

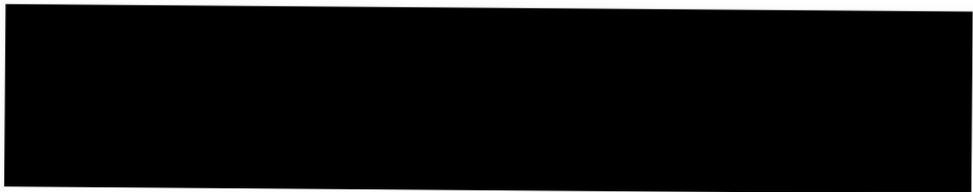


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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 19 2007
SRC 06 045 51473

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 gas station/convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store night manager. 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.

The record shows that the appeal was properly and timely filed and 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 director's decision of denial the 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, *See* 8 C.F.R. § 204.5(d), 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 February 14, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which equals \$31,200 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

The Form I-140 visa petition was submitted on November 28, 2005. On the petition, the petitioner stated that it was established on July 13, 1997 and that it employs four workers. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Orange, Texas.

On the Form ETA 750B, signed by the beneficiary on August 24, 2005, the beneficiary claimed to have worked 40 hours per week for the petitioner as a night manager since February 2005. The beneficiary also claimed to have worked 40 hours per week for Aristo's Incorporated dba Smart Stop in Orange, Texas as a night manager from February 2001 to January 2005.

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) the petitioner's 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) copies of monthly statements pertinent to the petitioner's bank account, (3) a letter dated January 11, 2006 from the petitioner's bank, (4) letters from an accountant dated November 6, 2005 and January 11, 2006, (5) a letter from the petitioner's owner dated January 11, 2006, (6) a personal balance sheet showing the assets and liabilities of the petitioner's owner, (7) an undated letter from the petitioner's owner's bank, (8) a letter dated January 4, 2005 from a credit union, and (9) a letter dated January 4, 2006 from another credit union. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains employment verification letters dated February 8, 2004 and November 1, 2005. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

The petitioner's tax returns show that it is a corporation, that it incorporated on July 31, 1997, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner reported a loss of \$167,822 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner reported a loss of \$106,131 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner reported a loss of \$150,305 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner reported taxable income before net operating loss deduction and special deductions of \$121,378. At the end of that year the petitioner had \$51,456 in current assets and \$42,633 in current liabilities, which yields net current assets of \$8,823.

The November 6, 2005 accountant's letter states that, based on the petitioner's bank statements, officer compensation, and current assets she believes that the petitioner is able to pay the proffered wage. The accountant stated,

For the past 4 ½ years there has been major road construction causing a decline in business. The road construction is finished and there has been a steady increase in business daily.

The accountant noted that her opinions rest, in part, on representations of the petitioner's management.

In that letter the accountant stated what purport to be the values of the petitioner's current assets during the salient years. For reasons discussed in depth below, this office does not consider current assets, *per se*, to be an index of a petitioner's ability to pay additional wages. Further, the values the accountant stated are incorrect. The computation of current assets, current liabilities, and net current assets is discussed below.

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

The accountant's January 11, 2006 letter cites the petitioner's bank accounts, its owner's net worth, and its depreciation and amortization deductions as indices of its ability to pay the proffered wage. The accountant also stated that, if necessary, the petitioner's retained earnings could be used to pay additional wages. In that letter the accountant stated the correct values for the petitioner's current assets during various years.

The January 11, 2006 letter from the petitioner's bank states that it opened an account on December 13, 2001 and that it maintains a five-figure balance.

In his January 11, 2006 letter the petitioner's owner stated that he would pay the proffered wage out of his own income and assets as necessary. The undated letter from his bank states that the petitioner's owner opened a bank account on December 14, 2001 and that as of January 5, 2005 he had \$24,446.65 in his bank account. The January 4, 2005 letter from the petitioner's owner's credit union states that he opened an account on May 31, 1988 and that he had \$7,221.20 in that account on January 4, 2006. The other credit union's January 4, 2006 letter states that the petitioner's owner has been a member of that credit union since September 8, 1994 and that; on January 3, 2006 he had a savings account balance of \$5,714.51.

The February 8, 2004 employment verification letter is from the Laxmi Store in Kathmandu. That letter states that the beneficiary worked for that store as a manager from July 1985 to March 1994.

The November 1, 2005 employment verification letter is from Sun chase Enterprises, Incorporated dba Delaware Food Mart in Beaumont, Texas. That letter states that the beneficiary worked for that store from February 15, 2001 to March 31, 2002 as an evening shift manager.

The director denied the petition on December 14, 2005, finding that the petitioner had not demonstrated that it has had the continuing ability to pay the proffered wage beginning on the priority date and that petitioner had not demonstrated that the beneficiary is qualified for the proffered position.

On appeal, counsel asserted that the accountant's letter sufficiently demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also urged that, under certain circumstances, the corporate veil may be pierced and the income and assets of a corporation's owners may be treated as corporate funds. Counsel cited **Article 2.21 of the Texas Business Corporations Act and *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986)** in support of that assertion. Counsel urged that the petitioner's owner's personal financial statement therefore demonstrates the petitioner's ability to pay the proffered wage.

Counsel cited a non-precedent decision of this office in support of the proposition that, under certain circumstances, a corporation's loss or low profit during a given year does not preclude that it may have been able to pay the proffered wage. Counsel noted that in that case the petitioner had paid large compensation to its sole officer and this office found that fact relevant to its ability to pay the wage proffered to the beneficiary in that case.

This office will first discuss the evidence in support of the proposition that the beneficiary has the two years of salient work experience that the approved Form ETA 750 labor certification states is mandatory.

On the Form ETA 750B the beneficiary claimed to have worked for Aristo's Incorporated dba Smart Stop in Orange, Texas from February 2001 to January 2005. The beneficiary also stated that he had worked for the petitioner since February 2005. Although the instructions on the form required him to list all employment related to the proffered position and all employment within the last three years, he listed no other employment.

Subsequently, the petitioner submitted documentation of different employment claims, never previously mentioned to Citizenship and Immigration Services (CIS). The February 8, 2004 employment verification

letter states that the beneficiary worked at the Laxmi Store in Kathmandu from July 1985 to March 1994. The November 1, 2005 employment verification letter stated that the beneficiary worked for Sun chase Enterprises, Incorporated dba Delaware Food Mart in Beaumont, Texas from February 15, 2001 to March 31, 2002 as an evening shift manager.

The beneficiary was required to list the employment in Kathmandu on the Form ETA 750B because it was related to the proffered position. The beneficiary was required to list the employment in Beaumont, Texas both because it was related to the proffered position and because the beneficiary ostensibly worked there within three years of signing the Form ETA 750B. Counsel provided no explanation, however, for the omission of those employment claims on the Form ETA 750B.

Further, this office notes that the claim of employment as a night manager at a Smart Stop in Orange, Texas from February 2001 to January 2005, as stated on the Form ETA 750B, appears to conflict with the claim of employment as a night manager for a Delaware Food Mart in Beaumont, Texas, from February 15, 2001 to March 31, 2002.

The amendment of the beneficiary's employment history and his submission of conflicting employment claims render his employment verification letters suspect, unreliable, and unconvincing. This office accords them very little probative value. The petitioner has not demonstrated that the beneficiary has the requisite employment experience as stated on the approved Form ETA 750 labor certification. As the petitioner has not demonstrated that the beneficiary is qualified for the proffered position, the petition may not be approved. The visa petition was correctly denied on that basis, which has not been overcome on appeal.

The remaining issue is the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In various submissions the petitioner's owner, the accountant, and counsel have urged that the petitioner's owner's personal income and assets are available as necessary to pay the proffered wage. The record contains the petitioner's owner's bank statements and a personal balance sheet to support the proposition that the petitioner's owner's personal funds are sufficient to pay the proffered wage.

The petitioner, however, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "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."

Counsel is correct that, under certain circumstances, a court may "pierce the corporate veil, that is, treat assets of a corporation's owners or shareholders as the property of the corporation." Article 2.21 of the Texas Business Corporations Act, cited by counsel, codifies this judicial ability, after first specifying that the general rule is that corporate owners and shareholders are not liable for the debts and obligations of the corporation.

Counsel's citation of *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986) is exceptionally germane, as it succinctly lists (at 272) circumstances that may trigger this piercing of the corporate veil. The list of those circumstances, which is not necessarily exhaustive, follows:

- (1) where the corporate fiction is used to perpetrate a fraud;
- (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation (alter ego);
- (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
- (4) where the corporate fiction is employed to achieve or perpetuate monopoly;
- (5) where the corporate fiction is used to circumvent a statute;
- (6) where the corporate fiction is relied upon as protection of crime or to justify wrong; and
- (7) where the corporation is inadequately capitalized.

Whether counsel sought to pierce the corporate veil pursuant to one of those listed circumstances, or pursuant to some other theory of shareholder liability, is unclear. This office perceives no reason to suppose that the petitioner's owner would be held responsible for the debts and obligations of the corporation. If counsel wishes to clarify his point, he may submit a more concrete argument on motion.

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

The record also contains copies of the petitioning corporation's own monthly bank statements. Counsel's reliance on the bank statements, however, even those of the petitioner itself, is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.¹ 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 accountant also implied, in her November 6, 2005 letter, that the petitioner's Form 1120, Line 12, Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. Counsel cited a non-precedent decision of this office in support of that proposition.

¹ 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.

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

Although counsel did not argue from the reasoning of that unpublished decision, this office notes that in that case the petitioner paid officer compensation of \$278,471 to its sole officer. In that case, this office found reasonable the proposition that the petitioner could have retained some portion of that amount as necessary to pay the \$34,989 proffered wage.

In the instant case, however, the petitioner's 2002, 2003, and 2004 tax returns show that it paid no compensation to its sole officer. Clearly, the argument that the petitioner could have retained some portion of its officer compensation is entirely unconvincing as to those years.

As to the remaining salient year, 2001, the petitioner paid its sole officer compensation of \$7,400. Even that amount would not be considered a fund available to pay additional wages unless, and only to the extent that, the petitioner showed that its officer was able and willing to forego that compensation, in whole or in part, to pay the proffered wage. The petitioner's officer compensation has not been shown to have been available to pay wages. Further still, even if that whole amount had been shown to be available to pay wages, the addition of \$7,400 to the funds available to pay the proffered wage during 2001 would not change the result of this case.

Counsel's argument that the petitioner's depreciation and amortization deductions should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that depreciation and amortization deductions do not require or represent specific cash expenditures during the year claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively. A depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or a sinking fund necessary to replace buildings and equipment at the end of their useful life. But the cost or other basis of assets and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

A depreciation 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. *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.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient to its present purpose.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.² Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

The accountant recommends the use of retained earnings as necessary to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

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

Counsel cited a non-precedent decision of this office for the proposition that a petitioner's losses or low profits during a given year may be disregarded in the determination of its ability to pay the proffered wage during that year. As was noted above, counsel's citation of a non-precedent decision is of no effect.

Counsel is correct, however, that, under some circumstances, losses or low profits during a given year may be disregarded. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of 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 time during which it was unable to do regular business.

In *Sonogawa*, 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 *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

² Counsel does 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.

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, the record shows that the petitioner suffered large losses during 2001, 2002, and 2003, and returned a large profit during 2004. The petitioner's accountant stated that the losses were occasioned by road construction, that the road construction is now complete, and that the petitioner's profits are climbing. The record contains no other evidence pertinent to that road construction, its effect on the petitioner's profitability, or its completion. Merely going on record without proof is insufficient to sustain the burden of proof. *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 accountant gives a plausible explanation of the results shown on the petitioner's tax returns. The mere assertion of the accountant, which he indicates may be based on representations of the petitioner, however, is insufficient to sustain the burden of proof.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, and 2003 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary claimed, on the Form ETA 750B, to have worked for the petitioner since February 2005, the petitioner did not establish that it paid any wages to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during 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 typically³ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$31,200 per year. The priority date is February 14, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions, or net income, of \$121,378. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

³ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petition in this matter was submitted on November 28, 2005. On that date the petitioner's 2005 tax return was unavailable. No evidence pertinent to the petitioner's ability to pay the proffered wage during 2005 was subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this additional basis, which has not been overcome on appeal.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of qualifying experience. Therefore, 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.