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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

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 02 2008

EAC 05 205 50071

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

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as an Enterprise Network Engineer/Software Engineer. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 either 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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 7, 2001. The proffered wage as stated on the Form ETA 750 is $93,142.40 per year.

The Form I-140 petition in this matter was submitted on June 30, 2005. On the petition, the petitioner did not state when it was established or the number of workers it employs in the spaces provided for that information. The petition states that the petitioner's gross annual income is $1.0 million, but does not state the petitioner's net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary on October 9, 2001, the beneficiary claimed to have worked for the petitioner in the proffered position since February 2001. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Edison, New Jersey.

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

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1] In the instant case the record contains (1) the petitioner's 2001 and 2003 Form 1120, U.S. Corporation Income Tax Return, (2) the first pages of the petitioner's 2002 and 2004 Form 1120, U.S. Corporation Income Tax Return, (3) a 2001 Form W-2 Wage and Tax Statement showing the amount the petitioner paid the beneficiary during that year, (4) 2000, 2001, 2002, 2003, 2004, 2005, and W-2 forms showing amounts another company, Enterprise Network Solutions, paid to the beneficiary during those years, (5) pay stubs showing amounts Enterprise Network Solutions paid to the beneficiary for work during various 2005, 2006, and 2007 pay periods, (6) monthly statements pertinent to the petitioner's bank account, (7) a credit note dated January 4, 1999 extending a $50,000 line-of-credit to the petitioner, (8) a small business loan application dated February 7, 2001 indicating that the petitioner applied to have that credit line extended to $100,000, (9) a monthly statement pertinent to that credit line showing that by March 8, 2006 the petitioner's credit line had been extended to $100,000, (10) the petitioner's compiled balance sheet and profit and loss statement for its 2004 fiscal year, (11) projected profit and loss statements for the petitioner's 2005 and 2006 fiscal years, (12) the 2005 and 2006 Form 1120, U.S. Corporation Income Tax Returns of Enterprise Network Solutions, (13) a letter from the petitioner's accountant dated January 20, 2006, (14) a letter from a principal of the petitioner dated June 9, 2006, and (15) a letter dated June 12, 2006 from the Director of Operations of Enterprise Network Solutions. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on October 27, 1993, and that it reports taxes pursuant to cash convention accounting and a fiscal year running from May 1 of the nominal year to April 30 of the following year.

The petitioner's 2001 tax return, which covers the fiscal year running from May 1, 2001 to April 30, 2002, shows that it declared taxable income before net operating loss deduction and special deductions of $29,033 during that fiscal year. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The first page of the petitioner's 2002 income tax return, which covers the fiscal year running from May 1, 2002 to April 30, 2003, shows that it declared a loss of $28,578 as its taxable income before net operating loss deduction and special deductions during that fiscal year. Although the corresponding Schedule L was not provided, this office notes that the petitioner's beginning-of-fiscal-year 2003 current assets and current liabilities, as shown on that fiscal year's Schedule L, should correspond to the petitioner's 2002 end-of-year figures. This office finds, based on the petitioner's 2003 Schedule L, that at the end of fiscal year 2002 the petitioner's current liabilities exceeded its current assets.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's 2003 tax return, which covers the fiscal year running from May 1, 2003 to April 30, 2004, shows that it declared a loss of $44,122 as its taxable income before net operating loss deduction and special deductions during that fiscal year. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The first page of the petitioner's 2004 tax return, which covers the fiscal year running from May 1, 2004 to April 30, 2005, shows that it declared a loss of $46,511 as its taxable income before net operating loss deduction and special deductions during that fiscal year. Because the record contains neither the petitioner's 2004 nor its 2005 Schedule L, this office is unable to compute the petitioner's 2004 end-of-year net current assets.

The 2001 W-2 form states that the petitioner paid the beneficiary $40,769.24 during that year.

The June 9, 2006 letter from the petitioner's principal states that the petitioner held an interest in Enterprise Network Solutions during 2001 and that the petitioner and Enterprise Network Solutions have discussed merger.

The June 12, 2006 letter from the Director of Operations of Enterprise Network Solutions states,

> Back in early 2001, the current employees of Enterprise Network Solutions worked under the Telstar Plus Inc. umbrella. Towards the latter part of 2001, Enterprise Network Solutions branched out as an independent entity providing network integration services. Throughout the years, Enterprise Network Solutions has increased its revenues each year, and at this time discussions of merging the two companies are currently [sic] underway.

The petitioner's accountant's January 20, 2006 letter states that the petitioner shows potential for future growth and that the addition of personnel will increase its profitability. The accountant did not provide the evidence upon which those opinions are based, except to state that the petitioner has made various capital expenditures.

The director denied the petition on May 15, 2006, finding that the evidence submitted does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel stated that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date, citing the petitioner's total salary expense, officer compensation, depreciation deductions, the wages paid to the beneficiary, the petitioner's bank statements, its unaudited financial statements, its pending merger with Enterprise Network Solutions, and its credit line.

The petitioner's accountant stated, in his January 20, 2006 letter, that the petitioner will thrive, and that hiring additional personnel would necessarily increase its profits, rather than decrease them. The chief evidence upon which the accountant apparently relied is that the petitioner made capital expenditures during 2001. The nature of those expenditures and in what way they insure profitability is unknown to this office.

If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary might generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is not demonstrated by any evidence in the record, and is apparently speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

Further, this office will not delegate its fact-finding duties to the petitioner's accountant. Counsel, the petitioner, and the accountant were free to provide evidence demonstrating that the petitioner will become profitable in the future but did not. This office will not base its decision on the accountant's conclusory opinions.

Although counsel acknowledged that this office does not generally consider depreciation expenses to be a fund available to pay additional wages, counsel cited a non-precedent 1999 decision of this office, apparently for the proposition that depreciation expenses should be so considered.

Counsel cited other non-precedent decisions of this office for the proposition that amounts paid to contract employees are available to pay additional wages. Counsel asserted, but provided no evidence to demonstrate, that the amount paid to contract employees whom the beneficiary would replace exceeds the proffered wage.

Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension. Counsel did not address the reasoning of the decisions, however, and counsel's citation of non-precedent decisions is of no precedential effect.

The assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not

offer any alternative allocation of those costs.[2] Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel suggested that all or some unstated portion of the petitioner's Line 8, Schedule A, Cost of Goods Sold represents payments to contractors, and that those amounts were available to pay the proffered wage. This office notes that payments for non-employee labor are typically found at Line 3, Schedule A, Cost of Labor. The record contains no indication, other than counsel's assertion, that any portion of the petitioner's cost of goods sold was paid to contractors.

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, therefore, insufficient to sustain the burden of proof.

Further, even if the record showed that some or all of the petitioner's cost of goods sold was paid for contract labor, it contains no evidence showing what portion of that amount, if any, was paid to contractors for performing the duties of the proffered position, rather than some other duties. If those payments were for the performance of other essential duties, then they were not available to pay wages for performing the duties of the proffered position.

Further, even if counsel had demonstrated, rather than alleged, that the petitioner paid contractors to do the work that the beneficiary would do, it did not state the hourly wage those contractors were paid. Without that information,[3] no calculation can be performed to demonstrate the amount of the contract labor payments that would have been obviated by hiring the beneficiary full-time. The petitioner has not demonstrated that any portion of the petitioner's cost of goods sold was available to pay the proffered wage and they will not be further considered.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[4] or otherwise increased its net income,[5] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The

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[2] Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

[3] Another necessary figure in that calculation would be the amount of the additional costs, beyond the beneficiary's salary, that the petitioner would incur by hiring the beneficiary.

[4] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

[5] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Counsel urged that some or all of the petitioner's Line 12 Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. Counsel provided no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Evidence was submitted to show that the petitioner and Enterprise Network Solutions have contemplated merger. The evidence does not demonstrate, however, that this merger has taken place or ever will, or that the merger will improve the petitioner's profitability. Further, contemplated merger does not make the funds of Enterprise Network Solutions available to the petitioner to pay additional wages.[6] The tax returns, pay stubs, and W-2 forms of Enterprise Network Solutions are irrelevant to this matter and will not be further considered.

Counsel's reliance on unaudited financial records is 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. Unaudited financial statements are the representations of management. 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.

Projected financial statements are even less reliable than other unaudited financial statements, and will similarly be disregarded.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements 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, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[7]

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[6] Further, if this merger results in the petitioner no longer being Telstar Plus Incorporated, but some other entity, then successor-in-interest considerations as discussed in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) would be raised.

[7] 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

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Further, the single monthly statement submitted pertinent to that credit line shows that on April 6, 2006 the petitioner had only $10,868.77 of available credit remaining on that $100,000 credit line, and owed $89,131.23 on it. Even if credit available were an index of ability to pay the proffered wage, the petitioner's credit line would show only the ability to pay $10,868.77 of the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary $40,769.24 during 2001, but did not establish that it paid the beneficiary any wages during any other year. The petitioner must show the ability to pay the balance of the proffered wage during 2001 and the entire proffered wage during each of the other salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). *See also* 8 C.F.R. § 204.5(g)(2).

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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.

The petitioner's net income 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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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[8] 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 $93,142.40 per year. The priority date is November 7, 2001. That date falls within the petitioner's 2001 fiscal year.

The W-2 form in the record indicated that the petitioner paid the beneficiary $40,769.24 during 2001. As the petitioner reports taxes pursuant to a fiscal year running from May 1 of the nominal year to April 30 of the following year, that amount must be prorated between the petitioner's 2000 fiscal year, which ended before the priority date on April 30, 2001, and its 2001 fiscal year. That calculation is not possible, however, because the beneficiary has given three different sworn versions of his employment history.

On the Form ETA 750B submitted in this case the beneficiary stated that he began working for the petitioner during February 2001 and was still working for the petitioner when he signed that form on October 9, 2001 acknowledging that his statement was subject to the penalty of perjury.

On a Form G-325 Biographic Information Form that the beneficiary completed on June 27, 2005, and which is in the record, the beneficiary stated that he worked for Amex Computer Solutions in New York City until March 2001 and commenced work for the petitioner during April 2001, which employment ended during December 2001. That version of the beneficiary's employment history, in which he began working for the petitioner during April 2001, directly contradicts the assertion on the Form ETA 750B that the petitioner began working for the petitioner during February 2001. That form notified the beneficiary that falsifying or concealing a material fact is subject to severe penalties.

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

On a Form ETA 9089 submitted in another matter, a petition by Enterprise Network Solutions for the beneficiary as an alien worker, the beneficiary, who signed that form on March 7, 2007, acknowledging that misstatements on it were subject to the penalty for perjury, indicated that he worked for the instant petitioner from February 20, 2001 to August 31, 2001, which directly contradicts his assertion on the October 9, 2001 Form ETA 750B that he was then working for the petitioner. It also contradicts the statements on the Form G-325 that the beneficiary began working for the petitioner during April of 2001 and worked for the petitioner until December 2001.

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

The evidence in the record does not demonstrate what portion of the wages the petitioner paid to the beneficiary during 2001, if any, was paid for work performed after the priority date. This office will not consider the $40,769.24 the petitioner allegedly paid to the beneficiary during 2001.

During its 2001 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of $29,033. That amount is insufficient to pay the proffered wage. 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 fiscal year. The petitioner submitted no reliable evidence of any other funds at its disposal during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

The first page of the petitioner's fiscal year 2002 income tax return shows that it declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. The petitioner's 2003 tax return shows that at the end of that fiscal 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 the 2002 fiscal year. The petitioner submitted no reliable evidence of any other funds at its disposal during its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

During its 2003 fiscal year 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 profit 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 fiscal year. The petitioner submitted no reliable evidence of any other funds at its disposal during its 2003 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

The first page of the petitioner's 2004 tax return shows that it declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. The record contains no reliable evidence from which the petitioner's net current assets can be calculated. The petitioner did not, therefore, demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner submitted no reliable evidence of any other funds at its disposal during its 2004 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2004 fiscal year.

The petition in this matter was submitted on June 30, 2005. On that date the petitioner's 2005 tax return was unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during its 2005 fiscal year and later fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2001, 2002, 2003, and 2004 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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

ORDER: The appeal is dismissed.