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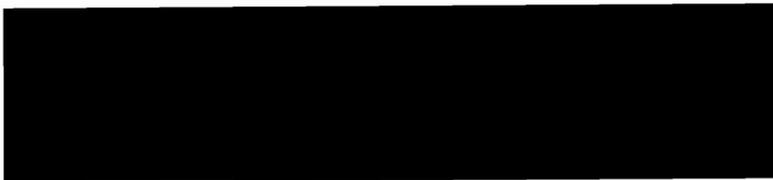
Date: SEP 05 2007

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

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

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 4, 1998. The proffered wage as stated on the Form ETA 750 is \$17.36 per hour for 35 hours per week, which equals \$31,595.20 per year.

The Form I-140 petition in this matter was submitted on April 29, 2005.<sup>1</sup> On the petition, the petitioner stated that it was established during January 1990 and that it employs seven workers. The spaces provided for the petitioner to report its gross annual income and its net annual income were left blank. On the Form ETA 750, Part B, signed by the beneficiary on February 25, 1998, the beneficiary claimed to have worked for the

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<sup>1</sup> The petitioner submitted a previous petition for the same beneficiary on May 30, 2003. That earlier petition was denied on September 16, 2004. Today's decision is concerned only with the Form I-140 petition submitted on April 29, 2005.

petitioner from June 1994 to December 5, 1997. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Tarrytown, New York.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the petitioner's 1998, 1999, 2000, 2001, 2002, and 2003 Form 1120, U.S. Corporation Income Tax Returns, (2) copies of monthly statements pertinent to the petitioner's bank accounts, (3) a letter dated October 1, 2004 from the petitioner's president, (4) a letter dated February 25, 2005 from the petitioner's president, and (5) letters from the petitioner's accountant dated May 13, 2003, and March 4, 2005. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on January 2, 1990, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 1998 the petitioner declared taxable income before net operating loss deduction and special deductions of \$0. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner paid officer compensation of \$63,600 during that year.

During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,413. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner paid officer compensation of \$92,400 during that year.

During 2000 the petitioner declared a loss of \$15,027 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner paid officer compensation of \$100,900 during that year.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$13,367. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner paid officer compensation of \$78,000 during that year.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,476. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner paid officer compensation of \$78,000 during that year.

During 2003 the petitioner declared a loss of \$60 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner paid officer compensation of \$81,000 during that year.

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's president's October 1, 2004 letter states that he could have forgone his officer compensation as necessary to pay the proffered wage.

The petitioner's president's February 25, 2005 letter states that the petitioner steadily employed the beneficiary from June 5, 1994 to April 5, 1999. This office notes that the petitioner's president stated that the beneficiary ceased to work for the petitioner on April 5, 1999, whereas the beneficiary stated, on February 25, 1998, on the Form ETA 750B, that he stopped working for the petitioner on December 5, 1997.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The petitioner's accountant's May 13, 2003 letter cites the petitioner's gross receipts, gross profits, and total payroll expense as indices of its ability to pay additional wages. The letter includes the following sentence: "Other favorable factors are (retained earnings, depreciation, inventory, assets, positive cash flow, substantial bank account balance, etc.)." The inclusion of that sentence, with various factors included for the accountant to choose to include or exclude, makes clear that the accountant did not compose the letter. The inclusion of that sentence, unedited, also makes clear that the accountant did not read the letter closely before signing it. This detracts from the evidentiary value of the letter.

The petitioner's accountant's March 4, 2005 letter cites the same statistics as evidence of the petitioner's ability to pay the proffered wage. That letter also contains the sentence, "Other favorable factors are (retained earnings, depreciation, inventory, assets, positive cash flow, substantial bank account balance, etc.)."

The acting director denied the petition on January 18, 2006.

On appeal, counsel asserted that the petitioner has been in continuous operation January 2, 1990 and stated that the petitioner's losses and low profits during the salient years do not demonstrate conclusively<sup>3</sup> that the petitioner is unable to pay the proffered wage, as taxable income on a tax return is intentionally minimized to avoid tax liability. Counsel urged that the petitioner's depreciation deduction might have been calculated differently, or merely not claimed, and that it should therefore be added to the petitioner's net income for the purpose of calculating the funds the petitioner had at its disposal during a given year.

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<sup>3</sup> In his brief counsel stated, "[CIS] seems to think that the petitioner cannot pay the proffered wage because the petitioner's net annual income is generally about '0.'" Counsel has inverted the burden of proof. The acting director did not find that the evidence shows that the petitioner is unable to pay the proffered wage, but merely that the evidence in the record does not adequately demonstrate the petitioner's ability to pay it. Denial does not require a finding that the evidence demonstrates conclusively that the petitioner is unable to pay the proffered wage, only a finding that the evidence in the record is insufficient to demonstrate that ability.

Counsel characterized the petitioner's retained earnings as "an after tax fund held in reserve to be available to pay expenses" and urged that the amount of the petitioner's retained earnings should be considered in determining its ability to pay additional wages.

Counsel states that the petitioner's total assets "can be used as leverage to pay expenses." Counsel also suggested that the increase in the petitioner's total assets from 1998 to 2003 demonstrates its ability to pay the proffered wage. Counsel urged that the petitioner's bank statements demonstrate cash flow sufficient to pay the proffered wage.

Counsel's assertion that the petitioner's tax returns do not show the true financial condition of the corporation is inapposite. It neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. Having failed to provide annual reports or audited financial statements, the petitioner may not now avoid the requirements of 8 C.F.R. § 204.5(g)(2) by arguing that its tax returns inaccurately reflect its cash position.

If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Unless the petitioner provides other reliable evidence of its ability to pay the proffered wage, it is bound by the figures on its tax returns.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.<sup>4</sup> 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 reported on its tax returns.

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. This office is aware that a depreciation deduction does not require or represent a specific cash outlay 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,

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<sup>4</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See 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. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>5</sup> Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel mischaracterized retained earnings as “an after tax fund held in reserve to be available to pay expenses.” Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer to pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

Counsel argued, and the petitioner's president asserted, that the petitioner's president could have sacrificed all or part of his compensation as necessary to pay the proffered wage.

If the record demonstrated that the petitioner's president was independently wealthy, this factor might have been considered as evidence that he was able to forego compensation provided to him by the petitioner. If the record contained an itemized budget showing that the petitioner's president needed much less compensation than he took, this evidence could have been considered. If the amount of officer compensation had fluctuated dramatically from one year to another, from zero or almost zero to several hundred thousand dollars or more,

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<sup>5</sup> Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

thus reducing income to zero or near zero, then this would tend to support the proposition that officer compensation was paid as an artifice to reduce corporate tax liability.

In the instant case, however, the tax returns provided show that over the course of six years the petitioner's officer compensation fluctuated only from a low of \$63,600 to a high of \$100,900. The wage proffered in the instant case is \$31,595.20. Although the petitioner's owner indicates that he would willingly have reduced his compensation as necessary to pay the proffered wage, the record contains no evidence that he could have sacrificed that portion of his annual income.

The record in the instant case contains no evidence, other than the petitioner's president's unsupported letter, to suggest that the petitioner's president was able to forego compensation, in whole or in part. That he could, as he asserted, have sacrificed his own income for the sake of hiring the beneficiary has not been proved.

Counsel urged that the petitioner's total assets could have been leveraged, that is, used as collateral to borrow money, as necessary to pay the proffered wage. An indication of available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>6</sup> or otherwise increased its net income,<sup>7</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Counsel urged that the petitioner's gross profits are an index of its ability to pay the proffered wage. This office rejects that argument for essentially the same reason that it rejects the argument pertinent to gross receipts. Gross profits are a company's gross receipts minus returns, allowances and the cost of goods sold, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional wages.

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<sup>6</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>7</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary claimed to have worked for the petitioner from June 1994 to December 5, 1997 and the petitioner claimed to have employed him from June 5, 1994 to April 5, 1999, the petitioner provided no evidence that it paid wages to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. An increase in the petitioner's total assets is, likewise, unavailable to pay wages.

Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are

typically<sup>8</sup> shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$31,595.20 per year. The priority date is March 4, 1998.

During 1998 the petitioner declared taxable income before net operating loss deduction and special deductions of \$0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,413. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$13,367. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,476. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The

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<sup>8</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

petitioner provided no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on April 29, 2005. On that date, the petitioner's 2004 tax return was due and should have been available.<sup>9</sup> The petitioner did not provide its 2004 return or any reason for that omission. The petitioner failed to demonstrate its ability to pay the proffered wage during 2004.

When the petitioner submitted the Form I-140 visa petition its 2005 tax return was not available. That tax return was not subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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

**ORDER:** The appeal is dismissed.

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<sup>9</sup> A Form 1120, U.S. Corporation Income Tax Return is due, absent extension, on the 15<sup>th</sup> day of the third month after the close of the tax year, if that is a business day. See Instructions for Forms 1120 and 1120-A, Page 3, available from the Internal Revenue Service. In this case, because the petitioner reports taxes pursuant to the calendar year, its 2004 tax return was due, absent extension, on March 15, 2005. The record contains no evidence that the petitioner requested an extension of time during which to file that return.