

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

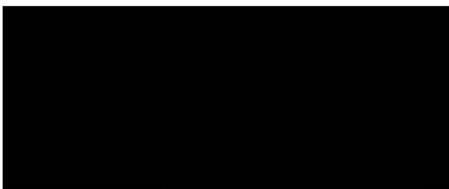
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6

**PUBLIC COPY**



FILE: [Redacted]  
LIN 05 025 50072

Office: NEBRASKA SERVICE CENTER

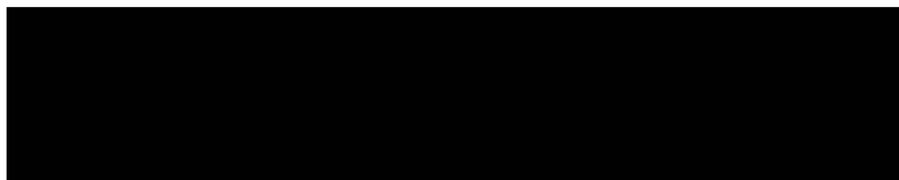
Date: **AUG 20 2007**

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Nebraska 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 bakery. It seeks to employ the beneficiary permanently in the United States as a bakery manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 acting 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$43,493 per year.

The Form I-140 petition in this matter was submitted on November 1, 2004.<sup>1</sup> On the petition, the petitioner stated that it was established during July 1994 and that it employs 38 workers. The petition states that the petitioner's gross annual income is \$2,348,872. On the Form ETA 750, Part B, signed by the beneficiary on October 6, 2003, the beneficiary claimed to have worked for the petitioner from January 1995 to April 2001.

---

<sup>1</sup> With the petition counsel submitted an addendum miscalculating the petitioner's net current assets. The calculation of net current assets is detailed below.

The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Denver, Colorado.

The AAO reviews *de novo* issues raised on appeal. *See 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.<sup>2</sup>

In the instant case the record contains (1) the 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation of Jeffrey Ventures, Inc dba Aspen Baking Co (the petitioner), (2) 2001 and 2004 Form W-2 Wage and Tax Statements, (3) earnings statements issued by the petitioner to the beneficiary during 2005, (4) a letter dated August 26, 2005 from the petitioner's president, (5) 2001 and 2002 Forms 1099 and 1096, (6) a G-325 Biographic Information form, (7) monthly statements pertinent to the petitioner's checking account, and (8) a decision by the Unemployment Insurance Appeals Section of the Division of Employment and Training of the Colorado Department of Labor and Employment. (Colorado UI Appeals Section) 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 January 1, 1989, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner declared Schedule K, Line 23 Income<sup>3</sup> of \$4,520. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared a loss of \$19,752 as Schedule K, Line 23 Income. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner declared Schedule K, Line 23 Income of \$9,837. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner declared a loss of \$14,000 as its Schedule K, Line 17(e) Income. At the end of that year the petitioner's current liabilities exceeded its current assets.

---

<sup>2</sup> 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).

<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) or line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

The W-2 forms show that the petitioner paid the beneficiary gross wages of \$11,475 and \$46,838.40 during 2001 and 2004, respectively.

The earnings statements submitted purport to show that the petitioner employed the beneficiary from December 27, 2004 to August 21, 2005 and paid him \$1,672.80 every two weeks during that period. The last of those earnings statements, for the pay period ended August 21, 2005, shows that the beneficiary had earned year-to-date wages of \$28,437.60.

The petitioner's president's August 26, 2005 letter states that the petitioner failed to file Form 1099 Miscellaneous Income statements for non-wage compensation in the amount of \$2,328.50 and \$19,489 paid to the beneficiary during 2001 and 2002, respectively. The Forms 1096 and 1099 provided purport to confirm those amounts during those years. The petitioner implied that they were sent to IRS, albeit tardily, sometime after August 26, 2005. The record contains no evidence in support of that implicit assertion.

The decision of the Colorado UI Appeals Section found that the petitioner lawfully dismissed an employee when he was found to have failed to report \$43,000 in unsaleable items from September 2002 through December 2002. That decision states, at page 3, "It is concluded the claimant was discharged for intentional falsification of employer records or reports, **whether or not substantial harm was incurred by the employer.**" [Emphasis supplied.] That decision indicates that the claimant ex-employee was still entitled to another appeal.

The acting director denied the petition on June 30, 2005.

On appeal counsel asserted, citing a May 4, 2004 memorandum from CIS' Associate Director for Operations, that the failure of the service center to issue a request for evidence deprived the petitioner of the opportunity to submit additional evidence.

Counsel noted that the decision of denial was based on information from the petitioner's tax returns, and asserted that tax returns are often a poor index of the financial health of a company. Counsel cited the petitioner's bank balances as indices of its ability to pay additional wages.

Counsel cited a nonprecedent decision of this office for the proposition that the amount of the proffered wage the petitioner should be required to demonstrate the ability to pay during 2001 should be prorated to reflect the portion of that year that remained on the priority date.

Counsel stated that the decision of the Colorado UI Appeals Section established that the petitioner lost \$43,000 as the result of the malfeasance of an employee, and that but for that extraordinary loss, its profit during 2002 would have included that additional amount. Counsel noted that, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), this office may approve a petition notwithstanding a single year's poor performance. Counsel also cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that CIS is obliged to consider the ability of the beneficiary to generate income.

Counsel alleges that the service center was obliged to issue a request for evidence in this matter. The regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

*Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence . . . .

If the petitioner had neglected to submit some portion of the initial evidence, evidence of its ability to pay the proffered wage, for instance, then the service center would have been obliged to issue a request for evidence. The petitioner, however, submitted tax returns pertinent to each of the salient years. The acting director found that the tax returns had failed to demonstrate the ability to pay the proffered wage, rather than that the evidence was incomplete. No request for evidence was required in the instant case.

Even if a request for evidence were required, the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The opportunity to submit additional evidence would have rendered moot the failure of the service center to issue a request for evidence if issuance of such a request were required.

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. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the 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), the petitioner has not submitted such evidence.

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.<sup>4</sup> 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.

Counsel asserts that the decision on appeal of the Colorado UI Appeals Section demonstrates that the petitioner's 2002 profit would have been \$43,000 greater but for the malfeasance of an employee. The evidence provided, however, does not support that assertion.

The decision of that body indicates that the fired employee failed to report \$43,000 in unsaleable goods, thus boosting his own bonuses. There is no indication in the decision that the employee caused the \$43,000 in goods to remain unsold. The decision on appeal explicitly declined to find that substantial harm was done to the petitioner. The record contains no evidence of any amount by which the petitioner's net profit was reduced as a result of the employee's malfeasance.<sup>5</sup>

Counsel's reliance on the decision in *Masonry Masters, Inc. v. Thornburgh, Id.* is misplaced. Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

While that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. 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 would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages, even in part. Absent any such evidence, this office will make no such assumption.

Counsel's reliance on *Matter of Sonogawa, Id.* is therefore misplaced. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or

---

<sup>4</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

<sup>5</sup> In fact, as the employee managed to boost his personal bonuses through misreporting, it appears to this office that some fiscal damage, however minor, must have been occasioned. The record, however, contains no evidence pertinent to the amount thus acquired by the employee and lost by the petitioner or of any other damage, direct or indirect, occasioned by the misreporting.

successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the salient years were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel asserts that the petitioner's tax returns may not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. Having declined to provide annual reports or audited financial statements, the petitioner's tax returns are required evidence. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay 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 submitted earnings statements and W-2 forms showing amounts it ostensibly paid to the beneficiary during 2001 and 2004, Forms 1099 and 1096 to show amounts it allegedly paid to him during 2001 and 2002, and earnings statements purporting to show wages it paid to him during 2005.

On the Form ETA 750, Part B, which the beneficiary signed on October 6, 2003, the beneficiary claimed to have worked for the petitioner from January 1995 to April 2001, but not to have worked for the petitioner from April 2001 to October 6, 2003. This directly contradicts the evidence provided to show that the petitioner paid compensation to the beneficiary during 2002.

Further, in his G-325 Biographic Information form,<sup>6</sup> which he signed on September 18, 2004, the beneficiary stated that he had not been employed at any time during the previous five years. This account directly contradicts all of the evidence that suggests that the petitioner paid compensation to the beneficiary.

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 beneficiary's statement that he did not work from September 18, 1999 through September 18, 2004 renders the evidence of wages paid to him during that period suspect and unreliable. The version of the petitioner's employment history in which he worked for the petitioner from January 1995 to April 2001 but not from then until October 6, 2003 creates yet further conflicts. The petitioner has not reliably demonstrated that it paid any wages to the beneficiary at any time.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add

---

<sup>6</sup> This form was provided in connection with a collateral matter, submission of a Form I-485 Application to Adjust Status.

back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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<sup>7</sup> 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 \$43,493 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared Schedule K, Line 23 Income of \$4,520. That amount is insufficient to pay the proffered wage.<sup>8</sup> At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss as its ordinary income. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year.<sup>9</sup> At the end

---

<sup>7</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

<sup>8</sup> Even if the evidence pertinent to wages paid had been found credible, the \$2,328.50 allegedly paid, added to the petitioner's profit during that year, would still be less than the annual amount of the proffered wage, and would not have demonstrated the petitioner's ability to pay the proffered wage during 2001.

<sup>9</sup> Even if the evidence pertinent to wages paid had been found credible, the \$19,485 allegedly paid, whether considered with the petitioner's loss during that year or separately, would still be less than the annual amount of the proffered wage, and would not have demonstrated the petitioner's ability to pay the proffered wage during 2002.

of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared Schedule K, Line 23 Income of \$9,837. 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 year. The petitioner submitted no other reliable evidence of funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is therefore unable to show the ability to pay any portion of the proffered wage with its profit during that year.<sup>10</sup> At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on November 1, 2004. On that date the petitioner's 2005 tax return was unavailable. The petitioner's 2005 tax return was not subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. 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.

---

<sup>10</sup> Even if the evidence pertinent to wages paid had been found credible, the amount allegedly paid to the beneficiary during 2004 was less than one week's pay, was considerably less than the annual amount of the proffered wage, and would not have demonstrated the petitioner's ability to pay the proffered wage during 2004.