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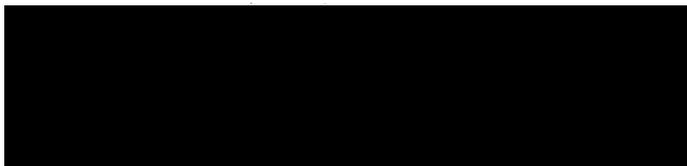
U.S. Department of Homeland Security
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 24 2005
WAC-02-288-50293

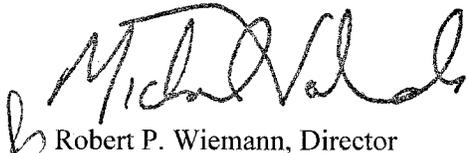
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

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

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

On appeal, counsel submits a brief and additional evidence.

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 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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 30, 2000. The proffered wage as stated on the Form ETA 750 is \$135,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1998.

On the petition, the petitioner claimed to have been established on September 22, 1997, to have a gross annual income of \$705,959, and to currently employ eight workers. In support of the petition, the petitioner submitted its Forms 1120S, U.S. Corporation Income Tax Returns for 2000 and 2001. The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Net income ¹	\$32,378	-\$3,908
Current Assets	\$28,293	\$45,813
Current Liabilities	\$273,572	\$302,377
Net current assets	-\$245,279	-\$256,564

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 8, 2003, the director requested additional

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's quarterly wage reports and complete tax returns.

In response, the petitioner resubmitted the petitioner's 2001 and 2000 corporate tax returns. The petitioner submitted a letter signed by [redacted] Manager of Finance and Operations of [redacted] [redacted] dated March 11, 2003, stating the following:

This letter is an explanation of the relationship between [redacted] and [the petitioner]. [redacted] is an owner and stockholder of [the petitioner] and therefore leases employees to its subsidiary company. All payrolls, payroll taxes, and benefits are therefore initially paid by [redacted] with [the petitioner] reimbursing [redacted] from its [sic] working capital.

The petitioner submitted corporate tax returns for [redacted] for 2001, which indicates it is a law firm and was owed \$268,572 from the petitioner for that tax year. In addition, counsel submitted copies of quarterly wage reports for [redacted] that do not show any wages paid to the beneficiary during the various quarters covered by the reports. The petitioner did not submit quarterly wage reports.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 17, 2003, the director again requested additional evidence pertinent to that ability. The director specifically requested IRS-generated tax returns for the petitioner; additional evidence to "establish the difference or connection between [the petitioner] and [redacted] and an explanation of the petitioner's organizational structure in relationship to [redacted] and the petitioner's 2002 corporate tax return.

In response, the petitioner submitted its tax return for 2002 and a written explanation as to the organization structure of the petitioner in relationship to [redacted] with a copy of a stock certificate. The petitioner's 2002 tax return reports net income of -\$156,234 and net current assets of -\$423,778. The petitioner also submitted [redacted] 2002 corporate tax return with another letter from [redacted] dated June 6, 2003, stating the following, in pertinent part:

[The petitioner] and [redacted] (DBH) are two different companies with different Federal EINs and two separate city business licenses . . . Their connection is that [redacted] owns 300 shares (or 30%) of [the petitioner] and they are physically located in the same office suite. . . .

* * *

A copy of [the petitioner's] Stock Certificate #2 as evidence that [redacted] a professional law corporation, owns 300 shares (or 30%) of [the petitioner's] stock, to address the significance of ownership. In addition, [redacted] holds 66.66% ownership of [redacted] and 60% ownership of [the petitioner].

Some administrative functions of both companies are performed by employees of [redacted] including the positions of Director of Administration, Manager of Finance & Operations,

Human Resources/Benefits Specialist, Communications Manager, Systems Administrator, Accounting Manager, and Senior Accountant.

Also submitted into the record of proceeding in this second response to the director's request for additional evidence was Forms W-2, Wage and Tax Statements, issued to the beneficiary in 2000, 2001, and 2002. Those W-2 forms, as well as the beneficiary's IRS-generated individual income tax returns, evidence that [REDACTED] paid the beneficiary \$132,770.07 in 2000; \$132,945.69 in 2001; and \$148,054.72 in 2002. The petitioner also submitted a copy of a common stock certificate showing that the petitioner issued 300 shares of its stock to [REDACTED].

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 24, 2003, denied the petition. The director noted that [REDACTED] is a separate and distinct legal entity from the petitioner. The director determined that the petitioner's negative net income and negative net current assets failed to establish its continuing ability to pay the proffered wage.

On appeal, substituted counsel asserts that the petitioner and DBH are affiliated as defined under the non-immigrant regulatory provisions found at 8 C.F.R. 214.2(I)(1)(ii)(L)(2) and 204.5(j)(2)(B), the IRS code and regulations, and a case dealing with a non-immigrant L-1A multinational corporation managerial intracompany transferee, and thus are not separate and distinct legal entities. Counsel also asserts that "despite being separate corporations, they function as a single integrated operating unit," and he provides copies of newsletters and Internet materials as supporting evidence. Counsel also points out that the petitioner is structured as a professional corporation and thus is taxed in a way compelling them to pay their profits after operating expenses as bonuses to officers thereby reducing the corporation's taxable income to zero or a loss.

On appeal, the petitioner submits a letter from [REDACTED] CPA of [REDACTED] dated August 19, 2003. [REDACTED] states the following, in pertinent part:

Under Internal Revenue Code Section 1563(a)(2) and IRS Regulation 1.1563-1(a)(3)(i)(b), [the petitioner] and [REDACTED] are affiliated by virtue of the fact that [REDACTED] owns sixty percent (60%) of the issued and outstanding shares of stock in [the petitioner] as well as sixty-six and two-third percent (66 2/3%) of the issued and outstanding stock in [REDACTED].

Since October 14, 1998, [REDACTED] has paid the salaries and benefits of [the beneficiary] and the other employees of [the petitioner]. [REDACTED] which has been in existence for more than fourteen (14) years, has had the profitability to pay the salaries and benefits of [the beneficiary] and the other employees of [the petitioner].

[REDACTED] corroborates counsel's assertion that professional corporations are taxed at a higher rate to motivate them to disperse profits to eliminate taxable income. [REDACTED] adds back shareholder bonuses to provide [REDACTED] with pre-bonus taxable income.

On appeal, the petitioner also submits a letter from the petitioner's president, [REDACTED] dated August 19, 2003, who states the following, in pertinent part:

[The petitioner] was incorporated on September 22, 1997, as an affiliate of [REDACTED] to offer insurance consultancy services to insurance companies and serve as a marketing vehicle for [REDACTED] legal services. [REDACTED] is an insurance defense law firm specializing in the defense of

litigation involving construction defects, personal injury and medical malpractice claims and claims pertaining to the existence of insurance coverage. In exchange for its funding of [the petitioner], [redacted] receives substantial benefits in terms of new attorney-client relationships generated by [the petitioner's] insurance consulting work and access to [the petitioner's] insurance industry expertise.

[redacted] established [the petitioner] as a separate corporate entity for the following reasons:

1. [The petitioner], unlike [redacted] can legally transact business throughout the U.S.;
2. [The petitioner], unlike [redacted] offers consulting services which do not constitute the practice of law;
3. [The petitioner], unlike [redacted] can legally offer ownership potential and other financial incentives to non-attorneys.

The petitioner copied pages from its online website at [redacted] evidencing that it was "created from the intellectual capital" of [redacted] and excerpts from its newsletter referring to its relationship with [redacted]. Copies of the petitioner's stock certificates issuing [redacted] 600 shares of the petitioner's stock and 300 shares of [redacted] stock and one certificate issuing the beneficiary 100 shares of the petitioner's stock were submitted on appeal. The petitioner submitted other corporate documents pertaining to [redacted] such as its articles of incorporation and subsequent amendments and name changes; evidence of [redacted] lines of credit; unaudited statements of assets and liabilities for [redacted] for the years ending December 31 in 2000, 2001, and 2002; and copies of credit reports issued for [redacted] from [redacted] dated March 14, 2000 and August 8, 2003.

Subsequent to appellate submissions, counsel also submitted a copy of an excerpt from Bender's Immigration Bulletin referring to an unpublished AAO decision.

The primary issue in this case concerns whether or not the petitioner and DBH are separate and distinct legal entities. The AAO concurs with the director in finding that the petitioner and DBH are separate and distinct legal entities. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In this case, counsel refers to non-immigrant visa regulations and employment-based immigrant visa regulations pertaining to multinational executives and managers for its reliance upon an affiliate definition. The visa petition in this case involves a third preference employment-based immigrant visa petition and not a multinational corporate employee transferee requiring resolution of the critical issue of two entities proving a relationship that provides them multinational corporate status. Thus, counsel's reliance upon those provisions is without merit to the issue in this case.

Counsel cited to the IRS code and a parallel regulatory provision that states the following:

Brother-sister controlled group

Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing -

(A)

at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

(B)

more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

The provision relied upon by counsel states that voting power is a consideration of a "brother-sister controlled group" under IRS statutory and regulatory authority. The petitioner only submitted its stock certificates issued to [REDACTED] and the beneficiary in this case. As general evidence of a petitioner's claimed affiliate relationship, however, stock certificates alone are not dispositive evidence of an affiliate relationship. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine whether or not the petitioner has an affiliate relationship with [REDACTED].

Additionally, the record of proceeding does not contain an affiliate agreement or other documentation to verify that [REDACTED] has a legal obligation to pay the petitioner's financial obligations, such as the petitioner's proffered wage in the instant case. Regardless of the benefits [REDACTED] receives from its relationship to the petitioner, the petitioner and its counsels, accountants, and financial officers concede that they are separate corporate identities with separate tax reporting statuses and identification numbers. The record of proceeding does not contain a preponderance of evidence that supports counsel's assertion on the petitioner's behalf. Thus, the AAO concludes that DBH is not responsible for proving its ability to pay the proffered wage in this case, and the petitioner must establish its independent continuing ability to pay the proffered wage.² If [REDACTED] is the actual employer of the

² Even if it were concluded that [REDACTED] had a legal obligation to pay the proffered wage in this case, [REDACTED] tax returns do not evidence a continuing ability to pay the proffered wage. In each applicable year, [REDACTED] reports either a loss or net income less than the proffered wage and negative net current assets. Additionally, its asserted credit line does not bolster its position even with its professional corporation status. In calculating the ability to pay the proffered salary, CIS will not augment a petitioning entity's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

[REDACTED] line of credit would not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, [REDACTED] has not established that the unused funds from the line of credit are available at the time of filing the petition since many have a maturity date in 2003. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, DBH's existent loans will be reflected in the balance sheet provided in the tax return or audited financial

beneficiary who is responsible for paying the beneficiary's salary and benefits, then [REDACTED] should have been the sponsor of this immigrant petition.³

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year.

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, 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). 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 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

statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if [REDACTED] wished to rely on a line of credit as evidence of ability to pay, it must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less 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, CIS must evaluate the overall financial position of a petitioning entity 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).

Also, [REDACTED] presented unaudited financial statements with respect to its assets and liabilities. The unaudited financial statements that counsel submitted with the appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioning entity relies on financial statements as evidence of its financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Finally, as the decision will discuss why general assets, and not current assets, are not considered later on with respect to the petitioner, it will not be discussed again here.

³ In *Matter of Smith*, 12 I&N Dec. 772, 773 (Dist. Dir. 1968), the district director determined that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary.

court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net incomes in 2000, 2001, and 2002 were \$32,378, -\$3,908, and -\$156,234, respectively. These amounts are less than the proffered wage. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net income.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 2000, 2001, and 2002, however, were negative. As such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets.

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

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa, supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

In this case, the petitioner was incorporated in 1997, so it had been operating for approximately three years prior to filing the petition. The petitioner's gross receipts in 2000 were \$357,189; its compensation of officers was \$137,000; and its salaries and wages paid was \$66,416. The petitioner's gross receipts in 2001 were \$705,949; its compensation of officers was \$142,942; and its salaries and wages paid was \$276,466. The petitioner's gross receipts in 2002 were \$1,047,601; its compensation of officers was \$309,893; and its salaries and wages paid was \$370,605. While these amounts show gradual improvement, the figures are still too modest to add a burden of an additional \$135,000 annual salary, especially when it shows losses and negative net current assets. Additionally, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2000, 2001, or 2002 were uncharacteristically unprofitable years for the petitioner.

Finally, counsel cites to an unpublished AAO decision. Counsel is reminded that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000, 2001, or 2002. In 2000, the petitioner shows a net income of only \$32,378 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has

not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2000.

In 2001, the petitioner shows a net income of only -\$3,908 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

In 2002, the petitioner shows a net income of -\$156,234 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 or subsequently during 2001 or 2002. 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 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.