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U.S. Citizenship
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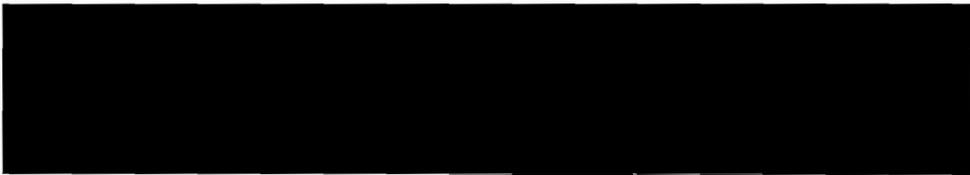
FILE: LIN 05 257 51143 Office: NEBRASKA SERVICE CENTER Date: JUL 02 2007

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a gymnastics training/sports club. It seeks to employ the beneficiary permanently in the United States as a gymnastics coach. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The acting director denied the petition accordingly.

The record shows that the appeal was properly and timely filed, makes a specific allegation of error in law or fact, and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issues in this case are whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether it has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification.

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 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, (8 C.F.R. § 204.5(g)(2)), 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. 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 September 9, 2002. The proffered wage as stated on the Form ETA 750 is \$16 per hour, for a 40 hour week, which equals \$33,280 per year. The Form ETA 750 states that the position requires four years of experience "coaching gymnastics at Elite level."

On the petition, the petitioner stated that it was established during 2000 and that it employs 12 workers. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Littleton, Colorado. On the Form ETA 750B, signed by the beneficiary on August 27, 2002, the beneficiary claimed to have worked as a gymnastics coach for the petitioner since January 2002.

On the Form ETA 750, Part B the beneficiary also stated that he had worked as a gymnastics coach (1) at the Sichuan Sports Technology Institute in Chengdu City, China from July 1980 to February 2000, and (2) for Flyers Gymnastics in Las Vegas, Nevada from February 2000 to December 2001.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification" The beneficiary listed no other qualifying experience on that form.

In the instant case the record contains (1) copies of the petitioner's 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) Form W-2 Wage and Tax Statements, (3) check stubs, (4) a monthly statement pertinent to the petitioner's bank account, and (5) a letter, dated both October 21, 2005 and October 23, 2005, from the petitioner's owner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

With the petition the petitioner submitted (1) a certificate in Chinese with an English translation dated June 20, 1999, (2) a letter dated August 2, 2005 from the former owner of Flyers Gymnastics, (3) a letter in Chinese with an English translation dated August 12, 2005 from Professor Jibai Feng, (4) evidence of previous gymnastics awards to the beneficiary and his alleged students, and a credential evaluation issued August 31, 2001. No other evidence relevant to the beneficiary's claim of qualifying employment experience was submitted with the petition.

Subsequently, in response to a request for evidence dated September 19, 2005 counsel submitted a letter in Chinese with an English translation, dated September 28, 2005, stating that the beneficiary coached both

women's and men's gymnastics at the Sichuan Sports Institute from January 1997 to January 2000. As further support for that assertion counsel submitted copies of various gymnastics awards. Those awards show the names of the competitors but do not show the beneficiary's name. This office notes that, on the Form ETA 750B, the beneficiary stated that he coached gymnastics at that institute from July 1980 to February 1990, and from August 1993 to February 2000, rather than from January 1997 to January 2000.

The petitioner's tax return show that it is a corporation, that it incorporated on September 5, 2000, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2002 the petitioner declared ordinary income¹ of \$14,012. At the end of that year the petitioner had \$23,696 in current assets and \$6,763 in current liabilities, which yields net current assets of \$16,933.

During 2003 the petitioner declared ordinary income of \$1,173. At the end of that year the petitioner had \$13,116 in current assets and \$8,612 in current liabilities, which yields net current assets of \$4,504.

During 2004 the petitioner declared ordinary income of \$7,306. At the end of that year the petitioner had \$4,631 in current assets and \$3,563 in current liabilities, which yields net current assets of \$1,068.

The W-2 forms submitted show that the petitioner paid the beneficiary \$17,300, \$21,175, and \$21,700 during 2002, 2003, and 2004, respectively.

The check stubs submitted show that the petitioner paid the beneficiary gross wages of \$1,000 on both August 31, 2005 and September 15, 2005. The length of the pay periods covered by the corresponding paychecks is unknown to this office. Whether the petitioner paid the beneficiary any other wages during 2005 is unknown to this office.

In his October 2005 letter the petitioner's owner stated that the petitioner would employ the beneficiary 35 hours per week. The petitioner's owner also stated that if necessary he could have foregone \$2,200 or more of his personal compensation, shown as compensation of officers on the petitioner's tax return.

The August 2, 2005 letter from the former owner of [REDACTED] states that the beneficiary worked for that company as a gymnastics coach from February 2000 to December 2001. The letter states that the beneficiary coached teams on various levels from Level IV through Elite at state, regional, and national competitions.

The English translation of the certificate dated June 20, 1999 states that the Sichuan Sport Technology College awarded the beneficiary the title of "Excellent Coach" on that date.

The August 31, 2001 credential evaluation states, "the beneficiary's professional experience came from his over ten years of employment as a Professional Coach with Sichuan Province Gymnastics Team," and "his trainees have won many awards in international and national competitions." The evaluation also states that

¹ The petitioner's ordinary income is shown on Line 21 of its Form 1120S, U.S. Income Tax Returns for an S Corporation. For the purpose of analysis of a subchapter S corporation's ability to pay the proffered wage, its ordinary income is considered to be its net income.

the beneficiary's admission to the Sichuan Institute of Sports Technology required five years of coaching experience.² The evaluator did not state his basis for those statements.

██████████'s August 12, 2005 letter states that the beneficiary coached men's and woman's gymnastics for the Sichuan Provincial Sports Technique College from 1980 to 2000. That letter represents that Professor Feng held various positions with, and is currently an honorary member of, F.I.G., though that organization is not further identified. The translation further states that ██████████ is a former vice president and president of the Technical Committee of Chinese Gymnastics Association and a former commissary (sic) of the Chinese Olympic Committee. ██████████'s position at Sichuan Provincial Sports Technique College, past or present, if any, is not identified. Professor Feng did not state the basis of his knowledge of the beneficiary's employment history.

The acting director denied the petition on November 29, 2005. The acting director found both that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and that it had not demonstrated that the beneficiary is qualified for the proffered position. The acting director noted that the Form ETA 750 states that four years "coaching gymnastics at Elite level" is a prerequisite for the proffered position, and that the evidence does not support that the beneficiary coached the requisite number of years at the Elite level.

On appeal, counsel acknowledged that the approved labor certification shows that the annual wage for the proffered position is \$33,280.³ Counsel asserted that the amount of the proffered wage the petitioner must show the ability to pay the proffered wage during 2002 should be prorated to reflect the portion of that year remaining on the priority date.

Counsel cited a non-precedent decision of this office for the proposition that under certain circumstances a petitioner's non-cash expenses may be considered. Counsel stated that the evidence demonstrates, "that the Beneficiary has been employed since the beginning of 2002 and continues to be employed."

The regulation at 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, but unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a nonprecedent decision, to argue that its logic is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no effect.

Counsel asserted that the petitioner has shown the ability to pay the proffered wage if the wages it paid to the beneficiary, plus its net income, plus its net current assets, is equal to or greater than the proffered wage

² The evaluation made other assertions and drew other conclusions pertinent to the beneficiary's education. Those other assertions are not relevant to the bases for the decision of denial.

³ In a previous letter dated October 27, 2005 counsel had stated that the petitioner only intends to employ the beneficiary 35 hours per week, as the petitioner's owner also stated in his October 2005 letter, and that the annual amount of the proffered wage is therefore \$29,120. This office notes that the terms of the approved labor certification include 40 hours of employment per week.

during a given year. Counsel also asserted that the petitioner's depreciation deduction in a given year should be added to its net income in considering its ability to pay the proffered wage.

Counsel argued,

The circumstances in the present case clearly indicate that the tax returns of the Petitioner are not an accurate depiction of the firm's overall financial condition. The company is continuing to experience significant growth, demonstrates a healthy balance sheet and a history of profitability. As such, it is appropriate to look beyond the tax returns in order to understand the overall financial position of the company, after which it is evidence that the petitioner has the ability to pay the prevailing wage.

Counsel provided no basis for those conclusions.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and a non-precedent decision of this office for the proposition that if a petitioner shows a reasonable expectation of growth and future profits its low profits or losses may be overlooked. Counsel asserts that the petitioner has such a reasonable expectation, citing a local economic downturn and plans for construction of a new facility as evidence that the petitioner is destined to grow significantly.

Counsel noted that the petitioner paid compensation to its sole officer of \$85,000 in 2002, \$90,000 in 2003, and \$86,500 in 2004. Counsel stated that the officer compensation was paid to the petitioner's owner "to avoid 'double-taxation' under the tax code" and urged that the petitioner could have paid less compensation to its officer/owner and used the balance as a fund to pay additional wages. Counsel states, "If [the petitioner's owner/officer] withdrew profits after tax, it would significantly reduce his salary, and create higher net income, and therefore a higher taxable income for the company." The tax effects, or rather lack of tax effects, of a subchapter S corporation's ordinary income are addressed below.

Finally, counsel stated that although figures for 2005 are not yet available, the financial evidence available evidences a healthy business that is undertaking significant growth. Counsel did not describe the evidence, in the absence of "figures" that led him to that conclusion, except that the petitioner had expended \$11,500 on gymnastics equipment.

As to the beneficiary's qualifying experience, counsel stated, "There is no dispute that his twenty-one months of coaching with the Las Vegas Flyers qualifies as coaching at an 'elite level.'"

Counsel further stated, "The evidence submitted with the initial application, in combination with the letter from the Sichuan Sports Institute, clearly demonstrates that the Beneficiary coached at an elite level." Counsel further notes that, according to that letter two competitors whom the beneficiary coached were national champions in China and two others placed in the top five in national competitions. That letter does not mention elite level gymnastics.

Counsel also cited the credential evaluation as evidence that the beneficiary coached gymnastics at the elite level, although that evaluation makes no such statement.

Counsel cited the letter from [REDACTED], which states that the beneficiary coached both men's and women's professional gymnastic teams, as proof that the petitioner has four years of experience coaching elite level gymnastics. That letter does not mention "Elite level" gymnastics.

Counsel and the petitioner provided no definition, authoritative or otherwise, of "Elite level" gymnastics, but states that "common sense dictates that an individual who coaches national champions and national team members in a country that is perhaps the world's foremost gymnastics powerhouse has coached at an elite level."

Counsel stated, "the initial request for evidence did not state that the Beneficiary needed to provide evidence to demonstrate anything beyond his experience as a coach," and that the decision, based on the failure to demonstrate that the beneficiary has four years of experience in coaching gymnastics at the elite level, is therefore clear error.

Initially, this office notes that the request for evidence required the petitioner to demonstrate that the beneficiary had four years of experience coaching elite level gymnastics, as do the underlying regulations. The experience that the approved Form ETA 750 labor certification stated as a prerequisite of the proffered position is four years experience in the related occupation of "coaching gymnastics at Elite level." The September 19, 2005 request for evidence requested that the petitioner, "Submit evidence that the alien obtained the required four years of experience in the related occupation [coaching gymnastics at Elite level] before September 9, 2002."

The petitioner was obliged by 8 C.F.R. § 204.5(l)(3)(ii) to show that the beneficiary has the experience that the Form ETA 750 states is mandatory for the proffered position. The petitioner was reminded of this obligation by the September 19, 2005 request for evidence. Holding the petitioner to that obligation was not error, as counsel asserts.

The employment verification letters and other evidence clearly demonstrate that the beneficiary coached gymnastics for more than four years. The issue, however, is whether the evidence demonstrates that the beneficiary coached gymnastics at the elite level for four or more years, as the Form ETA 750 requires.

This office suspects that the phrase "Elite-level" gymnastics is a term of art, but does not know its meaning. Counsel offered no assistance in that regard, except to state that the beneficiary's employment experience must necessarily, as a matter of common sense, constitute coaching at the Elite level. This office does not accept that conclusion. If counsel wishes to provide additional argument or explanation on this point he may present it on motion.

Three of the beneficiary's four employment verification letters do not mention elite level coaching, and this office will not conclude that any part of the experience attested to in those letters was at the elite level.

Further, one of those letters, the September 28, 2005 letter and translation, attests to a period of employment different from the employment period the beneficiary claimed on the Form ETA 750B. A petitioner raises serious questions of credibility when asserting a new claim to eligibility after his initial claim is found to be

insufficient. Counsel, the petitioner, and the beneficiary provide no explanation for the disparity between the two employment claims.

Only one of the beneficiary's employment verification letters, the August 2, 2005 letter from the former owner of [REDACTED], mentions Elite-level coaching. That letter states that the beneficiary coached teams on various levels from Level IV through Elite from February 2000 to December 2001. Counsel states, on appeal, "There is no dispute that [the beneficiary's] twenty-one months of coaching with the Las Vegas Flyers qualifies as coaching at an 'elite level.'"

In fact, that employment verification letter indicates that some portion, rather than all, of the beneficiary's coaching for Las Vegas Flyers was at the elite-level. The petitioner has not demonstrated that the beneficiary has four years of experience coaching gymnastics at the elite level, as the labor certification apparently requires. The petition was correctly denied on this basis, which has not been overcome on appeal.

The remaining issue is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Counsel requests that Citizenship and Immigration Services (CIS) prorate the proffered wage during 2002 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income, or 12 months of wages, toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income or wages toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel's argument that the petitioner's depreciation deduction⁴ should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

⁴ Rather than merely depreciation counsel referred, at one point, to non-cash deductions in general. The analysis applied to depreciation herein is equally applicable to amortization.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁵ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel urges that the petitioner's net current assets should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Cash is one component of a taxpayer's current assets, and, therefore, of its net current assets. Adding the petitioner's net income to its net current assets would be duplicative, at least in part.

Counsel's arguments pertinent to subchapter S taxation and pass-throughs appear to betray a lack of understanding of those subjects. As this office understands counsel's arguments, he is suggesting that a subchapter S corporation may pay out its income as Officer Compensation to avoid corporate taxation. This is not so.

The petitioner is a subchapter S corporation, which is a pass-through entity. Pass-through entities; S-corporations, partnerships, and limited liability companies, do not pay taxes on their income, but pass it through to their owners, who are taxed on it. The income thus passed through retains its character as ordinary income, interest income, dividend income, etc., and is added to the amounts in those categories on the pass-through entity's owner's or owners' tax returns. Because these various types of income will retain their character during the pass-through, they are shown in various locations on the pass-through entity's tax return, thus indicating what type of income they are, just as they will subsequently be entered in various places on the owners' tax returns and taxed in various ways pursuant to the intricacies of the tax code.

Counsel implies that the petitioner paid its profits as Compensation of Officers, rather than declaring it as Ordinary Income, to avoid double taxation. Ordinary Income and other types of income, however, are not taxed to an S-corporation at the corporate level.

In fact, a difference exists between levies on amounts paid as Compensation of Officers and those paid as a distribution of ordinary income, but it works counter to counsel's argument. Amounts paid as Compensation of Officers are treated as wages. They are reported on Form W-2 Wage and Tax Statements and are subject to FICA and Medicare. Declared ordinary income, on the other hand, is not subject to FICA and Medicare. The owner of an S-corporation effectively pays both the employer's and the employee's share of those contributions, which are approximately 15% of the wages paid, on the amounts declared as Compensation of

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

Officers, but not on the amounts declared as ordinary income. An S-corporation⁶ will typically declare as much as possible of its funds as Ordinary Income, rather than Compensation of Officers, to avoid this levy.

No tax incentive exists to disguise S-corporation profits as Compensation of Officers.⁷ Subchapter S corporation taxation at the individual level, rather than at the corporate level, does not explain why the petitioner's ordinary income was low during the salient years.

Although no tax incentive exists to pay out profits as compensation of officers counsel urged that the petitioner could, in any event, have retained some portion of its officer compensation as necessary to pay the proffered wage. The only evidence, however, to support the supposition that the petitioner's owner could and would forego his compensation as necessary to pay the proffered wage is the petitioner's owner's October 2005 letter. In that letter the petitioner's owner stated that he could have foregone \$2,200 or more of his personal compensation. As is shown below the amount he would have been required to forego is considerably greater than \$2,200.

The petitioner's tax returns show that it paid officer compensation to its owner of between \$85,000 and \$90,000 during each of the salient years. The relative evenness of those payments appears to indicate that the payments were based on the needs of the petitioner's owner. The record contains no indication, other than the petitioner's owner's assertion, that he could have foregone any amount of that compensation and no evidence at all that he could have foregone a large portion of it.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (Citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190(Reg. Comm. 1972)). The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Counsel argued that the totality of the circumstances of the petitioner and its finances, and its reasonable expectation of a considerable increase in volume and profitability, demonstrates its continuing ability to pay the proffered wage beginning on the priority date. In support of that proposition counsel notes that the petitioner recently bought \$11,500 worth of gymnastic equipment and has immediate plans to build a new and larger facility.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. at 612, in support of the assertion that losses or low profits during a given year may be overlooked if the petitioner's demonstrates a reasonable expectation of substantially greater profits in the future. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of

⁶ This issue is peculiar to pass-through entities.

⁷ In fact, counsel's argument would have been more valid if it were applied to a subchapter C corporation. Because a C-corporation is taxed at the corporate level it has a strong tax incentive to characterize or disguise its income as Compensation of Officers or other expenses in order to avoid taxation.

time during which it was unable to do regular business. The record does not indicate that the petitioner suffered any such unremunerated expenses.

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. That 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 that 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, though, the record contains no evidence that the petitioner has ever posted a large profit.

This office is unable to determine whether the purchase of \$11,500 worth of equipment represents expansion or a continuation of the petitioner's present volume of business. No reason exists to find that the expenditure on gymnastics equipment demonstrates an expectation, reasonable or otherwise, of increased business.

That the petitioner is building, or plans to build, a larger facility does indicate that the petitioner expects its business to expand. The record contains no evidence, however, to support the assertion that the petitioner's expectation is reasonable.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2003 and 2004 were uncharacteristically unprofitable years for the petitioner. Although the beneficiary has trained very successful competitors in the past, assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. The petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date as provided in 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary \$17,300 during 2002 and \$21,175 during 2003. Although counsel stated that the petitioner paid \$24,000 to the beneficiary during 2004, the only evidence of the total the petitioner paid to the beneficiary during that year, the 2004 W-2 form shows gross wages of \$21,700.

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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during 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 typically⁸ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$33,280. The priority date is September 9, 2002.

During 2002 the petitioner paid the beneficiary \$17,300. The petitioner is obliged to show the ability to pay the remaining \$15,980 balance of the proffered wage. During that year the petitioner declared ordinary income of \$14,012. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that year, however, the petitioner had net current assets of \$16,933. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary \$21,175. The petitioner is obliged to show the ability to pay the remaining \$12,105 balance of the proffered wage. During that year the petitioner declared ordinary income of \$1,173. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that year the petitioner had net current assets of \$4,504. That amount is also insufficient to pay the

⁸ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

remaining balance of the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 the petitioner paid the beneficiary \$21,700. The petitioner is obliged to show the ability to pay the remaining \$11,580 balance of the proffered wage. During that year the petitioner declared ordinary income of \$7,306. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that year the petitioner had net current assets of \$1,068. That amount is also insufficient to pay the remaining balance of the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

The evidence does not establish that the petitioner was able to pay the proffered wage during 2003 or 2004. Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The petitioner has not shown that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification and has not shown that it has had the continuing ability to pay the proffered wage beginning on the priority date. 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.