

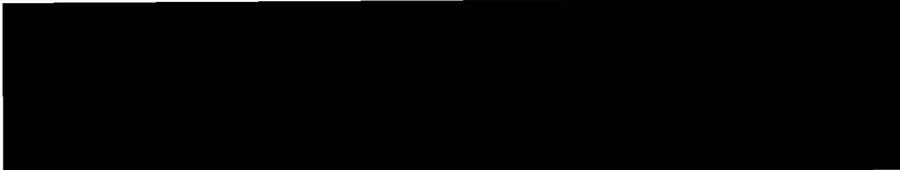
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**U.S. Department of Homeland Security**  
U. S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



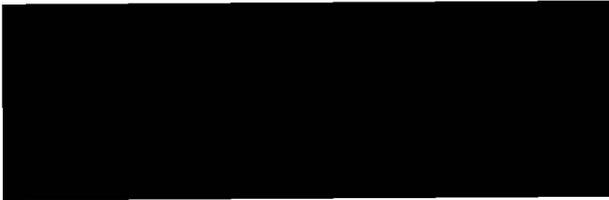
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FILE: LIN 06 191 52582 Office: NEBRASKA SERVICE CENTER Date: **APR 20 2009**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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)

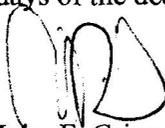
ON BEHALF OF PETITIONER:



**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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reconsider, which was also denied by the director. The petitioner has appealed the director's decision on the motion to reconsider, and that appeal is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a manager – fast food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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.

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 DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$39,000.00 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

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.<sup>1</sup> On appeal, counsel has submitted, *inter alia*, a brief; an affidavit from [REDACTED] the sole shareholder of the petitioner; a certificate of incorporation from the State of Illinois; a report from [REDACTED]; letters regarding personal bank accounts of [REDACTED] records of wages paid by the petitioner in 2002, 2003 and 2005; and copies of previously submitted evidence. Other evidence in the record includes copies of the petitioner's corporate tax returns for the years 2002 through 2006; copies of the petitioner's bank statements; copies of the [REDACTED] franchise profits report; [REDACTED] individual income tax returns for the years 2002 and 2005; corporate tax returns for other corporations of which [REDACTED] is the sole shareholder; and copies of articles and a U.S. Citizenship and Immigration Services (USCIS) memorandum regarding the legal requirements of establishing a petitioner's ability to pay.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have a gross annual income of \$1,256,849.00 and a net annual income of \$86,008.00. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B signed by the beneficiary on April 25, 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, USCIS 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, USCIS 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

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

petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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, USCIS 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS, 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 USCIS 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. [USCIS] 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 Chang* at 537.

The petitioner's tax returns demonstrate its net income for the years 2001 through 2006 as shown in the table below.<sup>2</sup>

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<sup>2</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (on income tax returns for the years 1997 through 2003) line 17e (on returns for the years 2004 and 2005) or line 18 (on returns for the year 2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 17, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income,

- In 2001, the Form 1120S stated net income<sup>3</sup> of \$190,963.00.
- In 2002, the Form 1120S stated net income<sup>4</sup> of \$31,261.00.
- In 2003, the Form 1120S stated net income<sup>5</sup> of -\$43,421.00.
- In 2004, the Form 1120S stated net income<sup>6</sup> of \$86,008.00.
- In 2005, the Form 1120S stated net income<sup>7</sup> of \$22,118.00.
- In 2006, the Form 1120S stated net income<sup>8</sup> of \$63,605.00.

The petitioner had sufficient net income to pay the proffered wage in 2001, 2004 and 2006. The petitioner did not have sufficient net income to pay the proffered wage in 2002, 2003 or 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>9</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2002, 2003 and 2005 as shown below.

- In 2002, the Form 1120S stated net current assets of -\$528,831.00.
- In 2003, the Form 1120S stated net current assets of -\$622,569.00.
- In 2005, the Form 1120S stated net current assets of -\$246,841.00

The petitioner did not have sufficient net current assets to pay the proffered wage in 2002, 2003 or 2005.

Therefore, the petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2002, 2003 or 2005 through an examination of wages paid to the beneficiary, net income or net current assets.

On appeal, counsel asserts that the director failed to consider the "totality of the circumstances" as required by *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel lays out a number

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deductions, credits, etc.).

<sup>3</sup> As listed on Schedule K, line 23 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>4</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>5</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>6</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>7</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>8</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>9</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

of arguments to establish the petitioner's ability to pay the proffered wage, and each will be considered below.

Counsel states that [REDACTED], the petitioner's sole shareholder and president, received "management fees" from the petitioner which should be considered in determining the petitioner's ability to pay the proffered wage. The record also contains a letter from [REDACTED] dated March 7, 2007, in which [REDACTED] states he received \$148,289.50 in "management fees" from the petitioner and that he would have been willing to reduce the "management fees" in order to pay the proffered wage. This corresponds with the amount listed under "management fees" which were included in "other deductions" on the petitioner's 2005 income tax return.<sup>10</sup> The record also contains an affidavit from [REDACTED], dated November 26, 2007, in which he again states that he has been, and always will be, willing to pay the proffered wage from his "management fees," as well as other sources.

Although the petitioner's 2005 income tax return lists \$148,290.00 paid in "management fees" under other deductions, the record does not contain any evidence regarding the "management fees" beyond the statements of counsel and [REDACTED]. There is no record of payment made by the petitioner to [REDACTED] and, in fact, [REDACTED] Form 1040 individual tax return from 2005 (schedule E attachment) only lists \$22,118.00 in income from the petitioner. This amount also appears in the petitioner's 2005 schedule K. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). It is therefore not clear that the "management fees" were paid to [REDACTED] or that those fees could have been reduced to enable the petitioner to pay the proffered wage. Further, as stated above, USCIS considers net income as listed on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Therefore, the "management fees" will not be considered in determining the petitioner's ability to pay the proffered wage in 2005.

Counsel also refers to a letter from [REDACTED], dated June 14, 2006. [REDACTED] points to a figure on line 20, page 3 of the petitioner corporate tax returns. This figure is for "Total property distributions (including cash) other than dividends reported on line 22 below." According to [REDACTED] the figure from line 20, page 3 of the petitioner's corporate income tax return represents a cash distribution made by the petitioner to its sole shareholder, [REDACTED].

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<sup>10</sup> The petitioner's income tax returns do not list any "management fees" paid in 2002 or 2003. However, the tax returns for 2002 and 2003 do list amounts paid for "outside services" which are also part of "other deductions." The record contains a "Profit and Cash Flow Analysis of S Corporation" prepared by [REDACTED]. This document states that the "outside services" which are included as part of the "other deductions" on the petitioner's income tax returns are discretionary "management" expenses. However, there is no evidence provided regarding the nature of the "outside services." 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)). In any event, as stated above, USCIS considers net income as listed on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

Mr. [REDACTED] indicates that this distribution to [REDACTED] could have been reduced so that the petitioner would have had sufficient funds to pay the proffered wage.

Although, as sole shareholder, [REDACTED] presumably would have flexibility in setting his salary and determining distributions made to himself, it is not clear what distributions were made to [REDACTED] if any. For example, page 3, line 20 of the petitioner's 2003 income tax return lists property distributions of \$172,601.00. However, this amount is not reflected in Form 1040 individual income tax return for 2003, as [REDACTED] listed a nonpassive loss of \$43,421.00 from the petitioner. Similarly, the petitioner's 2002 income tax return lists property distributions of \$152,012.00, but [REDACTED] did not list a corresponding amount as income on his 2002 individual tax return. No other evidence is provided regarding the nature or the amount of the distribution. Once again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Therefore, the petitioner has failed to establish that some or all of this distribution would have been available to pay the proffered wage in any year.

Counsel also states that the petitioner's sole shareholder, [REDACTED], is willing to use his personal assets and/or assets from other corporations of which he is the sole shareholder in order to pay the proffered wage. On appeal, counsel has submitted an affidavit from [REDACTED] in which he states that he has been, and always will be, willing to pay the proffered wage from his personal accounts, as well as from other sources. Counsel further claims that USCIS "will look at and consider the personal income" of an S corporation's "owner." However, contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.<sup>11</sup>

Counsel also states that loans which the petitioner made to its sole shareholder, [REDACTED], should be considered in assessing the petitioner's ability to pay the proffered wage. Counsel states that the loan from the petitioner to its sole shareholder is "an accounting fiction and can still be considered a

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<sup>11</sup> Counsel states that DOL's Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel asserts that this decision stands for the proposition that \$4 million in personal assets of a corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. 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). Accordingly, counsel's reliance on this decision is misplaced, and it is not persuasive.

liquid asset by the corporation." However, the record does not contain any evidence that the petitioner made loans to its sole shareholder. Counsel indicates that these loans to the sole shareholder are listed on Schedule L of the petitioner's income tax returns. "Loans to shareholders" are listed as assets on Schedule L, line 7 of the Form 1120S. There are no loans to shareholders listed on Schedule L, line 7 of the petitioner's income tax returns in 2002, 2003 or 2005.

Instead, the petitioner's tax returns for these years list "loans from shareholders" on Schedule L, line 19 in the following amounts: \$38,500 in 2002; \$89,500 in 2003; and \$205,811.00 in 2005. Whereas an S corporation's loans *to* its shareholders are listed as assets on Schedule L, loans *from* shareholders are listed as liabilities. In general, USCIS gives little weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). In any event, given counsel's statement that these loans were a "legal farce" and an "accounting fiction," it is not clear that the funds from these loans were actually available to the petitioner to pay the proffered wage.

As noted above, the record contains a letter from [REDACTED] states that the loans from the shareholder may be viewed as a temporary equity contribution. However, [REDACTED] has not provided any evidence to support this view. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). The amounts were listed on the petitioner's tax returns as loans from the shareholder and those amounts shall be considered as they were submitted to IRS. If [REDACTED] wished to persuade USCIS that the amounts were properly characterized as temporary equity contributions, then he was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Counsel also states that the petitioner is unable to show its ability to pay the proffered wage in 2002 and 2003 due to unusual circumstances which existed in those years making them uncharacteristically unprofitable. For example, counsel refers to the commission fee paid by the petitioner in 2002 which is listed as an "other deduction" in Statement 2 of the petitioner's 2002 tax return. Counsel states that this was a "one time charge" paid by the petitioner in connection with the purchase of a franchise in 2002. However, counsel has not provided any documentary evidence regarding the nature of this commission fee. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus it cannot be determined that that this amount resulted from a "one time charge" as indicated by counsel. Further, as noted above, in determining the petitioner's ability to pay the proffered wage, USCIS considers the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

Counsel further states that in 2003, the petitioner incurred expenses for mandatory remodeling and that these expenses exceeded the proffered wage. Counsel has not provided any evidence to

establish that remodeling occurred in 2003, nor has counsel provided evidence that such remodeling—if it did occur—was mandatory. Although counsel states that the remodeling expense exceeded the proffered wage, counsel does not specifically state the cost of the remodeling. Thus, it is not clear that the petitioner would have had sufficient net income to pay the proffered wage even if it did not incur the remodeling expenses. In any event, as noted above, USCIS considers the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

In addition, counsel states that 2002 and 2003 were difficult years because the petitioner, [REDACTED] franchise, suffered declining sales due to competition from [REDACTED]. Counsel states that [REDACTED] profitability did not improve until 2004. However, counsel submitted a copy of an article dated October 22, 2003 which states that sales for [REDACTED] increased seven percent in 2003. This, obviously, contradicts counsel's assertion regarding falling sales for [REDACTED]. Further, the petitioner's income tax returns show that gross receipts increased from 2002 to 2003, thus the petitioner's failure to establish its ability to pay the proffered wage cannot be explained by falling sales.

Counsel also states that depreciation should be added back to net income in determining the petitioner's ability to pay the proffered wage. However, USCIS will not add depreciation back into the petitioner's income in determining the ability to pay the proffered wage. Depreciation is a measure of the decline in the value of a business asset over time. *See Internal Revenue Service, Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. As noted above, courts have already rejected the argument that depreciation should be added back to net income in determining a petitioner's ability to pay the proffered wage. *See, e.g., Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989). Similarly, the "other deductions" listed on the petitioner's tax returns are necessary costs of doing business. As such, the resources used to pay these costs are not available to pay the proffered wage.

Counsel also states that the petitioner's bank statements establish its ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts 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 is considered in determining the petitioner's net current assets.

Counsel also states that the total wages paid by the petitioner greatly exceed the proffered wage. In addition, counsel states that the petitioner will terminate other employees in order to pay the

beneficiary the proffered wage. In support of this, counsel has submitted copies of payroll records for 2002, 2003 and 2005. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Further, the "Deductions" section of the Form 1120S, item 8, provides a space for taxpayers to list salaries and wages paid. The petitioner's tax returns for 2002, 2003 and 2005 do not list any salaries or wages paid in the "Deduction" section. The petitioner has failed to explain the discrepancy between the tax returns which indicate that no wages were paid, and the payroll records which allegedly show that wages were paid. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Counsel also refers to an unaudited financial statement as evidence of the petitioner's ability to pay the proffered wage in 2005. However, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel also argues that the petitioner's tax returns were prepared according to the accrual method, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. Counsel seems to assert that because, under the accrual method, the petitioner recognized expenses which would not actually be paid until the following year, the petitioner can now argue that those funds were available to pay the proffered wage. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS.<sup>12</sup>

In conclusion, the AAO finds that the evidence in this matter does not warrant approval under a totality of the circumstances analysis. *See Matter of Sonogawa*, 12 I&N Dec. 612. The decision in *Sonogawa* related to a petition filed during uncharacteristically unprofitable or difficult years in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in

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<sup>12</sup> Even if we were to accept counsel's argument, the petitioner would still be unable to establish its ability to pay the proffered wage. Counsel states that the "other current liabilities" listed on Schedule L of the petitioner's tax returns are "next year expenses" and, as such, the petitioner may argue that those funds were available to pay the proffered wage. However, even if the amounts for "other current liabilities" were taken out in 2002, 2003 and 2005 (\$65,607.00, \$37,531.00 and \$28,975.00, respectively), petitioner would still have had negative net current assets in each of those years and would have been unable to establish its ability to pay the proffered wage.

business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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. Clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner did not establish a pattern of profitable or successful years or that 2002, 2003 and 2005 were uncharacteristically unprofitable or difficult for some reason, or that it has a sound business reputation. Instead, as noted above, the record is insufficient to establish eligibility for the benefit sought and is rife with inconsistencies and evidentiary gaps. The petitioner has not established that it has the ability to pay the proffered wage.

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.