

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

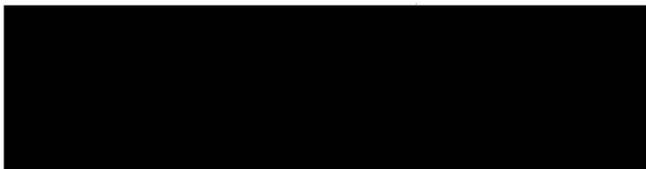
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

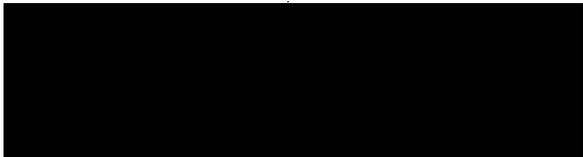


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 11 2007
WAC 06 015 51428

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 Director, Texas 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 computer-consulting firm. It seeks to employ the beneficiary permanently in the United States as a management analyst. 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)(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.

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 February 18, 2003. The proffered wage as stated on the Form ETA 750 is \$82,160 per year.

The Form I-140 petition in this matter was submitted on November 2, 2005. On the petition, the petitioner stated that it was established during July 2001 and that it employs five workers. The petition states that the petitioner's gross annual income is \$569,000. In the space reserved for the petitioner to report its net annual

income the petitioner entered "N/A."¹ On the Form ETA 750, Part B, signed by the beneficiary on February 14, 2003, the beneficiary claimed to have worked for the petitioner since May of 2002. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Fremont, California.

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.² In the instant case the record contains (1) the petitioner's 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) 2003, 2004, and 2005 Form W-2 Wage and Tax Statements, (3) copies of three paychecks the petitioner drew to the beneficiary's order during 2006 and associated pay stubs, (4) Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2005 and the first quarter of 2006, (5) copies of monthly statements pertinent to the petitioner's checking account, (6) 2004 and 2005 Form 1099 Miscellaneous Income statements showing amounts the petitioner paid in non-employee compensation, (7) copies of letters of intent, service agreements, and contracts, (8) a spreadsheet showing sales during the petitioner's 2001, 2002, 2003, 2004, and 2005 fiscal years, broken down by customer, and (9) a letter dated August 31, 2006 from the petitioner's CFO. 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 July 5, 2001, and that it reports taxes pursuant to accrual convention and a fiscal year running from July 1 of the nominal year to June 30 of the following year.

During its 2002 fiscal year, which ran from July 1, 2002 to June 30, 2003, the petitioner declared a loss of \$18,473 as its taxable income before net operating loss deduction and special deductions. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

During its 2003 fiscal year, which ran from July 1, 2003 to June 30, 2004, the petitioner declared taxable income before net operating loss deduction and special deductions of \$6,698. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

During its 2004 fiscal year, which ran from July 1, 2004 to June 30, 2005, the petitioner declared taxable income before net operating loss deduction and special deductions of \$2,577. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

¹ Why the amount of the petitioner's net annual income was deemed unavailable or inapplicable is unknown to this office.

² 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 W-2 forms submitted show that the petitioner employed the beneficiary during 2003, 2004, and 2005 and paid him \$54,999.84 during each of those years. The three paychecks drawn to the beneficiary during 2006 show that the petitioner paid the beneficiary \$2,291.66 during each of the bimonthly pay periods that they cover. The most recent of those checks, dated May 31, 2006, and covering the second half of May, shows year-to-date wages of \$22,916.60. This office notes that amount during the first five months of 2006 and the amounts shown on the individual bimonthly paychecks are both consistent with an annual salary of \$54,999.84.

The Form 941 quarterly returns show that the petitioner paid total wages of \$54,999.84 during 2005. This office notes that, although the petitioner claimed, on the Form I-140 visa petition, to employ five workers, its total 2005 wage expense equals the amount it paid to the beneficiary during that year. This appears to indicate that, contrary to the representation on the visa petition, the petitioner's only employee is the beneficiary.

The 2005 1099 forms, however, show that the petitioner paid an additional \$243,313.09 to non-employee individuals and companies during that year. The petitioner apparently included non-employee contract workers in its count of its employees.

The letters of intent, service agreements, and contracts provided show that the petitioner engaged in business as alleged. They do little, however, to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In his August 31, 2006 letter the petitioner's CFO cited the petitioner's growth in sales, customer base, and accounts receivable as evidence that the company has a reasonable expectation of becoming more profitable. The CFO also stated that the petitioner recently invested in a technical support center in Karachi, Pakistan, which resulted in expenditure of approximately \$200,000. The CFO stated that the expenditure began during January 2004 and that without that expenditure the petitioner would have been profitable.

The director denied the petition on August 8, 2006.

On appeal, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petition may be approved notwithstanding that the petitioner suffered a loss or declared very low profit during a given year, if the petitioner can demonstrate that it has a reasonable expectation of future profit.

Counsel argued that the petitioner's recent investment in a technical support center in Karachi, Pakistan was responsible for its loss and low profits during the salient years, and that the figures cited by the CFO in his August 31, 2006 letter demonstrate that the petitioner has a reasonable expectation of future profit.

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Counsel also cited two nonprecedent cases of this office for various propositions. 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's citation of *Masonry Masters* is unconvincing in this case. 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. The expenses of hiring an employee offset, at least in part, whatever amount of gross income that employee would generate. That the amount remaining, if any, would be sufficient to pay the employee's wages is speculative. Absent any such evidence, this office will make no such assumption.

Finally, in citing *Masonry Masters*, counsel implies that, had the petitioner been able to employ the beneficiary during 2003, 2004, and 2005, the petitioner would have enjoyed profits, or greater profits. In fact, the petitioner employed the beneficiary during all three of those years. In light of that fact, counsel's argument falls flat.

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 Sonogawa*, 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 \$54,999.84 during 2003, 2004, and 2005.³ The petitioner must show the ability to pay the balance of the proffered wage during those years.

³ The petitioner also submitted evidence that it paid the beneficiary wages during 2006. As is explained further below, however, this office does not consider 2006 to be a salient year with respect to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 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 typically⁴ 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 priority date is February 18, 2003, which fell within the petitioner's 2002 fiscal year. The proffered wage is \$82,160 per year. Because the petitioner has demonstrated that it paid the beneficiary \$54,999.84 during

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

each of those years, however, it is obliged to show only the ability to pay the remaining \$27,160.16 balance of the proffered wage.⁵

During its 2002 fiscal year, which ran from July 1, 2002 to June 30, 2003, the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its profit during that year. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its net current assets during that year. The petitioner is unable to demonstrate, with its fiscal year 2002 tax return, its ability to pay the balance of the proffered wage during that fiscal year.

During its 2003 fiscal year, which ran from July 1, 2003 to June 30, 2004, the petitioner declared taxable income before net operating loss deduction and special deductions of \$6,698. That amount is insufficient to pay the balance of the proffered wage. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its net current assets during that year. The petitioner is unable to demonstrate, with its fiscal year 2003 tax return, its ability to pay the balance of the proffered wage during that fiscal year.

During its 2004 fiscal year, which ran from July 1, 2004 to June 30, 2005, the petitioner declared taxable income before net operating loss deduction and special deductions of \$2,577. That amount is insufficient to pay the balance of the proffered wage. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its net current assets during that year. The petitioner is unable to demonstrate, with its fiscal year 2004 tax return, its ability to pay the balance of the proffered wage during that fiscal year.

The petition in this matter was submitted on November 2, 2005. On that date the petitioner's fiscal year 2006 tax return was unavailable. On April 18, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. CIS received counsel's response to that request on July 20, 2006, and the record is deemed to have closed on that date. On that date the petitioner's fiscal year 2006 tax return was still 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 fiscal year 2006 and later years.

On appeal counsel asserted, however, based on the August 31, 2006 letter from the petitioner's CFO, that the petitioner's losses and low profits were the result of its investment in an overseas technical support center and

⁵ The petitioner reports taxes pursuant to a fiscal year other than the calendar year. W-2 forms, on the other hand, show wages paid during given calendar years. Ordinarily, calculations involving wages shown on a W-2 form and taxable income before net operating loss deduction and special deductions shown on a tax return would involve attribution of portions of the wages to the two different tax years. In the instant case, however, the petitioner has paid the beneficiary the same annual salary during each of the salient years and appears to be continuing to do so. The petitioner appears to have paid the beneficiary the same amount during each of the salient fiscal years, and the additional calculation may therefore be avoided.

that its increased customer base, sales and receivables indicate that it will prosper in the future. Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petition should therefore be approved.

The petitioner's CFO represented that the petitioner's investment in its foreign office cost approximately \$200,000. The expenditure of that amount allegedly began in January 2004 and consisted of expenses for an office lease, construction of premises, hiring and training staff, and acquisition of office equipment and computer hardware and software. This office notes that, even if that assertion by the CFO were supported with reliable evidence, it would not explain the petitioner's loss during its 2002 fiscal year.

Expenditures on office rental should typically have been reflected on the petitioner's tax returns at line item 16, Rents. The petitioner's tax returns show rents of \$12,196, \$12,765, and \$14,920 during its 2002, 2003, and 2004 fiscal years, respectively. That modest increase does not account for a large portion of the petitioner's alleged \$200,000 expenditure.

Large expenditures on buildings or improvements to leased office space should have resulted in either a large increase in Schedule L, line 10a Buildings and other depreciable assets, or, if expensed, in a marked increase in some associated expense line item. The petitioner's buildings and depreciable assets, before depreciation, were \$12,500 at the beginning of its fiscal year 2002, \$12,500 at the beginning of fiscal year 2003, \$12,500 at the beginning of fiscal year 2004, and \$16,500 at the beginning of fiscal year 2004.⁶ That very modest increase in buildings and other depreciables does little to support the assertion of a \$200,000 expenditure. Further, no expense item on the petitioner's tax returns appears to indicate large construction costs with the possible exception of its Schedule A, Line 2, Purchases, which line item is discussed further below.

Similarly, a large one-time expenditure on computers and office equipment should have resulted either in a great increase in depreciables or a great increase in some associate expense. As was noted above, no great increase occurred in the petitioner's depreciables. Further, no expense item on the petitioner's tax returns is consistent with a large one-time expenditure on computers and office equipment with, again, the possible exception of its Schedule A, Line 2, Purchases.

The petitioner's Schedule A, Line 2, Purchases were \$171,143, \$144,579, and \$195,995 during its 2002, 2003, and 2004 fiscal years, respectively. Although the amount spent during the 2004 fiscal year represents a 36% increase over the amount spent during its 2003 fiscal year, it represents only a 13% increase over the amount spent during its 2002 fiscal year. This represents only a 6.5% increase per annum, overall. Those figures are consistent with normal fluctuation. They are not consistent with a one-time expenditure of approximately \$200,000 beginning in January 2004.

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).

⁶ The figure for the beginning of 2005 was taken from the end-of-year figure on the 2004 return.

The petitioner's CFO further stated that the petitioner's sales were \$305,000, \$459,000, \$612,000, \$653,000, and \$809,000 during its 2002, 2003, 2004, 2005, and 2006 fiscal years, respectively, and that those figures demonstrate a Compounded Annual Growth Rate (CAGR)⁷ of 22%.⁸

Those figures were taken from the unaudited statement of the petitioner's sales in the spreadsheet described above. The fiscal year 2002, 2003, and 2004 figures do not accord with the figures on the petitioner's tax returns, which state that the petitioner's gross sales were \$468,590, \$568,661, and \$619,236 during its 2002, 2003, and 2004 fiscal years, respectively.⁹

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 figures from the unaudited spreadsheet of the petitioner's sales will not be considered.

More importantly, the CFO indicated that the figure for the petitioner's 2006 sales, which is critical to the calculation of a CAGR, is a "preliminary" figure.¹⁰ The CFO indicated that the petitioner would enjoy sales of \$809,000 during its 2006 fiscal year. The CFO made this prediction on August 31, 2006, only two months into the petitioner's 2006 fiscal year.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp v. I.N.S.*, 153 F.Supp. 2d 7, 15 (D.D.C. 2001).

In the instant case, the CFO's prediction of the petitioner's 2006 gross sales, made with ten months of that year remaining, is based on insufficiently reliable evidence, if it is based on evidence at all. It may, or may not, be an educated projection, but it is only a projection. This office sees no evidence that the projection is reliable, and will not consider the CAGR calculation that depends heavily upon it, and can be dramatically

⁷ Because the meaning of this term is settled and elementary, an authoritative source is difficult to locate. Reference to any introductory text pertinent to financial statistics, however, will confirm that the accepted formula for CAGR is $[(\text{Ending Value} / \text{Beginning Value})^{1/n}] - 1$, where n = the number of intervening periods, this case, years.

⁸ In fact, the CFO's figures, if accepted as accurate, demonstrate a CAGR of over 23%. $[(\$809,000 / \$350,000)^{25}] - 1$. That difference is not, however, significant.

⁹ A CAGR calculated on the growth sales figures from the petitioner's tax returns provides a much less dramatic growth of 15% annually. That is; $[\$619,236 / \$468,590]^5 - 1 = \text{approximately } .15$.

¹⁰ The CFO represented the fiscal year 2006 gross sale figure as "preliminary." In fact, as the estimate was not based on a completed fiscal year with figures subject to further refinement, but on an estimate made during the course of the year in question, that figure is not preliminary, but projected.

skewed by a poor projection of it, in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In his letter the CFO also submitted what he represented to be the petitioner's accounts receivable from 2002 to July 31, 2006. The CFO stated that those figures are \$21,000 during 2002, \$18,000 during 2003, \$78,000 during 2004, \$57,000 during 2005, a "preliminary" figure of \$157,000 during 2006, and \$143,000 on July 31, 2006. The CFO further stated that those figures represent a CAPR of 65%.

This office notes that some of the figures correspond roughly to those given on the petitioner's tax returns. That is; the petitioner had Schedule L, Line 2a Trade notes and accounts receivable of \$21,118, \$18,486, \$78,865, and \$57,079 for the beginning of fiscal years 2002, 2003, 2004, and 2005,¹¹ respectively. The record contains no evidence to confirm the CFO's representations pertinent to the petitioner's accounts receivable on subsequent dates.

Further, those figures are the value of the petitioner's accounts receivable before the deduction of allowances for bad debts. Because bad debts are not a valuable asset, this office will consider the figures on Schedule L at Line 2b(b) and 2b(3), beginning-of-year and end-of-year receivables less allowance for bad debts.

The petitioner had beginning-of-fiscal-year receivables, after allowance for bad debts, of \$21,118, \$10,186, \$60,654, and \$38,868 in 2002, 2003, 2004, and 2005, respectively. This corresponds to a less dramatic CAGR of approximately 23%,¹² and the difference may, in fact, only be the result of fluctuation, rather than the inexorable climb that the CFO projects. Further, those increasing receivables may indicate poor collections, rather than successful operations. The petitioner's receivables, and the changes in them, do not support a reasonable expectation of increased profitability.

Matter of Sonogawa, Id., does support the proposition that a petition may be approved notwithstanding a loss or low profit during a given year. That proposition from *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonogawa*, 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 *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

¹¹ The number for the beginning of fiscal year 2005 is taken from the Schedule L, Line 2a(c) end-of-year figure on the 2004 return.

¹² $[(\$38,868 / \$21,118)^{333}] - 1$

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. Although counsel and the petitioner's CFO assert that the petitioner's losses and low profits are the result of unusual expenditures on a foreign office, the evidence in the record does not support that assertion of unusual expenditures. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the petitioner's 2002, 2003, and 2004 fiscal years were uncharacteristically unprofitable.

Sonegawa also indicates that CIS should consider the totality of circumstances in deciding whether a petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not demonstrated, however, that the totality of circumstances supports its continuing ability to pay the proffered wage beginning on the priority date. Assuming that the petitioner's business will flourish, with or without the beneficiary, is speculative.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2002, 2003, and 2004 fiscal years. The petitioner has not demonstrated that the totality of circumstances in this case support that it has been continually able to pay the proffered wage since the priority date. The record does not support that the petitioner has a reasonable expectation of increased profits. 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.