

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:



Office: TEXAS SERVICE CENTER

Date: NOV 09 2007

SRC 06 151 52434

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel 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 and continuing until the beneficiary obtained lawful permanent residency. The director denied the petition accordingly.

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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 27, 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 2001 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 nature, for which qualified workers are not available in the United States.

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 CFR § 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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$19.19 an hour, or \$39,915.20 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered job or two years of work experience as a night manager.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, the petitioner submits articles taken from the Internet primarily from the American Hotel and Lodging Association (AHLA), taken off the Internet on August 11, 2006. The petitioner also submits a letter dated August 16, 2006 from the company identified as [REDACTED] & Co., P.S., C.P.A., Houston, Texas. The letter is addressed to an individual in counsel's office and states that Kundan L.L.C. uses an accrual method of accounting and that the net operating income for the year 2005 before Section 179 depreciation was \$18,692. The letter writers also state that Kundan, L.L.C. as of the end of 2004 had Partners' Capital account balance of \$221,399, while the Partners' Capital account balance as of tax year 2004 was \$202,153.

The petitioner also resubmits federal income tax returns, Forms 1065, U.S. Return of Partnership Income, for tax years 2001 to 2005 for Kunden, L.L.C. as well as bank statements for a commercial checking account with Frost National Bank in the name of Kundan L.L.C. D/b/a Passport Inn-Hobby. C. d/b/a Passport Inn-Hobby.²

The petitioner also resubmits the beneficiary's W-2 Wage and Tax Statements for 2002 to 2005 and copies of the beneficiary's pay stubs from Paycheck that cover pay periods from April 14, 2001 to December 29, 2001 and from December 30, 2005 to May 13, 2006. The pay stubs identify the beneficiary's employer as Palace Inn-Hobby, Houston, Texas. Relevant evidence in the record includes Kundan, L.L.C.,'s Forms 941, Employer's Quarterly Tax Returns from the last quarter of 2001 to the third quarter of 2005; Schedule L. 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 raises questions as to the identity of the petitioner which in turn raises questions as to the petitioner's corporate structure. The federal income tax returns submitted to the record were filed in the name of Kunden, L.L.C., while the petitioner's name on the I-140 is Palace Inn Hobby. On both the federal income tax returns, and the I-140 petition, the petitioner's IRS Tax number is identified as 76-0572526.

Additional documentation submitted to the record in response to the director's request for further evidence indicates the correct spelling of this business is Kundan, L.L.C. The petitioner submitted an assumed name certificate dated April 6, 2006 and signed by [REDACTED]. This document identified the file number issued to the filing entity by the Texas Secretary of State is [REDACTED]. The petitioner also submitted a letter from [REDACTED] County Clerk, Harris County, Texas that acknowledged receipt of certificate of operation under assumed name which was filed in her office for Palace Inn on April 6, 2006. This document also indicated that the period of time during which the assumed name would be used was ten years from the date of filing with the Texas Secretary of State, or from April 7, 2006 to April 7, 2016.

The letter stated that certification was filed under a file number shown on the cash register validation also

¹ 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).

² The Frost Bank statements submitted in response to the director's request for further evidence, include most of the period of April 30, 2001 to April 24, 2006, with the period of November 2004 to October 2005 lacking any bank statements.

contained on the letter. Upon examination of the letter, the file number appears to be 400296807. The petitioner also submitted a notary statement signed by [REDACTED] Notary Public, that [REDACTED] had appeared before her and acknowledged that he had executed the certificate.

Thus, although the tax returns submitted to the record and the I-140 petition filed with Citizenship and Immigration Services (CIS) show the same IRS tax number, the record only establishes that Kundan, L.L.C. has been using the assumed name of Palace Inn since April 2006, almost five years after the Form ETA 750 was certified. In addition, the petitioner's complete name as identified on the Form ETA 750 and the I-140 petition is Palace Inn Hobby. Thus, the petitioner has not conclusively established that its name is an assumed one and that the actual petitioner as of the priority date is Kundan, L.L.C. Without further clarification of this issue, the AAO cannot establish whether the federal income tax returns submitted to the record, are those of the actual petitioner. The AAO does note that other documentation in the record such as bank statements from the Frost Bank, do indicate that Kundan, L.L.C. was doing business as Palace Inn Hobby as of April 2001, and that the W-2 statements submitted to the record for the beneficiary from Kundan, L.L.C. do contain the same EIN number as the federal tax returns. However, the documentation submitted with regard to the use of an assumed name, does not establish that Kundan, L.L.C. was using the assumed name of Palace Inn or Palace Inn Hobby as of the 2001 priority year.

Nevertheless the AAO will, for illustrative purposes, examine the federal income tax returns submitted to the record as well as other documentation submitted to establish the claimed petitioner's ability to pay the proffered wage.

The record shows that during the 2001 priority year through 2005, the petitioner was structured as a domestic limited liability company taxed as a partnership.³ On the petition, the petitioner claimed to have been established in 1999, to have gross annual income of \$313,887, net annual income of \$19,857, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on August 5, 2003, the beneficiary claimed to have worked for the petitioner since January 2001.

On appeal, the petitioner asserts it has not established its ability to pay the proffered wage based on the petitioner's net income or net current assets, but that it has supplied additional evidence, as allowed by 8 C.F.R. § 204.5(g)(2) to demonstrate that it has the financial resources to pay the proffered wage. The petitioner also states that the petitioners discussed in the case law cited by the director, including *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); are not analogous to the instant petitioner, because in neither case did the petitioner submit additional documentation as to the respective petitioner's further financial assets.

The petitioner states that in the instant petition, it had provided bank statements that indicated average monthly balances of over \$20,000 in tax year 2001; over \$18,000 in tax years 2003 and 2004; of over \$11,000 in 2005; and over \$30,000 in 2006. The petitioner states that based on this evidence, the petitioner would have had the additional \$3,258.25 per month needed to pay the entire proffered wage to the beneficiary.

The petitioner also states that other precedent decisions such as *Matter of Sonogawa* 12 I&N Dec. 612(BIA 1967) and *Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898 (D.C.Cir 1989) support the proposition that CIS can rely on additional factors including the company's future profitability, or the revenue-generating nature of an employee's job to determine a petitioner's ability to pay the beneficiary's wage.

³ For purposes of these proceedings, the petitioner is considered a multi-member limited liability company.

The petitioner states that following the reasoning of the court in these two cases, the petitioner can demonstrate that the beneficiary's position as hotel manager will generate future revenue with which the petitioner will be able to pay the proffered wage. The petitioner states that smaller businesses like the petitioner's hotel rely on the expertise of its management and support staff to run an efficient operation and maximize their profits. The petitioner states that the beneficiary will decrease operating costs by hiring and supervising energetic and hardworking employees, by reviewing the petitioner's financial and budget activities to maximize investments and increase efficiency, and also by supporting general hotel operations, among other activities. The petitioner also notes that the petitioner's **increasing profitability has already been apparent during the years the beneficiary has worked for the petitioner.** [REDACTED] notes that an analysis of the petitioner's recorded income between the years 2001 and 2005, reveals an increase in profitability and a trend toward an overall growth of the business.⁴

The petitioner then asserts that the tax and accounting structure of a limited liability company reflect additional funds that are available to the petitioner to pay the proffered wage. [REDACTED] states that the petitioner is a limited liability company that files income taxes as a limited liability partnership, and that partnerships, whether general, limited, or limited liability, have no income tax imposed on them, but rather the partnership's income is passed on through and taxed to each partner. [REDACTED] further states that in limited liability companies, income can be passed through to each partner if an election is not made, or it can be treated as a corporation. [REDACTED] states that small businesses should be allowed, under normal accounting principles, to supplement the evidence to demonstrate their ability to pay proffered wages through evidence as to the personal assets and liabilities of the owners because the partnership itself pays no federal income tax on its income; instead the partners' individual tax liabilities are affected by the performance of the partnership. [REDACTED] referred to an unpublished AAO decision in which the sole shareholder of a medical corporation routinely minimizes taxable income by taking it as compensation to avoid double taxation and in such a case, the net profit should not control.

[REDACTED] states that in order to get a complete picture of the petitioner's financial viability, it is necessary to not only look at the difference in net current assets and liabilities, but also to look at the information provided on Form 1065 Schedules K and M-2 that not only allocate the partnership's profits or losses to each partner, but also reconcile the partners' combined ending capital accounts.

With regard to the petitioner's 2001 tax return, [REDACTED] states that the petitioner, based on various decisions from CIS, only has to establish its ability to pay the proffered wage as of the apriority date April 23, 2001 to December 2001. [REDACTED] also notes that the depreciation expenses of \$53,835 can also be considered as it is money that the petitioner had available to pay the proffered wage. [REDACTED] then looked at the petitioner's bank statements for 2001 and states that the petitioner's average monthly bank balance of \$20,502.99 always surpassed the beneficiary monthly wages and that with deprecation and the bank balances in 2001 available to the petitioner, it could establish its ability to pay the proffered wage.

With regard to tax year 2003, [REDACTED] again added back the petitioner's depreciation expenses, and that when the petitioner's depreciation was added back to the original income of \$9,999 in 2003, this was sufficient to pay the difference between the beneficiary's actual wages and the proffered wage. [REDACTED] also states that

⁴ A graph provided by [REDACTED] shows that the petitioner's ordinary income has increased from -\$39,017 in tax year 2001 to \$18,692 in tax year 2005.

if CIS did not consider the added depreciation, based on the petitioner's monthly balances for 2003, the petitioner still had sufficient bank funds to pay the difference between the beneficiary's actual wages and the proffered wage. [REDACTED] made similar assertions with regard to the petitioner's depreciation and bank statements establishing the petitioner's ability to pay the difference between the beneficiary's wages and the proffered wages in both tax year 2004 and 2005.

[REDACTED] states that, given the evidence provided by the petitioner's W-2 Forms, its tax returns, and bank account statements, the CIS should consider the totality of the petitioner's overall circumstances, and that the present decision should be reversed.

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).

The AAO notes that [REDACTED] on appeal states that the petitioner as a limited liability company has additional funds available to pay the proffered wage. [REDACTED] further states that CIS should not just look at the petitioner's net current assets and liabilities, but also to information contained on the Forms 1065 Schedules K and Schedule M-2 Analysis of Partners' Capital Accounts. [REDACTED] submits a letter from a group of accountants that identify the petitioner's partners' capital accounts for tax year 2004 and 2005. Counsel's implication that the petitioner could pay the difference between the beneficiary's wages and the proffered wage out of its Partners' Capital Accounts is incorrect. Although an explanation of double-entry accounting is beyond the scope of today's decision, Partner's Capital Accounts are an offsetting credit to some asset and are not, in themselves, assets. They are not an account out of which the petitioner can withdraw funds to pay wages. They are not a fund available to pay the proffered wage.

The AAO also notes that [REDACTED] appears to suggest that the assets of the petitioner's partners can be used to establish the petitioner's ability to pay the proffered wage. However, 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). In a similar case, 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."

[REDACTED] also suggests that the depreciation amounts noted in the petitioner's tax returns also be utilized as a source of additional funds with which to pay the proffered wage. However, the AAO, in accordance with several precedent decisions does not consider the petitioner's depreciation when calculating either the petitioner's net income or net current assets.

[REDACTED] on appeal and counsel in the petitioner's response to the director's request for further evidence dated May 23, 2006 both refers to the Frost Bank checking account monthly statements as an additional

sources of further financial resources with which to pay the difference between the beneficiary's actual wages and the proffered wage. However, counsel's and the petitioner's reliance on bank account statements is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Furthermore, as previously stated, the bank statements submitted to the record document a bank account for Kundan, L.L.C., d/b/a Passport Inn-Hobby, and the petitioner has not clarified the relationship between itself and this entity. The AAO also notes that the bank statements are not complete, and statements from November 2004 to October 2005 do not appear to have submitted to the record. Thus, the AAO gives no weight to the Frost Bank checking account statements submitted to the record.

On appeal, [redacted] also refers to unpublished AAO decisions concerning the petitioner's ability to pay the proffered wage but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, the unpublished AAO decision to which the petitioner's partner refers on appeal that examined the ability of a sole shareholder to use officer compensation as a source of additional funds with which to judge a business's financial viability and its ability to pay the proffered wage is not analogous to the instant petition. In the instant petition, there is no officer compensation noted on the federal partnership returns, nor is there a sole shareholder with considerable flexibility to distribute the petitioner's profits as officer compensation.

In determining the petitioner's ability to pay the proffered wage during a given period under either status, 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 submitted W-2 Forms for the beneficiary that indicated he earned \$12,000 in tax years 2002, 2003, 2004, and 2005. The petitioner also submitted pay statements for the beneficiary that indicated biweekly salary of \$500 in tax years 2001 to 2006. The beneficiary's wages for tax year 2001 based on the 2001 pay stubs were also \$500 every two weeks, with the pay stub covering April 14, 2001 to December 29, 2001 indicating total wages of \$10,000. The AAO notes that if the beneficiary were paid this biweekly salary throughout tax year 2006, the petitioner would have paid the beneficiary wages of \$13,000 for tax year 2006 that is significantly less than the proffered wage of \$39,915.20. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the 2001 priority date and to the present. The petitioner thus has to establish it has the ability to pay the difference between the beneficiary's actual wages and the proffered wage as of the 2001 priority date until 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, contrary to counsel and the petitioner's assertions, 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 while taxed as a multi-member limited liability company:

- In 2001, the Form 1065 stated net income of -\$24,283.⁵
- In 2002, the Form 1065 stated net income of \$20,473.
- In 2003, the Form 1065 stated net income of \$2,770.
- In 2004, the Form 1065 stated net income of \$15,670.
- In 2005, the Form 1065 stated net income of \$1,493.

Therefore, from the 2001 priority year and through 2005, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage of \$39,915.20.

⁵ Where a multi-member limited liability company's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." Where a multi-member limited liability company has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. The petitioner's tax returns for 2001 through 2004 indicate other deductions on items 12 and 13a, therefore the petitioner's net income is taken from Schedule K.

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.⁶ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 15 through 17. If the total of a multi-member limited liability company'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 -\$12,284.
- The petitioner's net current assets during 2002 were -\$10,062.
- The petitioner's net current assets during 2003 were -\$17,725.
- The petitioner's net current assets during 2004 were \$978.
- The petitioner's net current assets during 2005 were -\$6,262.

Therefore, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2001, 2002, 2003, 2004, or 2005.

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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. The petitioner states that other precedent decisions such as *Matter of Sonogawa* 12 I&N Dec. 612(BIA 1967) and *Masonry Master, Inc v. Thornburgh*, 875 F. 2d 898 (D.C.Cir 1989) support the proposition that CIS can rely on additional factors including the company's future profitability, or the revenue-generating nature of an employee's job to determine a petitioner's ability to pay the beneficiary's wage.

The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's present and future employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

assertion. The AAO notes that although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage.⁷

Counsel also asserts that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and that this factor can establish that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any specific standard or criterion for the evaluation of such earnings other than general comments, such as the beneficiary will hire hardworking employees. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Further, when reviewing the petitioner's gross income for the pertinent years in question, the petitioner identifies its annual total income as follows: \$318,416 in 2001; \$304,366 in tax year 2003; \$313,887 in tax year 2004, and \$345,712 in tax year 2005. The record also indicates that in tax year 2002, the petitioner's total income was \$342,287. Thus, the record indicates a modest increase in total income in tax years 2002 and 2005, a more modest increase in total income in tax year 2004, and a decrease in total income in tax year 2003. The petitioner claims that the beneficiary's employment from the priority year 2001 to 2005 has already demonstrated the beneficiary's impact on the petitioner's profitability; however, the AAO does not view the record as establishing any consistent and significant increase in business operations that can be attributed to the beneficiary's employment during this period of time. Thus, the petitioner's statement that the beneficiary's future employment has led and will lead to the petitioner's greater profitability is not persuasive. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The decision provided for the approval of petitions where the petitioner's net profit is small or where the petitioner shows a loss if the petitioner's expectations of continued increase in business and increasing profits are reasonable.

The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that any year was uncharacteristically unprofitable for the petitioner. The petitioner also provided no further evidence as to the petitioner's reputation within the hotel industry, the growth in the number of employees, or similar factors that would further establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wages.

⁷ Following this decision, CIS did specify a formula for establishing a petitioner's ability to pay the proffered wage that has been used by the Service Center and the AAO in the current proceedings.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.