker (I-140) that was filed by this petitioner seeking a bookkeeper. The director noted that the I-140 in this case stated that the firm had two employees and requested the petitioner to explain how a company with two employees required two full-time bookkeepers.

In response, the petitioner, through counsel, submitted a letter, dated Februrary 9, 2004, from [redacted] its president. Mr. [redacted] states that in 2001, the company had two employees in addition to him, but following 2001, due to an increase in business, the firm now employs nine workers. Mr. [redacted] did not explain why only two workers were claimed on the I-140, which was filed in June 2003. Further discrepancies are shown by attached quarterly tax returns (Form 941), which show between four and seven employees reported during 2001, between three and seven employees in 2002, and seven employees during 2003. Mr. [redacted]

---

[1] For the purpose of this review, the taxable net income before the NOL deduction will be treated as the net taxable income.

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

states, however, that one bookkeeper was needed to take over bookkeeping duties that he had performed and that, "in the foreseeable future," due to increasing growth, the services of a second bookkeeper would be needed. Mr. [redacted] claims that "the additional bookkeeper hire will not occur before the year 2006, when my company is projected to gross around $1,000,000 in revenues." He adds that the processing and time delays involved motivated his decision to submit the underlying 1-140s in order to ensure that his firm's objectives were met.

The petitioner's response also included copies of its March and April 2001, and October, November, and December 2003 bank statements, as well as a copy of the petitioner's 2002 corporate tax return. It indicates the following:

	2002
Ordinary Income	$1,145
Current Assets (Sched. L)	$3,799
Current Liabilities (Sched. L)	$none listed
Net current assets	$ 3,799

The response further included a letter, dated February 11, 2004, from the petitioner's accountant, [redacted] Mr [redacted] emphasizes the company's financial health as shown by its gross sales in 2002 and his expectations that such success would continue in the future.

Counsel's transmittal letter advises that the petitioner's net income was not dispositive of its ability to pay the proffered salary and that despite the September 11th attacks in 2001, the petitioner's business had achieved impressive gross sales in 2001. It has also paid $35,7000 in compensation to the petitioner's owner and president, who had formerly filled the position offered as bookkeeper and that the extra funds needed to pay the full certified wage of $37,440 is represented by the petitioner's March 2001 bank statements. Referencing the accountant's letter, counsel further asserts that the petitioner's business is continuously expanding and expects to generate increasing sales in the future, which would justify hiring a second bookkeeper around 2006.

The director denied the petition on August 2, 2004. He reviewed the petitioner's financial data contained within its corporate tax returns from 2001 and 2002, and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of March 13, 2001. The director also noted that the selected bank statements were not persuasive in establishing the petitioner's ability to pay the certified wage when compared to the year-end cash balances in 2001 and 2002 shown by the tax returns to be less than $4,000 at the end of both years.

The director further concluded that the explanation provided as to the need for two bookkeepers was not persuasive. He noted that the first I-140 petition had been originally approved in November 2001 and had a priority date of July 26, 2000. The current and second I-140 petition for a bookkeeper, as represented by the petitioner's president, represented a future, projected need at the time the petitioner initiated the labor certification process in 2001. The director observes that the labor certification may have been fraudulently obtained because had a qualified US worker been found in the recruitment process, the actual employment would not have commenced for several years according to the petitioner's own statements.

On appeal, counsel submits the petitioner's January – July 2004 bank statements. Counsel reiterates the arguments provided in his letter accompanying the documents submitted in response to the director's request for additional evidence. Counsel cites several prior AAO decisions from 1992-1995, where appeals were sustained based on a finding of the ability to pay a given wage, which involved a variety of factual circumstances and various business structures. Counsel also relies on *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petition may be approved despite a modest net income where a petitioner has a reasonable expectation of increasing revenue. He asserts that the petitioner's recent bank statements submitted on appeal demonstrate that the ending balances exceeded the proffered salary and justify the petition's approval based on the petitioner's expectations of an increase in sales. Counsel further asserts that the director failed to recognize the negative economic effect of the September 11th attacks in the New York metropolitan area.

Regarding counsel's citation of previous AAO decisions, it is noted that such cases may offer guidance to the review of a current petition under consideration, but they are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions.

The AAO further notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS,* 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If a petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, however, the record contains no evidence that the petitioner has employed the beneficiary.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "[T]he [CIS] may reasonably rely on *net taxable income* as reported on the employer's return." (Emphasis added.) *Elatos Restaurant*

Corp. v. Sava, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra,* and *Ubeda v. Palmer, supra; see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). Relying only upon the petitioner's gross receipts or gross income is misplaced. 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.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, as discussed above, CIS will consider a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, as reflected on the petitioner's 2001 tax return shows that neither its net taxable income of $6,607, nor its net current assets of $3,834, was sufficient to pay the proffered wage of $37,440. The petitioner's ability to pay the wage offer was not established by the figures.

In 2002, the petitioner's net taxable income of $1,145 was not enough to cover proffered wage. Its net current assets of $3,799 were also not enough to pay the certified salary of $37,440. Neither established the petitioner's ability to pay during this period.

As noted above, counsel asserts that *Matter of Sonegawa,* supports the petitioner's ability to pay the proffered wage. In *Matter of Sonegawa,* an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the certified wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been **featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The** Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the two tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

Moreover, the fact that the petitioner's recent bank balances, as shown by the 2004 bank statements submitted on appeal, may show a petitioner's increasing growth during this period, they do not establish the petitioner's continuing ability to pay the proffered wage beginning at the priority date of March 13, 2001. Further, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," in this case it has not been established why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability

to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return or audited financial statement, if provided, as part of the listing of current assets that would also be balanced against current liabilities. We do not find that the selected bank statements submitted on appeal and contained in the underlying record to be determinative in appraising the petitioner's continuing ability to pay the proffered salary as of the priority date.

In this context, it is noted that the record also contains no evidence specifically connecting the petitioner's business fortunes to the events of September 11, 2001, other than a statement from the president indicating that renewed effort in the ensuing period resulted in an increase in business and payroll. An examination of the tax returns confirms that the petitioner's gross sales increased from $453,000 in 2001 to $531,000 in 2002, although its net income decreased by $5,000. Counsel's broad statement that the director failed to consider the negative impact of the September 11th attacks, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001.

The evidence does not support counsel's assertion that the petitioner had established its ability to pay the proffered wage because the position is not a new one and because the 2001 tax return demonstrates that its salary had already been paid. Counsel's reference to the payment of officer compensation of $33,300 to the petitioner's president in 2001 does not support the conclusion that the petitioner's owner would forego over 100% of his salary in order to pay an employee. The AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage of $37,440.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate its *continuing* ability to pay a proffered salary beginning at the visa priority date. Here, that date was April 30, 2001. Based on the evidence contained in the record and after consideration of the assertions presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

That said, the AAO also finds that as the director suggests, the record indicates that the labor certification submitted in this proceeding did not represent a bona fide position vacancy at the time the labor certification process was undertaken. The petitioner's president clearly stated that a labor certification for a second bookkeeper position was sought in order to fill a future vacancy anticipated to occur in 2006 due to the processint time of DOL and CIS. Because an employer must affirm that it is willing to hire qualified and available U.S. workers, there must be a bona fide job opening available to U.S. workers in order for a labor certification to be approved. Conducting a test of the U.S. job market that fails to locate qualified U.S. workers does not meet the requirements for a DOL certification if the agency determines that there is in fact no job available for which the employer is willing to hire a U.S. worker. In applying for a certification, the employer must clearly document that it now has a need for a person to fill the full-time permanent job. *See e.g., Matter of Randy Auerback,* 88-INA-103 (1988). Although the argument that the labor certification was submitted in order to fill an anticipated job created by the projection of an increase in revenue in the future may be a reasonable business rationale, it must be concluded that, based on the facts presented in the underlying record, indicating that the labor certification supporting the visa petition in this case was based upon a vacancy that was not anticipated to occur for over four years from the time that the ETA 750 was submitted, the AAO concludes that no bona fide job opening for U.S workers for this position existed at the time the labor certification was processed. Instead, by the logic of the petitioner's

statements, the petitioner began the process with the intention of hiring an alien. Pursuant to its authority under 20 C.F.R. § 656.30(d), giving CIS the authority to invalidate labor certifications upon a finding of fraud or willful misrepresentation of a material fact, the AAO finds that a second bookkeeper vacancy was willfully misrepresented as a existing bona fide job opening available to otherwise qualified available U.S. workers. The record, including the labor certification, is hereby returned to the director for his consideration as to whether or not it must be invalidated.

In a related issue, and beyond the decision of the director, it is noted that the beneficiary and the petitioner's president share the same last name. It is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, in future proceedings that may involve this petitioner and beneficiary, this issue would merit further investigation.

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 and the record is returned to the director for his consideration of the foregoing.