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U.S. Citizenship  
and Immigration  
Services

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JUN 14 2007

FILE: [REDACTED]  
EAC 05 197 53398

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:  
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemam, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original February 13, 2006 denial, 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.

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 or seasonal 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is February 26, 2001. The proffered wage as stated on the Form ETA 750 is \$26,023.93 annually (35 hour workweek).

The AAO takes a *de novo* look at issues raised in the denial of this 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 upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes counsel's brief, a copy of the petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, and a copy of a Form W-2, Wage and Tax Statement, issued by the petitioner for the beneficiary for 2005. Other relevant evidence includes copies of the petitioner's 2001 through 2004 Forms 1120S, copies of the beneficiary's 2001 through 2004 Forms W-2, a letter dated June 7, 2005, from [REDACTED] CPA of [REDACTED], a letter, dated December 7, 2005, from [REDACTED]s, and a copy of the wages paid to the beneficiary as of December 5, 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2005 Forms 1120S reflect ordinary incomes or net incomes from Schedule K (same as line 21 of Page 1) of -\$5,223, -\$2,753, -\$4,972, -\$9,252, and -\$17,089, respectively. The petitioner's 2001 through 2005 Forms 1120S also reflect net current assets of \$663, \$2,801, \$1,185, \$1,363, and \$831, respectively.

The beneficiary's 2001 through 2005 Forms W-2, issued by the petitioner, reflect wages earned of \$15,600, \$15,600, \$15,600, \$26,000 and \$25,500, respectively.

The copy of the wages paid to the beneficiary as of December 5, 2005 reflects wages paid to the beneficiary of \$24,939.59 as of that date.

The letter, dated June 7, 2005, from [REDACTED] states:

In 2001 year, its reported gross revenues were \$260,515 and its taxable net income was \$-5,223. There was for tax purposes, a loss of \$5,223 for the year. However, please note the corporation appears to always meet its daily operating expenses since the president and owner [REDACTED] of the corporation periodically advances the business cash from his considerable personal assets when necessary. This is one of the reasons that the corporation for more than 30 years has been able to continually pay its bills on time without experiencing a cash flow problem.

A copy of page 4 of the December 31, 2001 corporate income tax return is attached hereto. Please note on line 1, the corporation had as of December 31, 2001, cash in hand of \$4,568. It also had on line 10a Depreciable and Amortizable assets of \$121,100.00. Part of the corporation's "losses" – as indicated on the tax returns – were based on an accumulated depreciation of \$20,050 (see line 10b) and an accumulated amortization of \$69,626 (see line 13b) which are basically non-cash losses taken for business purposes only.

The corporation is a running concern, and quite clearly, it appears the owner and president is determined to do what he must to make it succeed and is capable of ensuring that the company meets all of its obligations.

The letter, dated December 7, 2005, from [REDACTED] and [REDACTED] states:

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

This is to certify that [REDACTED] Inc. had the monetary ability from 2001 through 2003 to pay an additional \$10,400, which is the difference between what the beneficiary was paid and the prevailing wage. The prevailing wage was in fact paid to the beneficiary in 2004 (please see his 2004 W-2 form) and has been paid to him continuously since then through to the present.

We have based our conclusion of the petitioner's monetary ability in 2001, 2002 and 2003 on the following:

- 1) Had the company known that it would have had to actually pay an additional \$10,400 in 2001, 2002 and 2003, the company would have had no problem in borrowing the difference from a financial institution as it did when it first began operations in 1994 in order to meet its daily operating expenses.

As a matter of fact, Line 13 of Schedule G on Form 1120S for the year 2001 shows interest paid of \$3,501, which supports the company's ability to borrow from financial institutions.

The company until now appears to have met all its liabilities, since it has no long term or short term loans. It has been a successful running concern since 1994; it has increased its assets appreciably over the years and quite clearly it appears the owner is determined to do what he must do to make it succeed. It also appears that the employer is capable of ensuring that the company meets all its obligations.

- 2) The Owner/Officer of [REDACTED] Inc. would have been willing to adjust his salary to provide for the difference between the wage earned by the beneficiary and the prevailing wage. Routinely the Owner/Officer only takes his salary each year after all the operating expenses have been paid. Line 7 of Schedule G (Form 1120S Year 2001) shows compensation of officers amounted to \$49,500. Line 7 of Schedule G (Form 1120S Year 2002) shows compensation of officers amounted to \$54,600. Line 7 of Schedule G (Form 1120S Year 2003) shows compensation of officers amounted to \$57,350. These all simply could have been reduced by \$10,400 in each of those years to cover the difference.
- 3) In addition, by delaying replacement of Plant and Equipment, because most of the equipment was still in good condition, the difference of \$10,400 could have been made available for salary to be paid to the beneficiary. You will notice that the total acquisition cost of Plant and Equipment as shown on the balance sheet for the year ending 12/31/2001 is \$141,150, of which \$121,100 has been depreciated; for the year ending 12/31/2002 it is \$141,150, of which \$125,556 has been depreciated; and for the year ending 12/31/2003 it is \$179,650, of which a total of \$134,136 has been depreciated.
- 4) A reduction of the savings and pension plan company contribution which covers all employees could similarly have been effectuated in order to ensure that the beneficiary was paid the difference between the wage earned and the prevailing wage.

- 5) [REDACTED] Inc. would have taken one of the above mentioned steps, if it had known in 2001, 2002, and 2003 that it had to ensure on its balance sheet the coverage of the difference between the wages paid to the beneficiary and the prevailing wage as alleged on the application. It appears that the employer would have taken one or a combination of some of the above measures to make his company succeed. It also appears that the employer is capable and has been capable of ensuring that the company meets all its obligations.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$26,023.93 based on the inclusion of depreciation, amortization, and compensation of officers. Counsel cites several non-precedent decisions issued by the AAO in support of his contention.

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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on February 23, 2001, the beneficiary claims to have been employed by the petitioner from January 1997 to the present. In addition, counsel has submitted the beneficiary's 2001 through 2005 Forms W-2, issued by the petitioner, in corroboration of the beneficiary's employment by the petitioner. Therefore, the petitioner has established that it employed the beneficiary in 2001 through 2005. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$26,023.93 and the actual wages paid of \$15,600, \$15,600, \$15,600, \$26,000, and \$25,500 to the beneficiary in 2001 through 2005. Those differences are \$10,423.93, \$10,423.93, \$10,423.93, \$23.93, and \$523.93, respectively.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no

precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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

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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant case, the petitioner’s 2001 through 2005 net incomes from Schedule K (same as line 21 of Page 1) were -\$5,223, -\$2,753, -\$4,972, -\$9,252, and -\$17,089, respectively. The petitioner could not have paid the proffered wage of \$26,023.93 from its net income in 2001 through 2005.

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

Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>2</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation’s end-of-year net current assets are equal to or

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<sup>2</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.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 through 2005 were \$663, \$2,801, \$1,185, \$1,363, and \$831, respectively. The petitioner could have paid the difference of \$23.93 in 2004 and \$523.93 in 2005 between the proffered wage of \$26,023.93 and the actual wages paid to the beneficiary of \$26,000 in 2004 and \$25,500 in 2005 from its net current assets. However, the petitioner could not have paid the difference of \$10,423.93 between the proffered wage of \$26,023.93 and the actual wages paid to the beneficiary of \$15,600 in 2001 through 2003.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$26,023.93 based on the inclusion of depreciation, amortization, and compensation of officers. Counsel cites several non-precedent decisions issued by the AAO in support of his contention.

First of all, it should be noted that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

Counsel's claim that the petitioner's amortization deduction should be included in the calculation of its ability to pay the proffered wage is also unconvincing. *Black's Law Dictionary*, 83 (6<sup>th</sup> ed. 1990) defines amortization as the allocation (and charge to expense) of the cost of other basis of an intangible asset over its estimated useful life. Intangible assets which have an indefinite life (e.g., goodwill) are not amortizable. Examples of amortizable intangibles include organization costs, patents, copyrights and leasehold interests. A reduction in a debt or fund by periodic payments covering interest and part of principal, distinguished from: (1) depreciation, which is an allocation of the original cost of an asset computed from physical wear and tear as well as the passage of time, and (2) depletion, which is a reduction in the book value of a resource (such as minerals) resulting from conversion into a salable product. The operation of paying off bonds, stock, a mortgage, or other indebtedness, commonly of a state or corporation, by installments, or by a sinking fund. An "amortization plan" for the payment of an indebtedness is one where there are partial payments of the principal, and accrued interest, at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished. There is no evidence in the record of proceeding that the petitioner could

postpone or neglect to pay its periodic payments covering interest and part of the principal of its debts involving intangible assets. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With regard to compensation of officers, the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, in the instant case, counsel has not provided a notarized affidavit from the petitioner's owner stating that he would be able and willing to forego the officers' compensation in order to pay the beneficiary's salary, and there is no evidence in the record that would establish that the petitioner is a sole shareholder. Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 1994 (The I-140 states that the business was started in 1973.). The petitioner has provided tax returns for the years 2001 through 2005. However, only 2004 and 2005 establish the petitioner's ability to pay the proffered wage of \$26,023.93, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's

reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petitioner's 2001 tax return reflects an ordinary income or net income of -\$5,223 and net current assets of \$663. The petitioner could not have paid the difference of \$10,423.93 between the proffered wage of \$26,023.93 and the actual wages paid to the beneficiary of \$15,600 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of -\$2,753 and net current assets of \$2,801. The petitioner could not have paid the difference of \$10,423.93 between the proffered wage of \$26,023.93 and the actual wages paid to the beneficiary of \$15,600 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of -\$4,972 and net current assets of \$1,185. The petitioner could not have paid the difference of \$10,423.93 between the proffered wage of \$26,023.93 and the actual wages paid to the beneficiary of \$15,600 from either its net income or its net current assets in 2003.

The petitioner's 2004 tax return reflects an ordinary income or net income of -\$9,252 and net current assets of \$1,363. The petitioner could have paid the difference of \$23.93 between the proffered wage of \$26,023.93 and the actual wages paid to the beneficiary of \$26,000 from its net current assets in 2004.

The petitioner's 2005 tax return reflects an ordinary income or net income of -\$17,089 and net current assets of \$831. The petitioner could have paid the difference of \$523.93 between the proffered wage of \$26,023.93 and the actual wages paid to the beneficiary of \$25,500 from its net current assets in 2004.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **Here, that burden has not been met.**

**ORDER:** The appeal is dismissed.