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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
EAC 04 018 51752

Office: VERMONT SERVICE CENTER

Date: **JUL 26 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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and subsequently dismissed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is an Indian restaurant.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 based on the petitioner's net income or net current assets for tax year 2001.

On appeal, counsel stated that CIS had ignored the statement of the petitioner's president that indicated he would have used part of his officer compensation to pay the proffered wage. Counsel also submitted two letters to the record, one of which the AAO determined was material to the instant petition. This document, a letter from ██████████, Professor of Finance, Seattle Pacific University, examined the petitioner's tax returns for 2001, 2002, and 2003, and determined that although the petitioner's tax return for 2001 did not establish the petitioner's ability to pay the proffered wage, the petitioner's tax returns for 2002 and 2003 showed significant growth in net profit. ██████████ also examined the petitioner's balance sheets for 2001, 2002, and 2003, and determined that although these documents did not show higher current assets than liabilities, this fact was caused by the large cash withdrawals by the petitioner's owner. ██████████ stated that the cash withdrawals that totaled \$89,400 for 2002 and 2003 were optional and could have been retained in the business to pay the proffered wage of \$27,500.

On December 21, 2005, the AAO dismissed the appeal. The AAO examined the petitioner's owner's statement submitted with the initial petition with regard to using his compensation to pay the proffered wage, but did not accept the use of officer compensation to pay the proffered wage, as the duties performed by officer were not the same as those to be performed by the beneficiary, and as such, the officer compensation would not be considered as an available source of funds with which to pay the beneficiary. The AAO also noted that officer compensation for tax year 2001, namely \$46,400, would be reduced by almost 60 percent if the beneficiary's wages were to be paid from such compensation, and that the record was not clear that the officer was able to forego approximately 60 percent of his compensation during the relevant period of time.

The AAO also distinguished between personal assets of a petitioner's director and the petitioner's corporate assets, and determined that personal assets could not be used to pay the beneficiary's wage. Finally the AAO determined that it could not evaluate the opinion rendered by ██████████ as to the petitioner's business viability because the petitioner had not submitted its tax returns for tax years 2002 and 2003 to the record. In considering the petitioner's net income and net current assets for tax years 2001, the priority year, the AAO concurred with the director that the petitioner could not establish its ability to pay the proffered wage in tax year 2001.

On motion, counsel submits the petitioner's tax returns for 2002 and 2003. According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on

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<sup>1</sup> While the petitioner indicates it is an Indian restaurant, its name indicates it is a pizza/Italian restaurant.

an incorrect application of law or Service policy. Counsel has submitted the petitioner's tax returns for 2002 and 2003. This evidence is viewed as sufficient to reopen the proceedings.

The procedural history in this case is documented by 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 denial and the AAO dismissal of the appeal, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director's decision focused primarily on whether the petitioner's net income or net current assets in tax year 2001 were sufficient to pay the proffered wage. The AAO's prior denial also determined that the officer compensation noted on the petitioner's 2001 tax return could not be considered as many of the duties performed by the officer are not the same as those to be performed by the beneficiary, and that the officer compensation would be reduced almost 60 percent after the proffered wage was paid.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$27,500 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the petitioner's motion to reconsider the petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal. On

motion, counsel submits a statement in support of the motion and the petitioner's Forms 1120S for tax years 2002 and 2003. The record also contains the petitioner's Form 1120 for tax year 2001, a letter dated from [REDACTED] the petitioner's president submitted with the initial I-140 petition, a letter from [REDACTED] Vice President for Academic Affairs, Seattle Pacific University,<sup>2</sup> and a letter dated August 24, 2004 from [REDACTED], Professor of Finance, Seattle Pacific University, who analyzed the petitioner's ability to pay the proffered wage based on the petitioner's 2002, 2002, and 2003 tax returns with particular emphasis on the petitioner's gross sales and ordinary income.

[REDACTED] determined that based on the petitioner's 2002 and 2003 tax returns, the petitioner's net income had increased significantly in the years 2002 and 2003. Based on this, [REDACTED] determined that the petitioner has established its ability to pay the proffered wage. [REDACTED] also referenced the petitioner's balance sheet for 2001, 2002, and 2003,<sup>3</sup> and determined that although the petitioner's net current assets in these years was not sufficient to pay the proffered wage, the primary reason the petitioner's cash levels were so low was due to the relatively large cash withdrawals by the petitioner's owners in 2002 and 2003 which totaled \$89,400. Dr. Hess stated that the most relevant number to gauge the petitioner's ability to pay the proffered wage was net profit, an amount that exceeded \$27,500 in both 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that in tax year 2001, the petitioner was structured as a C corporation, and that in tax years 2002 and 2003, the petitioner was structured as an S corporation. On the petition, the petitioner did not provide any information as to when it was established,<sup>4</sup> its gross or net annual income or the number of current workers.<sup>5</sup> On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner.

On motion, counsel corrects [REDACTED] statement with regard to the location of the officer compensation on the petitioner's tax returns. Counsel also requests that the AAO note that the petitioner is a small company and that compensation paid to the petitioner's officer would certainly be paid, as per [REDACTED] statements, to manage the petitioner.

With regard to the AAO's reference to *Sitar v. Ashcroft*, 203 WL 22203713 (d.Mass. September 18, 2003) counsel states that this decision is not controlling in the present proceedings. Counsel states that the court in *Sitar v. Ashcroft* considered whether the personal assets of a director or stockholder should be included in determining the petitioner's ability to pay a proffered wage. Counsel states that the decision did not determine whether the cash flow of a petitioner that included officer compensation, stated on line 12 of a petitioner's tax

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<sup>2</sup> The AAO already commented on the contents of [REDACTED] letter on appeal, and will not comment further on this letter on motion.

<sup>3</sup> Since the record does not contain any independent balance sheets, the AAO assumes that [REDACTED] referred to the petitioner's Schedule L Balance Sheet in its tax returns for 2001, 2002, and 2003. However, as previously noted, the petitioner did not submit its tax returns for 2002 and 2003 to the AAO on appeal. Therefore in its denial of the petitioner's appeal, the AAO made no further statement with regard to the petitioner's ability to pay the proffered wage of \$27,500 in 2002 and 2003.

<sup>4</sup> However, the petitioner's tax returns indicate that it was incorporated on March 26, 1997.

<sup>5</sup> In his statement submitted with the initial petition, [REDACTED] stated that in the year 2001 he was operating the restaurant by himself with a little help from immediate family members. He also stated that in 2002 he was able to obtain some assistance in the restaurant and that his salary and compensation was also reduced based on his reduced hours.

return, could have a bearing on a petitioner's ability to pay the proffered wage. Counsel states that officer compensation as stated on the petitioner's tax return is part of the corporate cash flow and that the \$46,000 stated on the petitioner's 2001 returns is a direct deduction from the petitioner's receipt or sales, and as such is a part of the corporate financial pictures and not an independent item. Counsel asserts that the corporation is a separate legal entity from its owners or stockholders but the compensation paid by the corporation to either officers or employees is directly relevant to the corporation's ability to pay the proffered way. Counsel states that the failure to consider officer compensation is clearly contrary to existing corporate and tax law.

Counsel then asserts that with the submission of the petitioner's 2002 and 2003 tax returns to the record, Dr. Hess' analysis of the petitioner's ability to pay the proffered wage is confirmed.

Counsel then reviews the elements of the petitioner's 2001 tax return that would warrant a reconsideration of the instant petition. Counsel states that the petitioner shows \$46,400 in officer compensation, and also notes that the company was incorporated on March 26, 1997, had been in operation for nine years, and as of the date the I-140 petition was filed, had been in business for four years. Counsel notes that with regard to the issue of whether the petitioner's cash flow would support a salary of \$528 per week, the cash taken out by [REDACTED] for compensation in 2001 was \$46,400. Further counsel states that in his statement, [REDACTED] states that he will turn over management to the beneficiary and reduce his salary by the amount needed to pay the beneficiary.

Counsel also notes that on the I-140 petition, part 6, the petitioner noted that the position is not a newly created position and thus logic would dictate that [REDACTED]'s statement submitted with the petition is true and that he was the person managing the petitioner in 2001. Counsel then states that the petitioner's cash flow that presumably includes the officer compensation is sufficient to pay the weekly salary of \$528, and that no additional cash flow or higher net profits would be necessary.

Counsel states that the petitioner's net income is not the only figure that should be relied upon when evaluating a petitioner's ability to pay the proffered wage, and that the petitioner's cash flow, the compensation of officers and the compensation of salaried employees should also be considered in determining the overall picture of the petitioner's financial circumstances.

Counsel also states that the AAO's determination that the findings of the precedent decision *Matter of Sonogawa* are not applicable to the circumstances of the instant petitioner is incorrect. Counsel states that the holdings in *Sonogawa* should be applied to instant petition. Counsel notes that the petitioner's 2002 and 2003 returns submitted on motion show an increase of the petitioner's net income in 2002 and 2003, with \$33,000 in net income in 2002 and \$45,000 in tax year 2003, and an increase of sales of approximately one third in the years following the 2001 priority year. Counsel states that the petitioner's 2002 tax return also shows \$42,000 in compensation of officers and salaries and wages, while the petitioner's 2003 tax return shows officer compensation and wages and salaries of \$28,000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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).

On morion, counsel states that the decision in *Sitar v. Ashcroft* is not controlling to the present proceedings, and that the decision did not determine whether the cash flow of the petitioner that included officer compensation could have a bearing on a petitioner's ability to pay the proffered wage. CIS has long held that it may not "pierce the corporate veil, and look to the assets of a corporation's owner to satisfy the corporation's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In *Sitar v. Ashcroft* the petitioner wanted to use the assets of its director to pay the proffered wage. In the instant petition, the petitioner wishes to use the compensation of [REDACTED] the petitioner's president, to pay the wage. Regardless, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility the owners have in setting officer compensation based on the profitability of the business. Counsel's argument regarding officer compensation will be addressed further in these proceedings.

Further on appeal, counsel asserts that the petitioner's cash flow should be considered an additional manner of establishing the petitioner's ability to pay the proffered wage. However, counsel provides no further regulatory or statutory authority that such an analysis would be warranted in the consideration of a petitioner's ability to pay the proffered wage. As previously stated, 8 C.F.R. § 204.5(g)(2), required one of three types of evidence to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to the time the beneficiary obtains lawful permanent residence.

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, without consideration of 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).

Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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. 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$27,500 per year from the priority date:

- In 2001, the Form 1120 stated a net income<sup>6</sup> of \$0.
- In 2002, the Form 1120S stated a net income<sup>7</sup> of \$33,563.
- In 2003, the Form 1120S stated a net income of \$45,719.

Therefore, for the 2001 priority year, the petitioner did not have sufficient net income to pay the proffered wage, while it did have sufficient net income to pay the proffered wage of \$27,500 in tax years 2002 and 2003. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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<sup>6</sup>The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

<sup>7</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), line 17e (2004-2005), or line 18 (2006) 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.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for tax years 2002 and 2003, the petitioner's net income is found on line 21 of the petitioner's Form 1120S.

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>8</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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$852.

Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for tax years 2002 and 2003.

On motion, counsel states that the AAO should consider the sole shareholder's compensation in tax year 2001 as a source of additional funding to pay the proffered wage. The AAO does consider officer compensation in particular petitions. To determine whether or not an entity's officer compensation would have been available to the proffered wage, CIS examines many issues, including the flexibility that the shareholders have in setting their own compensation; the profitability of the corporation; whether the officer compensation is discretionary as opposed to wages which are not discretionary; and/or whether the officer compensation is substantially more than the amount of the proffered wage. In addition, CIS would examine whether the amount of officer compensation varies over the course of the pertinent years, and whether the officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder.

In addition, the totality of the circumstances (i.e., other information in the record) should support the fact that the petitioner is a viable, profitable enterprise. Such information would include issues examined in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. In *Matter of Sonogawa*, the court looked at such issues as the petitioner's longevity, number of employees, and reputation, in examining the totality of the petitioner's circumstances.

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<sup>8</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.

The tax documentation in the record for tax years 2002 and 2003 indicates that [REDACTED] is the 100 percent shareholder of the petitioner. The petitioner's tax return for the priority year 2001 identifies officer compensation on line 12 of the first page of the Form 1120, and provides no further identification of officers and their compensation on Schedule E. While it is noted that [REDACTED] identifies himself as the petitioner's president, the record does not establish that in the priority year 2001, he was the petitioner's sole shareholder.<sup>9</sup> In a letter submitted to the record, [REDACTED] does state that he took all the net profit of the petitioner in 2001 as his compensation, while he was operating the restaurant by himself. The record indicates that [REDACTED]'s compensation received in 2001 was based on his work in the petitioner, as the sole employee, and can also be considered wages. The record also indicates that after four years of business activity, in the 2001 priority date, the petitioner was operating based on the work performed by the petitioner's sole shareholder, and some family members. Thus, [REDACTED]'s officer compensation in the 2001 priority year also appears to be his salary for work performed as a manager and necessarily for other duties.

In looking at the officer compensation in 2001 in relation to the proffered wage, the proffered wage of \$27,500 is almost 60 percent of the officer compensation for 2001, namely \$46,400. Furthermore, because the petitioner paid no wages in the priority year 2001, and because the petitioner, based on [REDACTED] letter submitted to the record, had no other compensated or paid employees, the AAO gives less probative weight to counsel's assertion that in 2001, the petitioner should be allowed to use its officer compensation as an additional source of funds with which to pay the proffered wage. Finally, the petitioner's tax returns for 2002 and 2003 indicate that while the petitioner has sufficient net income to pay the proffered wage, the aggregate amount of compensation and salaries were decreasing rather than increasing from tax year 2001. The record indicates that the combined officer compensation and salaries and wages were \$42,000 in 2002 and were \$29,400 in tax year 2003. Upon examination of the issues identified above, and after examining the totality of the petitioner's circumstances, the AAO does not find the use of the petitioner's officer compensation in tax year 2001 to pay the proffered wage to be reasonable.

On motion, counsel also asserts that [REDACTED] would turn over management of the petitioner to the beneficiary and reduce his salary by the amount needed to pay the beneficiary, thus suggesting the beneficiary would replace [REDACTED] and his duties. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In the instant petition, the officer compensation provided to [REDACTED] could also be viewed as [REDACTED]'s salary, who is described as the only compensated employee and a director of the corporation during the 2001 priority year. Moreover, there is no evidence that the position of [REDACTED] involves the same duties as those set forth in the Form ETA 750. If [REDACTED] performed other kinds of work such as cooking food, then the beneficiary could not have replaced him.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the petitioner's 2001 tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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.

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<sup>9</sup> The petitioner's 2001 tax return indicates that no individual owned more than 50 percent of the corporation's voting stock at the end of the tax year. (See Schedule K.) Thus, the record reflects no evidence that [REDACTED] had authority to set officer compensation in tax year 2001.

**ORDER:** The appeal is dismissed.

[REDACTED]