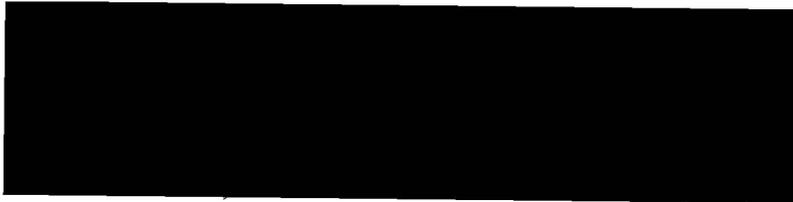


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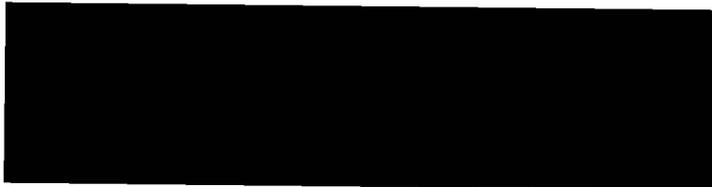
Petitioner:

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. The director reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a franchise hotel. It seeks to employ the beneficiary permanently in the United States as a hotel 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. 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 November 9, 2004 denial and his subsequent reaffirmation on motion March 15, 2005, 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20 per hour or \$41,600 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position, and states other special requirements as follows: "Some training in repair and maintenance of mechanical equipment; non-smoking; 24 hour call; live on premises provided."

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).

With the initial I-140 petition, the petitioner submitted monthly statements for two bank accounts, a Bank of Essex checking account for [REDACTED] (Acct. 479715403) for the period of time of April 17, 2001 to June 28, 2002. The second account, a commercial checking account with Union Bank and Trust Company, (Acct. No. [REDACTED]) is in the name of [REDACTED]. The petitioner submitted statements for this account that covered the period April 30, 2001 to July 31, 2002.² The petitioner also submitted a letter written by [REDACTED] dated [REDACTED]. In her letter, [REDACTED] stated that Red Roof Inn and [REDACTED] is owned and operated by [REDACTED].

In the petitioner's response to the director's request for further evidence dated October 22, 2003, counsel submitted [REDACTED].

The petitioner also submitted the beneficiary's Form W-2 Wage and Tax Statement, for tax year 2002, that indicated Carmel Lodging Ramada Inn, 806 England Street, Ashland, Virginia paid the beneficiary \$1,296.25. The petitioner also resubmitted bank account statements previously submitted for the Bank of Essex and Union Bank and Trust Company and submitted additional bank statements for the two previously identified accounts and an additional third account.

The additional Bank of Essex bank account is for Acct. No. [REDACTED] a money market savings and mortgage loan account, and is for the period of time from December 18, 2000 to March 16, 2001 and is in the name of [REDACTED]. The petitioner also submitted additional bank statements for the Bank of Essex checking account for Carmel Lodging, L.L.C., 806 England Street, Ashland, Virginia, (Acct. [REDACTED] for the periods February 2002 to April 2002 and July 2002 to December 31, 2002. The petitioner also submitted additional bank account statements for the commercial checking account with Union Bank and Trust Company, (Acct. No. [REDACTED] for the months July 2002 to December 31, 2002. In the RFE response, counsel stated that the bank statements clearly indicated the petitioner's ability to pay the proffered wage, because in tax year 2001, the average ending balance was in excess of \$52,000 a month and in tax year 2002, the average ending balance was over \$57,000 per month.

² The mailing addresses for these two bank accounts vary throughout this period of time. For example, the Union Bank and Trust Company statement for June 28, 2002 indicates the address for [REDACTED] of Essex provides [REDACTED].

On motion, counsel resubmitted bank statement evidence³ previously submitted with the initial petition and in response to the director's request for further evidence. The petitioner also resubmitted the letter from [REDACTED]. The petitioner also submitted for the first time to the record, Form 1065, U.S. Return of Partnership Income, for tax year 2003, for Carmel Lodging L.L.C, and the beneficiary's Form W-2 Wage and Tax Statement for 2003. This Form 1065 indicates ordinary income of \$17,354⁴ in tax year 2003, while the 2003 W-2 document indicate that the petitioner paid the beneficiary \$41,600 in tax year 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On motion counsel compiled a list of the combined monthly ending balances for the Bank of Essex and Union bank & Trust Company's accounts and lists the combined total monthly ending balances for these accounts from April 2001 to December 2001, and then from January 2002 to December 2002. Counsel stated that the average ending balance in tax year 2001 was \$ [REDACTED] while the average ending balances for the two bank accounts in 2002 was \$115,138.42. Counsel stated that the funds available to the petitioner during each relevant month exceeded the proffered wages of [REDACTED]. Counsel stated that the director erroneously stated that the petitioner had \$11,548 in its banking account as of April 2001 when the petition was filed. Counsel noted that this amount took into account only one of the petitioner's corporate bank accounts, and that the petitioner actually had a total ending balance of \$55,377.55 in its two corporate accounts: [REDACTED] in the Union Bank Trust Company account and [REDACTED] in its Bank of Essex account. Counsel asserted that the director had overlooked the submitted bank statements in his decision, and the director's letter dated November 9, 2004 referenced incomplete information. Counsel stated that Citizenship and Immigration Services (CIS) should give ample weight to the bank funds available to the petitioner and cites *Royal Antique Rugs, Inc.*, 90-INA-529 (October 30, 1991), a Board of Alien Labor Certification Appeals (BALCA) decision for the proposition that inventory and liquid assets should also be used in determining the petitioner's ability to pay the proffered wage.

In reaffirming his initial decision, the director stated that the petitioner submitted two additional bank statements for two other bank accounts in order to establish the petitioner's ability to pay the proffered wage as of the 2001 priority date. The director stated that these two accounts totaled [REDACTED], which along with the [REDACTED] held in another bank account as of April 2001, only reduced the liabilities of the petitioner to [REDACTED] in the priority year.⁵ The director stated that the evidence was far from enough money to pay the proffered wage of [REDACTED] in the 2001 priority year.

On appeal, counsel cites to 8 C.F.R. § 204.5(g)(2), and asserts that the regulations, in addition to establishing that income tax returns may be relied upon to establish the petitioner's ability to pay the proffered wage, also permit bank funds to be considered in the determination of a petitioner's ability to pay the proffered wage. Counsel again cites *Royal Antique Rugs, Inc.* 90-INA-529 (October 30, 1991). Counsel also states that while *Elatos Restaurant Corp., Etc. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) establishes that income tax returns

³ On motion, counsel submitted the front page of the previously submitted bank account statements.

⁴ The AAO uses the net income figure identified on line 1, page four of the 2003 Form 1065, since the partnership indicated it earned additional interest income on its Schedule K, Partners' Shares of Income, Credits, Deductions, etc.

⁵ The record is not clear as to how the director reached his determination with regard to the petitioner's combined bank account amounts or to his determination of the impact of these bank amounts on the petitioner's liabilities in the 2001 priority year. The AAO will discuss more fully the director's determination as to the petitioner's net income and net current assets in 2001 further in these proceedings.

can establish the petitioner's ability to pay the proffered wage, the decision also stands for the proposition that CIS abuses its discretion in issues such as the petitioner's ability to pay where its final determination is "unsupported by reasonable, substantial evidence on the record considered as a whole." Counsel also cites *Matter of Sonogawa*, 12 I & N Dec. 612 (BIA 1967), and notes that an unprofitable year does not preclude a positive finding with regard to a petitioner's ability to pay a proffered wage, if the petitioner can show that it was profitable before and/or after the year in which the labor certification application was filed.

Counsel states that the petitioner in fact had the ability to pay the proffered wage of \$ [REDACTED] priority year and continuing, and that CIS erred in not giving adequate weight to the petitioner's available bank funds. Counsel states that the director erred in his conclusion that the loss in ordinary income taken by the petitioner on its tax return is considered a liability against which the funds available in the petitioner's bank account should be counted. Counsel states that the petitioner's liabilities and assets are discussed on Schedule L, of the petitioner's tax returns.

Counsel further asserts that the director erred in his discussion of the petitioner's liabilities and assets figures on the relevant tax returns. Counsel states that the petitioner's tax liabilities did not exceed its assets. Counsel notes that at the end of tax year 2001, the petitioner's assets and liabilities were both [REDACTED] while in tax year 2002, the petitioner's assets and liabilities at the end of the tax year each equal [REDACTED].⁷ Counsel states that the petitioner did not have liabilities of [REDACTED] in excess of its assets at the end of tax year 2001, as stated in the director's decision to deny the motion to reconsider. Counsel further states that the funds available in the petitioner's bank accounts were immediately available to pay the beneficiary's wages as of the 2001 priority date, and should have been properly considered.

With regard to the petitioner's bank accounts, counsel states that in 2001 the petitioner had three corporate business accounts from which it could have paid the beneficiary wages. Counsel states that the petitioner had an average total monthly balance of \$125,642.98, and that the amount of cash available to the petitioner in 2001 always exceeded the beneficiary's annual salary of \$41,600. Counsel states that the petitioner continued to have more than sufficient funds in its bank account in tax year 2002, with an average total monthly balance of \$115,138.42. Counsel asserts that the CIS erred in not according the petitioner's available funds adequate evidentiary weight. Counsel also notes that based on the beneficiary's W-2 form for tax year 2003, the petitioner continued to have the ability to pay the wages of the beneficiary in tax year 2003, when it paid the beneficiary \$41,600.

With reference to *Matter of Sonogawa*, counsel states that the instant petitioner is a sizeable business that has been in existence for several years, and that in 2001, the petitioner paid \$243,536 in salaries, and in tax year 2002, the petitioner paid \$221,903 in salaries. Counsel further asserts that the petitioner had \$789,542 and \$836,428 in gross receipts in 2001 and 2002, respectively, while taking large depreciation deductions of \$177,628 and \$139,407 in 2001 and 2002 that are not cash expenses. Counsel states that even if the petitioner had had an unprofitable year, the petition should still have been approved.

The evidence in the record of proceeding shows that the petitioner that submitted the I-140 petition also submitted Forms 1065 for tax years 2001, 2002 and 2003 that indicate it is a domestic general partnership.

⁶ The partnership's liabilities and equity equal assets on Schedule L as they must, under proper accounting standards.

⁷ Again, the partnership's liabilities and equity equal assets on Schedule L as they must, under proper accounting standards.

On the petition, the petitioner claimed to have been established in December 1999, to have a gross annual income of [REDACTED] and to currently employ 18 workers. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner.

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).

The AAO notes that the letter submitted to the record from [REDACTED] is not sufficient evidence to establish that Carmel Lodging, L.L.C., is the owner and operator of Red Roof Inn and [REDACTED] the business that obtained the certified ETA 750 Labor Certification Application, and submitted the I-140 petition. Of more probative weight would be the articles of incorporation that lists owners of the claimed business, or documentation of fictitious business names. 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)). The AAO further notes that the entity that filed the I-140 petition, namely Red Roof Inn and [REDACTED] and Carmel Lodging, L.L.C. that [REDACTED] claims owns Red Roof Inn and [REDACTED] have the same Employer Identification Number [REDACTED] listed on the I-140 petition and Carmel Lodging's federal income tax returns. This information is not sufficient to clearly establish whether Carmel Lodging actually owns and operates Red [REDACTED]. If the petitioner pursues this matter further, it should provide probative evidence to the record as to the relationship between Carmel Lodging, L.L.C. and Red Roof Inn ^ Aunt [REDACTED]. For illustrative purposes, the AAO will examine the tax returns submitted by Carmel Lodging when it considers the petitioner's ability to pay the proffered wage.

The AAO also notes that the bank account statements for the Union Bank and Trust Company submitted to the record are identified as Carmel Lodging L.L.C. T/A Ramada Inn, which suggests this is a commercial checking account for an additional business entity, rather than for Red Roof Inn and [REDACTED]. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The petitioner has not established the relationship between itself and the monthly bank statements for Carmel Lodging L.L.C. T/A Ramada Inn from Union Bank and Trust Company. Thus, the monthly bank statements from Union Bank and Trust Company will be given no evidentiary weight in these proceedings.

Similarly the petitioner also did not establish the relationship between itself, the monthly bank statements from the Bank of Essex for [REDACTED] and the business that obtained the labor certification, namely Red Roof Inn and [REDACTED]. Therefore the AAO also gives no evidentiary weight to the Bank

of Essex bank statements.

Furthermore, counsel's reliance on the bank statements is not persuasive. First, contrary to counsel's reference to 8 C.F.R. § 204.5(g)(2), 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) and submitted by the petitioner, namely corporate income tax returns, is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, if the bank statements submitted to the record were given evidentiary weight, 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 returns, 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.

On appeal, counsel states that a Department of Labor's (DOL) BALCA precedent decision is applicable to the instant petition before the Department of Homeland Security's AAO. [REDACTED] 529 (BALCA 1991) counsel states that this case stands for the proposition that inventory and liquid assets **should be used to calculate the petitioner's ability to pay the proffered wage.** Counsel does not state how DOL precedent is binding in these proceedings. 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, BALCA 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, as will be discussed further, the AAO does not view inventory or liquid assets such as cash separately as primary evidence of the petitioner's ability to pay the proffered wage, but rather includes them in its examination of the petitioner's current assets, a preliminary step in calculating the petitioner's net current assets. The AAO further notes that the petitioner in *Royal Antique Rugs*, was a rug import business position and established that it had \$150,000 in paid inventory, while the instant petitioner indicates no inventory in any of the Forms 1065 submitted to the record. Thus, the issue of inventory listed on Schedules L that could be used to establish the instant petitioner's ability to pay the proffered wage through its current assets is irrelevant in the present proceedings.

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 submitted the beneficiary's W-2 Forms for tax years 2002 and 2003. These documents establish that the petitioner identified as [REDACTED] paid the beneficiary [REDACTED]. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2001 priority date and continuing until the beneficiary obtained lawful permanent residency. While the petitioner established that it paid the beneficiary the proffered wage in tax year 2003, the petitioner has to establish its ability to pay the entire proffered wage in tax year 2001, and the difference between the beneficiary's actual wages and the proffered wage in tax year 2002, namely [REDACTED].

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, contrary to counsel's assertion, 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. [REDACTED] 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.

The petitioner's appellate suggestion that depreciation expenses should be considered as cash is misplaced. 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.

Where a partnership'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 partnership 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. In the instant petition, for tax years 2001 and 2002, the AAO utilizes line 22 of the petitioner's Form 1065, as shown in the table below:

Tax Year	Net Income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$223,280	\$41,600 ⁸	-\$264,880 ⁹
2002	-\$23,295	\$40,404.75	-\$63,699.75 ¹⁰

With regard to tax year 2001 the petitioner did not establish that it paid the beneficiary any wages in 2001 or that it had sufficient net income in 2001 to pay the proffered wage of \$41,600. In tax year 2002, the petitioner did not establish that it had sufficient net income to pay the difference between the beneficiary's actual wages and the

⁸ The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

⁹ This figure is calculated by adding the petitioner's negative net income with the entire proffered wage.

¹⁰ This figure is calculated by adding the negative net income with the amount of the difference between the beneficiary's actual wages and the proffered wage.

proffered wage. Therefore the petitioner has not established that it had the ability to pay the proffered wage as of the priority date, namely, April 27, 2001, or in tax year 2002. As stated previously, the petitioner did establish that it paid the beneficiary the proffered wage in tax year 2003, and thus established its ability to pay the proffered wage in 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). Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$41,600 as of the 2001 priority date and onward.

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. In addition, 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.

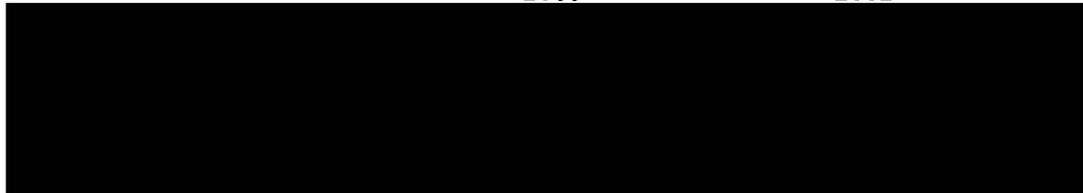
The AAO notes that the director's analysis in his denial of the motion of the petitioner's actual assets and liabilities in tax year 2001 based on the ending balances of the petitioner's claimed bank accounts in 2001 is incorrect. The petitioner's available cash reserves, as identified on line 1, Schedule L, Form 1065 for tax year 2001 was -\$159,636. The petitioner's end of year available cash in any and all of its bank accounts would have already been included in this figure. The AAO further notes that, contrary to counsel's assertions, the petitioner's cash is considered when analyzing the petitioner's net current assets.

The AAO notes that the director combined the petitioner's negative net income and negative net current assets in his initial denial of the instant petition when considering the petitioner's assets available to pay the proffered wage. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with the director that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current

¹¹ According 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,

liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the tax year 2002:

2001	2002
	

The petitioner established that it did not pay the beneficiary any wages in 2001 and paid \$1,296.25 in tax year 2002. Based on its net current assets for tax years 2001 and 2002, the petitioner has not established that it has the ability to pay the proffered wage of \$41,600 in 2001 or the difference between the beneficiary's wages and the proffered wage in 2002. Thus, the petitioner has not established that it has the capability of paying the proffered wage as of the 2001 priority date and onward.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). This precedent decision relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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*. The instant petitioner was established in 1999, three years before filing the instant petition, while the petitioner in *Sonogawa* had been in business for eleven years prior to filing its employment-based petition. Furthermore, the petitioner has provided no further evidence to establish the petitioner's reputation within the industry, or that 2001, the priority year, or tax year 2002 were uncharacteristically unprofitable years for the petitioner. The AAO does not find the circumstances of the petitioner in the instant petition to be analogous to the petitioner's circumstances in *Sonogawa*.

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.

short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed.