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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAY 02 2007  
EAC 02 211 50608

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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion, affirming the director's decision. The matter is now before the AAO on a second motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a health care placement agency. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a education and training manager. The director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

The record shows that the motion was properly and timely filed and makes a specific allegation of error in law or fact. 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 sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are unavailable in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 14, 1997. The proffered wage as stated on the Form ETA 750 is \$76,107.20 per year.

The Form I-140 petition in this matter was submitted on June 6, 2002. On the petition, the petitioner stated that it was established during 1990 and that it employs 35 workers. The space on the petition for the petitioner to report its gross annual income was left blank. In the space reserved for its net annual income the petitioner entered \$1 million.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary on February 17, 1997, the beneficiary claimed to have worked for the petitioner as an education and training administrator since March 1994. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Montclair, New Jersey.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the petitioner's<sup>3</sup> 1997, 1998, 1999, 2000, 2001, and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) an affidavit dated July 6, 2005 from the

<sup>1</sup> None of the evidence submitted confirms this optimistic estimate of the petitioner's net income.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> The petitioner is [REDACTED], New Jersey. The tax returns submitted show that the taxpayer is [REDACTED] of [REDACTED] Montclair, New Jersey. A New Jersey Certificate of Incorporation shows that the corporation thus formed is [REDACTED]. A statement of coverage from the petitioner's insurance company shows that the insured is [REDACTED] g Incorporated dba [REDACTED]. The evidence demonstrates that [REDACTED] Care are the same entity.

petitioner's president, (3) 1994, 1995, 1996, 1997, 1998, 1999, 2001, 2002, and 2003 Form W-2 Wage and Tax Statements, and (4) an IRS printout. 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 tax returns show that the petitioner is a corporation, that it incorporated on September 15, 1989, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 1997 the petitioner reported a loss of \$10,373 as its ordinary income. The petitioner's Schedule K, Line 23 Income was also a loss of \$10,373. At the end of that year the petitioner reported current assets of \$100 and no current liabilities, which yields net current assets of \$100.

During 1998 the petitioner reported a loss of \$11,437 as its ordinary income. The petitioner's Schedule K, Line 23 Income was also a loss of \$11,437. At the end of that year the petitioner reported current assets of \$100 and no current liabilities, which yields net current assets of \$100.

During 1999 the petitioner reported a loss of \$3,145 as its ordinary income. The petitioner's Schedule K, Line 23 Income was a loss of \$3,102. At the end of that year the petitioner reported current assets of \$100 and no current liabilities, which yields net current assets of \$100.

During 2000 the petitioner reported a loss of \$3,077 as its ordinary income. The petitioner's Schedule K, Line 23 Income was a loss of \$3,035. At the end of that year the petitioner reported current assets of \$100 and no current liabilities, which yields net current assets of \$100.

During 2001 the petitioner reported ordinary income of \$35,728. The petitioner's Schedule K, Line 23 Income was also \$35,728. At the end of that year the petitioner reported current assets of \$150 and no current liabilities, which yields net current assets of \$150.

During 2002 the petitioner reported a loss of \$9,947 as its ordinary income. The petitioner's Schedule K, Line 23 Income was a loss of \$13,395. At the end of that year the petitioner reported current assets of \$100 and no current liabilities, which yields net current assets of \$100.

The W-2 forms submitted show that the petitioner paid the beneficiary \$21,050 during 1997, \$18,400 during 1998, \$9,600 during 1999, \$36,500 during 2001, \$23,700 during 2002, and \$37,000 during 2003. Because the priority date of the instant petition is July 14, 1997, evidence pertinent to wages paid during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The reason the W-2 form showing 2000 wages was not provided is unknown to this office.

The IRS printout shows that the petitioner paid the beneficiary \$36,400 during 2000. The July 6, 2005 affidavit attests that on June 10, 2005 the petitioner's officers met and resolved that the petitioner owes the beneficiary \$38,707.20, and further attests that the officers guarantee the availability of that amount. Although the proposition that this affidavit was intended to support is unclear, this office notes that the sum of those two amounts, that on the IRS printout and that on the affidavit, is \$75,107.20 and the annual amount of the proffered wage is \$76,107.20.

The director denied the petition on April 22, 2003.

On appeal, counsel noted that the petitioner is a subchapter S corporation and taxed differently from subchapter C corporations. Counsel provided information pertinent to the pass-through nature of S-corporation profits. Counsel stated that because S-corporations are pass-through entities, "It is indubitably clear that earnings reflected in the corporate income tax or an S-Corporation is [sic] not a good gauge of the earnings or profitability of an S-corporation." Counsel asserted that,

"The best gauge of the earnings of an S-corporation is [it's Line 6 total income minus its Line 8 to 21 expenses, but without subtracting its Line 7 Compensation of Officers] which might reflect the net income of the corporation since [its Compensation of Officers] is most likely the distributed shares [of profits] to the shareholders."

Counsel also argued that the fact that the petitioner employs 35 workers and remains in business after more than ten years demonstrates that it is able to pay the proffered wage. Counsel cites the petitioner's "total income" during the various salient years as evidence that it is able to pay the proffered wage.

Finally, counsel argued that the petitioner's shareholders could have agreed to lend the petitioner money or to reduce the amount they received from the petitioner.

The AAO dismissed the appeal on December 17, 2003. The decision on appeal, in addition to finding that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date, found that the petitioner had failed to demonstrate that United Marketing Incorporated and United Health Care are the same entity. The decision also discussed the nature of the limited liability of corporate shareholders for the debts and obligations of the corporation.

On the previous motion counsel submitted evidence sufficient to demonstrate that United Marketing Incorporated and United Health Care are the same entity. Counsel reiterated his arguments pertinent to the nature of S-corporation taxation and pass-throughs. Counsel also urged that the petitioner's assets and its cash-on-hand should be considered in assessing its ability to pay the proffered wage.

Counsel asserted that, under the CIS interpretation of the 8 C.F.R. § 204.5(g)(2) requirement of showing ability to pay the proffered wage, "a [subchapter] S corporation [could] never be [a successful] immigration petitioner."

On June 7, 2005 the AAO granted the petitioner's motion to reopen and reconsider, and affirmed the previous decisions denying the petition and dismissing the appeal. On the instant motion counsel reiterated the arguments previously made pertinent to subchapter S corporate taxation and pass-throughs.

Counsel asserts that the petitioner's employment of 35 workers and the fact that it has been in business in excess of ten years demonstrates its continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner, in general, to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2) contains a special exception for petitioners who employ 100 or more workers. In that event a statement from a financial officer of the company to the effect that the petitioner is able to pay the proffered wage may suffice. No such exception is made for companies that employ 35 workers. No such exception is made for companies that have been in business in excess of ten years. The instant petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

Counsel asserts that the petitioner's total income, rather than its net income, should be the figure considered in assessing ability to pay the proffered wage. When counsel refers to "total income" he may be referring to the sum of the various types of income shown at Schedule K, Line 23; or the petitioner's Line 6 Total Income from the first page of its tax return, or the petitioner's net income with its Line 7, Compensation of Officers added back into it, which computation counsel asserts elsewhere is the correct computation of the funds available to a subchapter S corporation.

On the Form 1120S, Line 6, Total Income, is the result of subtracting the Line 1b Returns and Allowances and Line 2, Cost of Goods Sold, from Line 1a, Gross Receipts. In that calculation the operating expenses shown at Lines 7 through 20 have not yet been subtracted. This interim figure is not an index of ability to pay additional wages as is explained further below.

Counsel urges that the petitioner's Form 1120S, Line 7, Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. The only evidence provided to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage,<sup>4</sup> however, is the petitioner's president's July 6, 2005 affidavit. In that affidavit the petitioner's president attests that the petitioner's officers resolved that the petitioner owes the beneficiary \$38,707.20, which the affidavit characterizes as the balance of her pay for the year 2000, and guarantee its availability.<sup>5</sup>

That affidavit does not demonstrate that those wages were actually paid to the beneficiary during 2000, however. Rather, that the board passed that resolution during 2005 is apparently an acknowledgement that that they were not. Further, the directors' resolution that they should have paid that amount during 2000, and that the debt remained during 2005, is insufficient to show that the petitioner had those funds during 2000 or, for that matter, during 2005. Exactly what proposition that affidavit was intended to support is unclear. In any event, neither than resolution nor any other evidence in the record shows that the petitioner's officers were willing and able, during each of the salient years, to forego compensation, in whole or in part, as

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<sup>4</sup> 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.

<sup>5</sup> Whether the officers intended to jointly and severally guarantee that amount from their own personal funds, for instance, or whether they merely meant to assure that the petitioner is able to pay it, was not made clear.

necessary to pay the wage proffered in this case. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Counsel's assertion that the petitioner could have borrowed money from its officers is inapposite. Even if counsel had demonstrated that ability, rather than merely alleging it,<sup>6</sup> an indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of its owners or any other lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel's arguments pertinent to subchapter S taxation and pass-throughs are not entirely clear. 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.<sup>7</sup> 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. Distributions of ordinary income, on the other hand, are 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

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<sup>6</sup> Again, counsel's assertions are not evidence. *INS v. Phinpathya*, 464 U.S. 188-89; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503.

<sup>7</sup> Counsel noted that because distributive shares of an S-corporation's income are attributed to its shareholders and subject to tax on their tax returns whether or not it is actually paid to its shareholders, a "phantom income" problem sometimes exists, in which the owners are forced to pay taxes on income they did not actually receive. This tax effect is peculiar to pass-throughs entities. It does not, however, accord an incentive that encourages a pass-through entity to characterize its income as Compensation of Officers on its tax return as counsel appears to imply and does not, therefore, explain the petitioner's low profits.

Compensation of Officers, but not on the amounts declared as ordinary income. An S-corporation<sup>8</sup> 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.<sup>9</sup> 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.

Counsel's assertion that the CIS interpretation of CIS prevents approval of a visa petition filed by an S-corporation is incorrect.<sup>10</sup> As was explained above, S-corporations are not prevented, nor even discouraged by tax incentives, from showing profits on their tax returns. An S-corporation is able to show its ability to pay the proffered wage with its own profits, just like any other entity.

A corporation, however, 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."

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.

If counsel, in referring to "Total Income," as described above, meant to include the various types of income and losses described at Lines 1 through 6 on Schedule K, his point is taken. All of those types of income; ordinary income, income from rentals, interest and dividend income, capital gain, etc., reduced by the various types of losses shown in that same section, represent funds available to the petitioner, and, although they are segregated for pass-through reasons, the various types of income and loss are all correctly included in the determination of the petitioner's ability to pay additional wages. The petitioner's income as shown on its various years' Schedules K will be considered below in determining the petitioner's ability to pay the proffered wage during those years.

Counsel urged the consideration of the petitioner's cash-on-hand. End-of-year cash is shown on Schedule L at Line 1(d). That amount is included in the consideration of the petitioner's net current assets, which calculation is explained further below. In the instant case, however, the petitioner's cash-on-hand was \$100

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<sup>8</sup> This issue is peculiar to pass-through entities.

<sup>9</sup> 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 tax incentive to characterize its income as Compensation of Officers or other expenses in order to avoid taxation.

<sup>10</sup> Many Form I-140 petitions filed by S-corporations are routinely approved.

at the end of 1997, 1998, 1999, 2000, and 2002; and \$150 at the end of 2001. Those amounts are unlikely to determine the outcome of this case.

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 demonstrated that it paid the beneficiary \$21,050 during 1997, \$18,400 during 1998, \$9,600 during 1999, \$36,400 during 2000, \$36,500 during 2001, \$23,700 during 2002, and \$37,000 during 2003. The petitioner is obliged to show the ability to pay the balance of the proffered wage during those years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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. 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.

The petitioner's net income 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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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

typically<sup>11</sup> 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 \$76,107.20 per year. The priority date is July 14, 1997.

The petitioner paid the beneficiary \$21,050 during 1997. The petitioner is obliged to show the ability to pay the remaining \$55,057.20 balance of the proffered wage during that year. During 1997 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its profit during that year. The petitioner reported net current assets of \$100 at the end of that year. That amount is insufficient to pay the balance of the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner during 1997 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

The petitioner paid the beneficiary \$18,400 during 1998. The petitioner is obliged to show the ability to pay the remaining \$57,707.20 balance of the proffered wage during that year. During 1998 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its profit during that year. The petitioner reported net current assets of \$100 at the end of that year. That amount is insufficient to pay the balance of the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner during 1998 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

The petitioner paid the beneficiary \$9,600 during 1999. The petitioner is obliged to show the ability to pay the remaining \$66,507.20 balance of the proffered wage during that year. During 1999 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its profit during that year. The petitioner reported net current assets of \$100 at the end of that year. That amount is insufficient to pay the balance of the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner during 1999 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner paid the beneficiary wages of \$36,400. The petitioner is obliged to demonstrate the ability to pay her the \$39,707.20 balance of the proffered wage during that year. During 1999 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 profit during that year. The petitioner reported net current assets of \$100 at the end of that year. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner 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.

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<sup>11</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner paid the beneficiary \$36,500 during 2001 and is obliged to show the ability to pay her the remaining \$39,607.20 balance of the proffered wage during that year. During 2001 the petitioner declared ordinary income of \$35,728. That amount is insufficient to pay the balance of the proffered wage. The petitioner reported net current assets of \$150 at the end of that year. That amount is also insufficient to pay the balance of the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner 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.

The petitioner paid the beneficiary \$23,700 during 2002 and is obliged to demonstrate the ability to pay the remaining \$52,407.20 balance of the proffered wage during that year. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the balance of the proffered wage out of its profit during that year. The petitioner reported net current assets of \$100 at the end of that year. That amount is insufficient to pay the balance of the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner during 2002 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$37,000 during 2003 and would ordinarily be obliged to demonstrate the ability to pay the remaining \$39,107.20 balance of the proffered wage during that year. The petition in this matter was submitted, however, on June 6, 2002. On that date the petitioner's 2003 tax return was unavailable. On December 12, 2002 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2003 tax return was still unavailable. Evidence pertinent to 2003 was never subsequently requested. The petitioner is relieved of its burden to demonstrate its ability to pay the balance of the proffered wage during 2003 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, 2001, and 2002. 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 that basis, which has not been overcome on appeal.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion is granted. The AAO's decisions of December 17, 2003 and June 7, 2005 are affirmed. The petition is denied.