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**U.S. Citizenship
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FILE: WAC 03 158 53985 Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2006

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

PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

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 "Michael Valada".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

Counsel has requested that this matter be set for oral argument. Counsel argues that, "Oral argument is necessary due to the numerous legal analyses that can be drawn from the case, . . . not all of which can possibly be made in writing." CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unusual factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). This office finds that counsel identified no unusual factors or issues of law to be resolved. Consequently, the request for oral argument is denied.

The petitioner is a group home for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements

of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. 8 C.F.R. § 204.5(g)(2). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on May 25, 1999. The proffered wage as stated on the Form ETA 750 is \$1,995.07 per month, which equals \$23,940.84 per year. The Form ETA 750 states that the position requires three months of experience in the job offered.

The petition in this matter was submitted on April 28, 2003. On the petition, the petitioner stated that it was established during 1991 and that it employs six workers. On the Form ETA 750B, signed by the beneficiary on May 19, 1999, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have worked as a nursing assistant [REDACTED] in Quezon City, in the Philippines from June 1996 to March 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Gilroy, California.

With the petition, counsel submitted (1) 1999, 2000, 2001, and 2002 Form W-2 Wage and Tax Statements issued by the petitioner to Herminia Catanghal, (2) a letter dated November 18, 2003 from the petitioner's executive director, (3) some of the petitioner's California Form DE-6 quarterly wage reports, (4) the petitioner's checking account statements from January 1999 through January 2003, (5) an employment verification letter dated March 17, 2003, and (6) a statement dated April 25, 2003 from counsel.

The November 18, 2003 letter from the petitioner's executive director states that the petitioner is a non-profit entity. That letter also states, "We have multiple income [sic] from other facilities and employment."¹ That letter also states that the petitioner's income is reduced because the petitioner's owners elect to use that facility to train employees, which results in higher wage expenses than it would otherwise incur.

The petitioner stated that the beneficiary would [REDACTED] the person identified on the W-2 forms provided as an employee of the petitioner. The W-2 forms show that the petitioner paid [REDACTED] \$18,047.21, \$19,961.16, \$22,952.75, and \$19,868.07 during 1999, 2000, 2001, and 2002, respectively.

The quarterly wage reports provided are for all four quarters of 2000, the last three quarters of 2001, and the first three quarters of 2002. Those reports show that the petitioner employed between eight and eleven workers during those quarters. Those reports also confirm that the petitioner employed [REDACTED] during each of those quarters but do not show that it employed the beneficiary.

¹ Although the "we" in that statement is not explicitly identified, the petitioner's executive director appears, from context, to be stating that she and her husband also own other companies and are free to use funds from those other companies as necessary to pay the petitioner's debts and obligations. The executive director's assertion will be addressed as such.

The four 2000 quarterly reports show that [REDACTED] earned a total of \$23,402.54 during that year. The 2000 W-2 form submitted contradicts this number, which shows that [REDACTED] earned only \$19,961.16 during that same year. The reason for this discrepancy is unknown to this office.

Doubt cast on any aspect of the petitioner's proof, however, 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 three 2001 quarterly reports show that [REDACTED] earned a total of \$20,167.87 during those three quarters. The three 2002 quarterly reports show [REDACTED] earned a total of \$13,477.32 during those three quarters.

Counsel states that the California Form DE-6 quarterly wage reports provided demonstrate that the petitioner has had at least five employees during each of the past several years and has had no difficulty meeting its payroll obligations.

Counsel states that the evidence demonstrates that the petitioner has been in operation since 1994, which implies that it has not hired employees it was unable to pay.

Counsel states that the checking account statements show that the petitioner had tens of thousands of dollars on hand during most months.

The March 17, 2003 employment verification letter states that the beneficiary worked from June 1996 to September 1998 for a floating clinic operated by the government of the Sorsogon province in the Philippines. That employment verification letter is signed [REDACTED] MD. This is not the same claim of qualifying employment the beneficiary claimed on the Form ETA 750B, which the beneficiary signed on May 19, 1999.

Counsel cites *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) for the proposition that the petitioner is able to submit evidence other than copies of annual reports, federal tax returns, or audited financial statements and cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a net loss during one year does not, in itself, preclude a petitioner from demonstrating its continuing ability to pay the proffered wage beginning on the priority date.

Counsel notes that the duties described on the employment verification letter are nearly identical to those of the proffered position and states that the beneficiary has, therefore, demonstrated that he has three months of experience in the proffered position.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite

three months of qualifying employment experience, the California Service Center, on April 19, 2004, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and must demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

As to the petitioner's ability to pay the proffered wage, counsel submitted (1) the petitioner's 1999, 2000, 2001, and 2002 Form 990 Returns of an Organization Exempt from Income Tax, (2) a letter dated June 1, 2004 from the petitioner's executive director, (3) a letter dated June 16, 2004 from a professor of finance at Seattle Pacific University, and (4) counsel's own letter dated July 7, 2004.

As to the beneficiary's claim of qualifying employment the petitioner submitted a letter dated June 25, 2004 from, [REDACTED] MD, the Head of Internal Medicine of the Fernando Duran Memorial Hospital in the Sorsogon province of the Philippines. That letter reiterates that the beneficiary worked as a physician's aide on the provincial government's floating clinic from June 1996 to September 1998. The letter does not state the number or hours the beneficiary worked per week. That letter is not on letterhead of the Sorsogon Province Floating Clinic. Whether [REDACTED] is affiliated with the Floating Clinic is unknown to this office.

The petitioner's returns show that it is a non-profit organization, and that it files its returns based on cash convention accounting and the fiscal year. The petitioner declared 1999 end-of-year net assets or fund balances of \$464. At the end of 2000 the petitioner declared a loss of \$14,785 as its net assets or fund balances. The petitioner's 2001 end-of-year net assets or fund balances were \$18,512. Its 2002 end-of-year net assets or fund balances were \$48,343.

Those returns also show that the petitioner paid Compensation of officers, directors, etc. of \$48,456, \$43,918, \$24,704, and \$17,510 during 1999, 2000, 2001, and 2002, respectively.

The petitioner's executive director's June 1, 2004 letter states that the executive director and her husband typically take as their salaries whatever funds remain in the petitioner's account after paying all expenses. She further states that they anticipate lowering their salaries as necessary to pay the proffered wage to the beneficiary.

The finance professor's June 16, 2004 letter states that, based on the petitioner's total expenses and total revenues for 1999 and 2000, which he enumerated, he believes that the petitioner is able to pay the proffered wage. The professor states that year-end fund balances are a poor index of a nonprofit entities ability to pay additional wages. The professor observes that *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, cited in the request for evidence for the proposition that gross receipts are an inadequate index of a petitioner's ability to pay the proffered wage, should not apply to the instant petitioner, as the instant petitioner is a not-for-profit

corporation. Counsel notes that nonprofit companies do not typically report net income. The letter contained no additional analysis.

Counsel's letter states that the bank statements and payroll receipts submitted with the petition were sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also states that, because the duties shown on the June 25, 2004 employment verification letter are nearly identical to the duties shown for the proffered position on the Form ETA 750 the petitioner has demonstrated that the beneficiary is qualified for the proffered position.

The director denied the petition on August 31, 2004, finding 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite three months of qualifying work experience. In that decision the director noted the discrepancy between the claim of qualifying employment stated on the March 17, 2003 and June 25, 2004 letters, and the claim of qualifying employment stated on the Form ETA 750B.

On appeal, counsel submits (1) an additional employment verification letter, (2) evidence in support of the proposition that the petitioner is a not-for-profit entity, (3) additional copies of evidence previously provided, and (4) a brief.

Counsel again cites *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) for the proposition that a petitioner may provide other evidence of its ability to pay the proffered wage, in addition to the copies of annual reports, federal tax returns, or audited financial statements required by 8 C.F.R. § 204.5(g)(2). Counsel further cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petition need not necessarily be denied merely because the petitioner's tax returns do not show profits sufficient to pay the proffered wage during a given year.

The additional employment verification letter submitted reiterates the assertion that the beneficiary worked for the Sorsogon Floating Clinic as a doctor's aide from June 1996 to September 1998 and is signed by

in his brief counsel notes that the issue of the discrepancy between the claim of qualifying employment as stated on the Form ETA 750B and the claim stated on the petitioner's employment verification letters was not raised prior to the Notice of Denial. Counsel cites the regulation at 8 C.F.R. § 103.2(b)(8) for the proposition that a request for evidence should have been issued to allow the petitioner to explain that discrepancy.

Counsel states that the individual who prepared the Form ETA 750 in this case² has a high volume of cases for caregiver positions. Counsel states that an employment verification letter from the Sorsogon floating clinic was provided with the Form ETA 750 when it was first submitted to the Department of Labor,³ but does

² This office notes that the individual who prepared the Form ETA 750 Labor Certification Application is on the public list of individuals ineligible to practice before CIS.

³ Actually, counsel's letter is not clear on this point, but states, "If the original Labor Certification file is reviewed, it will be found that the letter was included . . ." without specifying the letter to which he refers. This office notes further

not state the basis of his asserted knowledge or provide any evidence in its support. Counsel further observes that the three employment verification letters subsequently submitted all relate the same employment period. Counsel states, "It can only be assumed that the ETA 750A [sic] includes a drafting error, and not any attempt to falsify the Beneficiary's previous work experience."

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. The employment verification letters submitted conflict with the claim of qualifying employment on the Form ETA 750B, signed by the beneficiary on May 19, 1999⁴. This office does not make the assumption, urged by counsel, that the discrepancy was the result of an innocent mistake. The evidence does not demonstrate that the beneficiary has three months of experience in the proffered position and the petition was correctly denied on that basis.

Counsel's argument that a request for evidence was required in this case is unconvincing. The regulation at 8 C.F.R. § 103.2(b)(8) requires a request for evidence if some portion of the requisite initial evidence is missing or if the evidence submitted does not fully establish eligibility. No request for evidence is required if the record contains evidence of ineligibility. The service center was permitted to find that a contradiction between the employment claim on the Form ETA 750 B and that on the beneficiary's employment verification letters was evidence of ineligibility.

In any event, even if a request for evidence were required by 8 C.F.R. § 103.2(b)(8), the error of not issuing one would have been cured on appeal. The purpose of issuing a request for evidence in such a case would be to permit the petitioner to address it. The petitioner was accorded that opportunity on appeal and counsel has, in fact, addressed the discrepancy. No reason exists to believe that counsel would have addressed it more adequately in response to a request for evidence than he did on appeal. Even if the failure to issue a request for evidence were error, it would be moot at this point, and would, therefore, be harmless error.

The evidence submitted satisfactorily demonstrates that the petitioner is a not-for-profit entity. That the petitioner is a nonprofit entity, however, neither demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date nor relieves if of the obligation, imposed by 8 C.F.R. § 204.5(g)(2), to do so.

The assertion that the petitioner's owners use the petitioner as a training ground for personnel is inapposite. That statement does not excuse the petitioner from the obligation imposed by 8 C.F.R. § 204.5(g)(2) to show its continuing ability to pay the proffered wage beginning on the priority date, nor does it show that any additional funds were available to the petitioner.

that the original Labor Certification file was not provided by counsel and is not otherwise part of the instant record.

⁴ The employment claimed on the Form ETA 750B is in Quezon City from June 1996 to March 1999. The employment claim supported by the beneficiary's employment verification letters is in Sorsogon province from June 1996 to September 1998. Sorsogon province is approximately 200 air miles from Quezon City. The two claims overlap in time, and are for employers separated by 200 miles. This office therefore considers those claims to be mutually contradictory.

Counsel stated, in his April 25, 2003 letter, that the California Form “. . . DE-6 wage reports . . . [show that the petitioner] . . . has never experienced any difficulties in meeting its payroll responsibilities.” Whether the petitioner has had any such difficulties is not shown by these reports and counsel does not support his position with additional argument, nor would such a fact demonstrate the petitioner’s ability to pay additional wages. This office shall draw no such conclusion from those reports.

Similarly, counsel states that the evidence demonstrates that the petitioner has been in operation since 1994,⁵ which implies that it has not hired employees it was unable to pay. The petitioner is obliged to show the continuing ability to pay the proffered wage to the beneficiary beginning on the priority date ability. Merely showing that it has paid other employees in the past is insufficient.

As was noted above the amount shown on the 2000 quarterly reports as the total wages paid to Herminia Catanghal was \$23,402.54. The 2000 W-2 form, however, states that the petitioner paid the beneficiary only \$19,961.16 during that year, thus contradicting the DE-6 reports. This discrepancy raises additional questions about the accuracy of the evidence submitted in this case. As was noted above, doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho, supra*. The quarterly reports and W-2 forms submitted will be accorded considerably less weight, given that they are mutually contradictory, and the credibility of the remaining evidence is also diminished.

In her June 1, 2004 letter the petitioner’s executive director stated that she and her husband typically take the funds remaining in the petitioner’s account after expenses as their annual salary. She further asserts that she and her husband would merely lower their own salaries as necessary to pay the proffered wage.

If the petitioner’s officers do not require or rely upon their compensation from the petitioner, but merely take its end-of-year net assets or fund balances as compensation, then one would expect for the petitioner’s end-of-year net assets or fund balances to vary very little, and to approximate zero during each year, though the petitioner’s compensation of officers might fluctuate considerably.

For 1999 the petitioner paid compensation of officers of \$48,456 and declared end-of-year net assets or fund balances of \$464. For 2000 the petitioner paid compensation of officers of \$43,918 and declared a loss of \$14,785 as its end-of-year net assets or fund balances. For 2001 the petitioner paid compensation of officers of \$24,704 and declared net assets or fund balances of \$18,512. For 2002 the petitioner paid compensation of officers of \$17,510 and declared net assets or fund balances of \$48,343. The evidence does not fit the pattern that would support the assertion of the its executive director that she and her husband merely take the petitioner’s end-of-year net assets or fund balances as their compensation from the petitioner. Further, the evidence in the record of proceedings does not show that the petitioner’s owners would have been able to forego their compensation. Further still, during some years their compensation was less than the annual amount of the proffered wage.

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

⁵ Counsel does not identify the evidence that allegedly demonstrates that the petitioner was established during 1994.

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.⁶ 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.

The petitioner's executive director indicated, in her letter of November 18, 2003, that she and her husband own other facilities from which they are able to extract money as necessary to pay the petitioner's debts and obligations.

The decision in *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958) observed that a corporation is a legal entity separate and distinct from its owners or stockholders, that is, the owners and stockholders are not obliged to pay the company's debts and obligations out of their own funds as the owner of a sole proprietorship, for instance, would be. Because a corporation is a separate and distinct legal entity from its owners and shareholders, and its owners and shareholders are not personally responsible for its debts, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining a petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). For that reason, the income and assets of a corporation are not considered in determining a corporate petitioner's ability to pay the proffered wage.

That same reasoning is applicable to a nonprofit entity. The directors of a nonprofit entity, like the shareholders of a corporation, are not required to pay the debts and obligations of the entity out of their own income and assets. Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's executive director and her husband shall not be further considered.

Elatos Restaurant Corp. v. Sava, supra states that if the evidence required by 8 C.F.R. § 204.5(g)(2) (copies of annual reports, federal tax returns, or audited financial statements) 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. From the language of *Elatos* counsel deduces that the petitioner is permitted, therefore, to provide other evidence in addition to its copies of annual reports, federal tax returns, or audited financial statements. Counsel's argument is compelling and this office accepts that the petitioner was not only permitted but also obliged to provide additional evidence.

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

⁶ 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.

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 has not established that it employed and paid the beneficiary during the salient years.

Counsel urges, however, that the beneficiary would replace [REDACTED] and that the wages paid to her during the salient years was available to pay the wage proffered in this matter. As was noted above, however, the W-2 forms and quarterly reports submitted are mutually contradictory and have, therefore, little credibility or evidentiary value. The amounts shown on the W-2 forms and quarterly reports have not been shown to have been available to pay the proffered wage.

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, 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).

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 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

Although counsel and the finance professor are correct that the end-of-year net assets or fund balances shown on a Form 990 Return of Organization Exempt from Income Tax are not identical to the net profit of a for profit company, it is the most analogous figure on a Form 990 and could, if it exceeded the proffered wage in a given year, show that the petitioner was able to pay the proffered wage during that year. The petitioner's total revenue, urged by the finance professor as an index of the petitioner's ability to pay the proffered wage, is very analogous to a profit company's gross receipts, and is an unacceptable measure of a petitioner's continuing ability to pay the proffered wage beginning on the priority date for the reasons explained above.

If the petitioner wishes to assert that some other figure from its returns shows its ability to pay the proffered wage, it must demonstrate to CIS how that other figure shows that it had the amount of additional funds necessary to pay the proffered wage. Neither counsel nor the finance professor provided any argument showing that any other figures from the petitioner's returns are indices of its ability to pay the proffered wage. The petitioner's net assets and fund balances is the difference between its total revenue and its total expenses, and is closely analogous to a profit company's net profit, which is the amount left after payment of all of its expenses out of its gross receipts.

In the analysis of whether the petitioner's returns show the ability to pay wages, this office will consider the net assets and fund balances shown during the salient years.

A petitioner's net income, or net assets and fund balances, however, are not the only statistics 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 the 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. Only the petitioner's current assets, those expected to be 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 net of 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 typically⁷ 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.

A Form 990 Return of Organization Exempt From Income Tax includes no section for reporting current assets or current liabilities. Having failed to demonstrate the amount of its net current assets the petitioner is unable to rely on that statistic to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage is \$23,940.84 per year. The priority date is May 25, 1999.

In 1999 the petitioner had end-of-year net assets or fund balances of \$464. That amount is insufficient to pay the proffered wage. The petitioner has not provided credible 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.

In 2000 the petitioner had end-of-year net assets or fund balances of \$14,785. That amount is insufficient to pay the proffered wage. The petitioner has not provided credible 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.

In 2001 the petitioner had end-of-year net assets or fund balances of \$18,512. That amount is insufficient to pay the proffered wage. The petitioner has not provided credible 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.

⁷ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

In 2002 the petitioner had end-of-year net assets or fund balance of \$48,343. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 1999, 2000, and 2001 the petitioner's end-of-year net assets or fund balance was less than the annual amount of the proffered wage. Counsel cites *Matter of Sonegawa, supra*, however, for the proposition that the petition may be approved even if the petitioner's net profits, during a given year were less than the amount of the proffered wage.

Sonegawa, though, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in 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 couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, because the petitioner is a nonprofit entity, the evidence fails to demonstrate that the petitioner has never posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1999, 2000, and 2001 were uncharacteristically poor years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The evidence does not demonstrate that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. Further, as was noted above, the evidence submitted does not demonstrate credibly that the beneficiary has the requisite three months of qualifying experience. Therefore, for both reasons, the petition may not be approved.

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.