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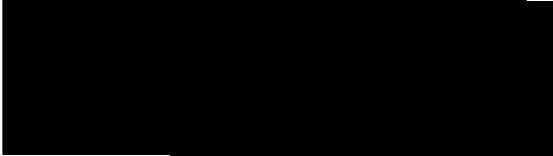
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U.S. Citizenship  
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 29 2006  
SRC 04 136 50361

IN RE: Petitioner: [REDACTED]  
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:



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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an enterprise application services company. It seeks to employ the beneficiary permanently in the United States as a senior systems consultant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel states that CIS erred in its decision and cites to various AAO decisions as a basis for reevaluating the petitioner's ability to pay the proffered wage.

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 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 June 24, 2002. The proffered wage as stated on the Form ETA 750 is an annual salary of \$77,163. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July 2001.

On the petition, the petitioner claimed to have been established in 2001, to have twelve employees and a gross annual income of \$773,260, and a net annual income of \$84,979. In support of the petition, the petitioner submitted IRS Form 1120S, the petitioner's corporate income tax return for 2002 and 2003. These documents indicated the petitioner has an ordinary income of -\$7,283 in tax year 2002 and \$1,855 in tax year 2003. The petitioner's director of operations submitted a letter to explain the petitioner's ability to pay the proffered wage. The director of operations submitted copies of Accounts Receivable aging reports as of December 2003 and April 2004; and IRS Forms W-3, Transmittal of Wage and Tax Statements for tax years 2002 and 2003. These documents indicated the petitioner paid wages of \$163,399.48 in tax year 2002 and \$404,472.91 in tax year 2003. The petitioner also submitted Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2004 that indicated total wages and tips paid of \$118,808.50. The petitioner also submitted income

by customer summaries for tax years 2002 and 2003, and from January to April 2004. Finally the petitioner submitted a balance sheet as of April 2004, and a profit and loss statement that compared ordinary income /expenses for the period of January 1 to April 8, for both 2003 and 2004. With regard to the beneficiary's qualifications, the petitioner submitted documentation on the beneficiary's four-year baccalaureate degree in computers, an educational equivalency report, and letters of work verification from previous employers.

On November 18, 2004, the director issued a notice of intent to deny (NOID) the petition. The director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of June 24, 2002 and to the present. The director stated that the evidence must be in form of copies of annual reports, prepared federal tax returns, or audited financial statements. The director also stated that if the petitioner employed more than 100 employees, a statement from the petitioner's financial officer may establish the petitioner's ability to pay the proffered wage. The director also stated that if the petitioner had been paying the beneficiary in previous years, it should submit all of the beneficiary's W-2 forms.

In response, counsel noted that the petitioner had previously submitted substantial documentation to the record with regard to the petitioner's ability to pay the proffered wage, and resubmitted the initial evidence. The petitioner submitted a letter from [REDACTED] the petitioner's president, that stated the petitioner employed the beneficiary in H-1B status from July 2001 to April 2002 at which time he completed his six years of H-1 B status. The petitioner stated the beneficiary changed his status to F-1 (student) and then subsequently returned to India. [REDACTED] stated that the petitioner originally paid the beneficiary a base salary of \$100,000 per year in 2001 that was significantly greater than the prevailing wage of \$77,163. [REDACTED] submitted the beneficiary's W-2 Form for 2001 that indicated total wages of \$65,280, and stated that these wages were for five months and amounted to \$13,056 per month, again, a sum significantly higher than the monthly wage of \$6,431 based on the prevailing wage. [REDACTED] stated that in 2002, the beneficiary's consulting hours were reduced due to his school commitments and that the beneficiary's base salary was reduced to \$6,827 a month. The petitioner submitted the beneficiary's W-2 Form for tax year 2002 which indicates total wages of \$27,308.

[REDACTED] then stated that in 2002, the petitioner had to establish it had the ability to pay the prevailing wage from June 24, 2002 to year's end, approximately 6 months, or \$38,581.50, and that the difference between this sum and the beneficiary's actual wages of \$27,308 is \$11,273.50. [REDACTED] stated that the petitioner had more than sufficient funds to cover the remaining balance in that the petitioner's 2002 profit and loss report reflects a profit based on the accrual method of accounting of \$8,713.57. [REDACTED] also stated that as sole shareholder, he took a distribution check in the amount of \$15,000 in August 2002 that otherwise would have gone toward the beneficiary's salary had he still been employed by the petitioner.

[REDACTED] then submitted a document identified as "Distribution Check to Owner", and dated August 8, 2002 that notes a distribution check paid to [REDACTED] for \$15,000. The petitioner also submitted a statement from [REDACTED] Morani & Associates, P.C., Irving, Texas, that states the firm has taken care of the petitioner's accounting and tax filing since tax year 2001. [REDACTED] stated that in order to minimize its tax liabilities the petitioner adopted the cash basis of reporting on its tax return, thus reporting revenues when they are collected and reporting expenses when paid. [REDACTED] noted that in the petitioner's tax returns, the revenues of the last two months of business were not reported, as they were not collected by the end of the

year; however, all expenses including payroll of employees were paid in full and deducted at the end of the year. The accountant then noted that in the year 2001, the petitioner had approximately \$22,000 in earned revenues, which were not received until 2002. These revenues would have resulted in a break-even for the company in 2001, the first year of their business operation. The accountant similarly stated that based on earned revenues not collected until 2003, the petitioner had approximately \$23,000 in earned revenues that on an accrual basis the petitioner would have reported as a profit of \$9,000 in 2002. The accountant finally stated that in 2003, the petitioner reported cash based revenues of \$773,260.49; however using the accrual basis, the petitioner would have reported revenues of \$915,850.49 and thus a profit of \$183,540.46.

The accountant also stated that the petitioner's financial statement for 2004, as prepared and submitted by the petitioner's officers, if based on the accrual basis, reports a profit. The petitioner submitted its profit and loss statements for January through December 2001, 2002, 2003, and 2004. Finally the petitioner submitted a letter from [REDACTED], Owner, Solution Beacon, Seattle, Washington. In her letter, Ms. [REDACTED] stated that the petitioner has been a valued partner of Solution Beacon since 2002, and that Solution Beacon planned to continue the partnership, investing in and supporting the petitioner's financial and business development. Finally, the petitioner submitted its Form 941, for the third quarter of 2004. This document indicates that the petitioner paid wages and tips, plus other compensation of \$196,622 during the third quarter.

On December 16, 2004, the director denied the petition. The director noted that the petitioner had provided evidence of its ability to pay the proffered wage by means of copies of federal tax returns, unaudited financial statements and the beneficiary's W-2 Forms. The director examined the petitioner's federal income tax returns and stated that the tax returns for tax year 2002 indicates the petitioner had a gross income of \$276,728 and a net income of -\$7,283. The director stated the petitioner's total assets were -\$6,283 while its liabilities were \$24,634.<sup>1</sup> The director cited an unpublished AAO decision and stated that the petitioner must establish sufficient assets over its liabilities to pay the proffered wage.

The director then examined the beneficiary's W-2 Forms and stated that the petitioner paid the beneficiary \$65,280.80 for tax year 2001 and \$27,308 for tax year 2002. The director stated that the beneficiary's wages for either 2001 or 2002 did not equal the proffered wage of \$77,163. With regard to the unaudited financial statements submitted by the petitioner, the director noted that these statements commenced with tax year 2001. The director noted the petitioner's financial statement for 2001 indicated the petitioner's net income was -\$2,529.89, while the 2002 financial statement indicated the petitioner's net income was \$8,713. The director stated that the net income identified on the documents for 2001 and 2002 was not equal to the proffered wage. The director then determined that the petitioner did not establish that it had the ability to pay the proffered wage as of the June 24, 2002 priority date based on its net profit or based on its net current assets.<sup>2</sup>

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<sup>1</sup> The director added line 18, Other Current Liabilities and Line 19, Loan from Shareholders, as identified on the petitioner's 2002 Schedule L to arrive at this figure. The AAO will discuss further in these proceedings how it examines the petitioner's current liabilities.

<sup>2</sup> In his decision, the director identified the petitioner's net current assets as "its assets over liabilities ratio".

On appeal, counsel states that the beneficiary started working for the petitioner in July 2001 and was earning a base salary of \$100,00 for 2001. Counsel states that the beneficiary's W-2 for 2001 reflected total wages of \$65,280 for five months or approximately \$13,000 a month. Counsel then states that the beneficiary worked for the petitioner until April 2002 at which time he changed status to F-1. Counsel states that the beneficiary's salary in 2002 equals \$6,827, which also exceeds the prevailing wage. Counsel reiterates [REDACTED] statement that the petitioner is only required to prove its ability to pay the proffered wage from June 24, 2002 to December 2002, approximately 6 months, or \$38,581.50. Counsel also notes that the petitioner paid the beneficiary \$27,308 in 2002, which leaves a difference of \$11,273.50 between the beneficiary's actual wages and the proffered wage. Counsel states that the petitioner's 2002 Profit and Loss report reflects a profit of \$8,713.57, and that the sole shareholder took a distribution check (in addition to salary) in August 2002 in the amount of \$15,000. Counsel then states that the combined net income and proceeds from the distribution check indicate that the petitioner had nearly \$24,000 to pay the difference between the beneficiary's actual wages and the prorated proffered wage, or namely, \$11,273.

Counsel states that CIS abused its discretion in refusing to consider all of the petitioner's evidence submitted to the record, and by focusing solely on the petitioner's net income and assets over liabilities. Counsel states that the director's decision that the petitioner did not have sufficient funds to pay the proffered wage is incorrect, does not comport with existing case law, and does not stand as a valid basis upon which to deny the petition.

Counsel discusses a previous AAO decision in which two shareholders of a medical corporation, each holding 50 percent of the stock, routinely minimized taxable income by taking it as compensation to avoid double taxation. Counsel states that in this decision, the AAO determined that had the owners opted to pay themselves slightly less income, the petitioner would have had the ability to pay the proffered wage. Counsel stated that the findings in the previous AAO decision are analogous to the instant petition since the petitioner's sole shareholder took a distribution check of \$15,000 that otherwise would have been available to pay the proffered wage. Counsel refers to a second AAO decision involving a medical corporation whose sole shareholders routinely minimize the taxable income of the corporation by withdrawing profits as compensation. Counsel also states that CIS may consider the totality of the circumstances concerning a petitioner's financial performance and refers to *Matter of Sonogawa*, 12 I & N Dec. 612 (Reg. Comm. 1967). Counsel states that the petitioner presented evidence of its increase in business and profits with its gross income increasing from \$298,963 in 2002 to \$915,850 in 2003 to over one million dollars in 2004. Counsel also refers to a third AAO decision that stated the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during a complete fiscal year, but only that portion which would have been due if it had hired the beneficiary on the priority date.

Counsel further discusses other AAO decisions that examined such financial figures such as depreciation, retained earnings and cash on hand when assessing the fiscal health of other petitioners. Counsel states that the AAO has confirmed that other sources of income may be considered when assessing the fiscal health of a petitioner, and notes decisions in which other financial figures represented in federal tax returns were considered in the AAO examination of petitioner's ability to pay the proffered wage. Such items in the decisions cited by counsel include retained earnings, depreciation and cash on hand.

Finally counsel refers to new PERM regulations issued by the Department of Labor on December 27, 2004 that state that the Department of Labor (DOL) has been informed that DHS was planning to amend its regulation at 8 C.F.R. § 204.5(g), which currently focuses on the ability to pay the proffered wage in the course of processing the employment-based petition, to require evidence focusing on the bona fides of the employer. Counsel states that such an amendment would better reflect the statutory language and legislative intent of establishing the bona fides of the petitioner and the job offer as opposed to a detailed analysis of tax returns and financial statements.

With the original petition and in response to the director's NOID, the petitioner submitted unaudited financial statements. In his decision, the director referred to these statements in examining the petitioner's net income for 2001 and 2002. Counsel's and the director'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. In the accountant's letter submitted to the record in response to the director's NOID, the accountant clearly explains that the accounting firm takes care of all accounting and tax filing needs for the petitioner, and also examines the difference in actual profits if the petitioner's tax returns are reported on a cash basis, as opposed to an accrual basis. There is no indication in the accountant's letter that any of the reports submitted were audited. Rather the accountant states that the financial statements for 2004, that on accrual basis report a profit were prepared and submitted by the company's officers. Thus, the AAO cannot conclude that they represent audited statements. 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.

In addition, the petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioner's continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

The director as well as counsel refers to previous unpublished AAO decisions. Counsel refers to previous AAO decisions that examined petitioner's cash on hand, or depreciation or retained earnings in determining whether the petitioner had the ability to pay the proffered wage. It is noted that neither the director nor counsel provides the published citations from these decisions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, the AAO does not follow any such analysis presently with regard to the petitioner's cash on hand, depreciation expenses, or retained earnings.

With regard to retained earnings, these earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

With regard to depreciation expenses, In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. **Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054.** [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Finally with regard to cash on hand, this figure is reflected on line 1, of Schedule L, and as such, is part of the petitioner's net assets for the respective tax year. To discuss cash on hand as separate funds available to pay the proffered wage is redundant.

Counsel also refers to new PERM regulations. The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into

effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition is governed by the prior regulations.

The petitioner's owner and counsel both state that the petitioner only has to establish its ability to pay the proffered wage in 2002 from June 24, 2002 to the end of the year, or \$38,581.50 for six months of employment. Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Although the petitioner submitted W-2 salary statements for the beneficiary for the years 2001 and 2002, since the priority date for the petition is June 24, 2002, the beneficiary's salary and the petitioner's financial resources in the year 2001 are not dispositive in the present proceedings. Therefore, only the IRS W-2 form for tax year 2002 is considered in this proceeding. Based on this document, the petitioner paid the beneficiary an annual salary of \$27,308, which is \$49,855 less than the proffered annual wage of \$77,163.

Although both the petitioner and counsel assert that this 2002 salary is sufficient to establish the petitioner's ability to pay the complete wage in 2002, because the beneficiary only worked January to April 2002, as stated previously, neither counsel nor the petitioner submit any further evidentiary documentation as to the claimed period of employment. Counsel's assertions, as well as the petitioner's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the petitioner has not established that it paid the beneficiary a salary equal to or greater than the proffered wage in 2002 and to the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Contrary to counsel's assertions, CIS will not consider the petitioner's depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co.*,

*Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. As noted previously, the wage and tax documentation submitted by the petitioner for the year 2001 is not relevant to these proceedings. Therefore, only the petitioner's 2002 and 2003 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 2002 and 2003 show the following amounts of ordinary income: -\$7,283 and \$1,855 in 2003. These figures fail to establish the ability of the petitioner to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner submitted the following information for tax years 2002 and 2003:

	2002	2003
Ordinary Income	\$ -7,283	\$ 1,855
Current Assets	\$ 10,196	\$ -6,286
Current Liabilities	\$ 27,383	\$ 11,999
Net current assets	\$ -17,187	\$ -18,285

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2002. In 2002, the petitioner shows a net income of -\$7,283, and net current assets of -\$17,187, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. In 2003, the petitioner stated that the beneficiary had returned to India, and therefore, the petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2003, the petitioner shows a net income of \$1,855, and net current assets of -\$18,285. Therefore the petitioner has not demonstrated the ability to pay the entire proffered wage in tax year 2003. Thus, the petitioner has not established that it has the ability to pay the proffered wage as of the 2002 priority date and to the present.

On appeal, counsel states that the petitioner should be allowed to utilize an August 2002 distribution of funds to its sole shareholder for \$15,000 to pay the difference between the beneficiary's actual wages and the prorated proffered wage. With regard to the compensation of the corporation's sole officer being used to pay the proffered wage, the compensation of sole corporate officers may be viewed as discretionary expense, as opposed to wages, which are not discretionary. As such, officers' compensation can be viewed at times as a source of additional funds with which to pay the proffered wage. However, in the instant petition, the record lacks substantive documentation to gauge the feasibility of the officer's compensation being considered as a means of paying the proffered wage. For example, the record lacks information on the compensation of the petitioner's officer for the years other than 2001, or that it is discretionary. The record reflects no information as to whether the amount of officer compensation varied over the course of the pertinent years 2002 and 2003, demonstrating that the amount does not represent some contractually obligated and fixed amount of compensation. The record also contains no other evidence of officer compensation in 2002 beyond the one-page document that states \$15,000 was distributed to the petitioner's owner and president.

It is also noted that the amount of the one distribution to the petitioner's officer, even if considered as additional funding, would be insufficient to pay the difference between the beneficiary's actual wages in 2002 and the proffered wage, namely, \$49,855. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

Counsel also refers to *Matter of Sonogawa* in asking that CIS consider the totality of the petitioner's circumstances. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner. It is noted that the petitioner, established in 2001, has increased its consulting gross income and wages; however, it has yet to have a profitable year.

The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2002 and continuing to the present date. 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.