U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 12 2007

WAC 05 054 51758

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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, California 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 medical staffing company. It seeks to employ the beneficiary permanently in the United States as a quality assurance coordinator. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

Two attorneys have purported to represent the petitioner in this matter. The record contains a Form G-28 executed by the petitioner's majority shareholder recognizing [redacted] as the petitioner's counsel. Information from the website of the State Bar of California[1] indicates that [redacted] has been ineligible to practice law since September 18, 2006. The appeal was submitted by [redacted][2] The record does not contain a Form G-28 Notice of Entry of Appearance recognizing [redacted] as counsel.

On August 27, 2007 this office sent a facsimile transmission to [redacted] asking that, if the petitioner has agreed to be represented by him, that he submit a Form G-28 Notice of Entry of Appearance executed by the petitioner acknowledging him as the petitioner's counsel. [redacted] did not respond to that facsimile transmission. This office finds that the petitioner is not represented. All representations will be considered, but the decision in this matter will be provided only to the petitioner.

The record shows that the appeal 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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

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[1] <http://www.calbar.ca.gov/state/calbar/calbar_home.jsp>

[2] The California bar website indicates that, although he was suspended from practice from April 11, 2004 to April 11, 2005, [redacted] is now able to practice law again.

> 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 DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $27.50 per hour, which equals $57,200 per year.

The Form I-140 petition in this matter was submitted on December 14, 2004. On the petition, the petitioner stated that it was established on January 1, 1996 and that it employs 2,045 workers. The petition states that the petitioner's gross annual income is $17,445,744 and that its net annual income is $855,383. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Culver City, California.

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.[3]

In the instant case the record contains (1) the petitioner's compiled, unaudited, financial statements for 2001 and 2002, (2) a photocopy of the petitioner's 2002 "Annual Report," (3) the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (4) an August 20, 2004 letter from the petitioner's president, (5) a letter dated November 15, 2004 from the petitioner's president, (6) a letter dated March 21, 2006 from the petitioner's CFO and a CPA, and (7) a March 23, 2006 letter from a commercial lender. 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 2002 annual report describes the petitioner favorably. It states that the petitioner employed approximately 1,500 workers and had net income of $907,000 during that year.

The petitioner's 2003 tax return shows that it is a corporation, that it incorporated on December 3, 1996, and that it reports taxes pursuant to cash convention accounting and the calendar year. During 2003 the petitioner declared Schedule L, Line 23 Income of $910,384. At the end of that year the petitioner's current assets exceeded its current liabilities.

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[3] 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).

The petitioner's president's August 20, 2004 letter states that it guarantees the beneficiary full-time year-round remuneration whether or not it is able to place her. It stated an address where the beneficiary will be placed in Thousand Oaks, California. The petitioner further stated that it had no employees at that location, that it had not previously placed anyone in a Quality Assurance Coordinator position, and that the beneficiary may be placed at other unanticipated locations within the area. Finally, the petitioner's president stated that the petitioner has had no difficulty meeting its payroll obligations.

The petitioner's president's November 15, 2004 letter cites the petitioner's gross income as an index of its ability to pay additional wages and states that the petitioner is able to pay the proffered wage.

The March 21, 2006 letter from the petitioner's CFO and a CPA states that the petitioner has a payroll of over $10,235,500, has had more than four thousand employees since 2001, and has access to over $3 million in capital. The commercial lender's letter of March 23, 2006 states that the petitioner's then had a $2.5 million line of credit subject to availability of eligible collateral, with a current availability of $1.5 million.

The director denied the petition on January 25, 2006. In that decision the director noted that although the petitioner's net profit greatly exceeds the wage proffered in the instant case, the petitioner then had approximately 140 alien worker petitions pending and was obliged to show the ability to pay the wages proffered to all of its beneficiaries.

On appeal, counsel asserted, "Decision is factually incorrect and the decision fails to consider AAO precedent decisions."

Subsequently, in a brief filed to supplement the decision, counsel argued that the petitioner would earn a profit from employing and placing the beneficiary, and that assuming that a markup of 30% is the industry standard, the petitioner would profit from hiring the beneficiary even if she did not work a full year. Counsel provided no evidence that the industry standard markup for staffing companies placing quality assurance coordinators or any other employees is 30% or more. Counsel provided no calculations to demonstrate, given that the standard markup is 30%, that the petitioner would profit from hiring and placing the beneficiary.

Counsel argued that the petitioner would not have to pay the proffered wage to all 140 beneficiaries of its outstanding petitions. Counsel stated that most of the beneficiaries are registered nurses and that some are beneficiaries of other petitions filed by other potential employers. Counsel further stated that many of the beneficiaries of other petitions already work for the petitioner. As such, the petitioner has been paying their wages and their wages need not be deducted from profit to show the ability to pay their wages. Counsel cited the U.S. Embassy's letter as evidence that not all of the petitioner's approved beneficiaries apply for visas through the petitioner.

Counsel further argued that CIS failed to consider the holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel argued that the petitioner has had no difficulty meeting its payroll obligations in the past and that the totality of the circumstances of this case shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel cited the petitioner's total wage expense, its employment of over 1,100 employees, its positive net profit, total assets, sustained growth, longevity, gross receipts, ready access to capital including a $2.5 million line of credit, and annual increase in revenues and

assets as examples of the factors relevant to that determination. Counsel cited a non-precedent case for the proposition that the petition should, under these circumstances, be approved.

In a previous letter, dated August 9, 2005, counsel cited a May 4, 2004 memorandum from William R. Yates, the Associate Director for Operations for the proposition that a petitioner has shown ability to pay the proffered wage if, during a given year, its net income, its net current assets, or the wages it paid to the beneficiary exceeded the annual amount of the proffered wage during that year. Counsel stated that the petitioner's profit and its net current assets exceeded the annual amount of the proffered wage during the years in question. In his discussion, counsel misstated the amount of the petitioner's net current assets.

Counsel's reliance on the line of credit evidenced by the March 23, 2006 commercial lender's letter is misplaced. A line of credit, or any other 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 a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

In their March 21, 2006 letter the petitioner's CFO and a CPA state that the petitioner "has access to over $3 million in capital." Use of the word "capital" includes, in some contexts, available credit. The letter may be including the petitioner's line of credit in the amount stated. As was explained above, this office declines to include available credit in the determination of the funds available to the petitioner to pay additional wages.

From the fact that the CFO and CPA stated that the petitioner "has access to" capital, rather than "has" capital, this office infers that they were not referring to capital already in the petitioner's possession. If funds of the petitioner's owner, or others, were included in the $3 million figure, this office would, again, decline to consider it.

The petitioner 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."

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.

On the I-290 appeal form counsel stated that CIS has failed to consider AAO precedent. Counsel, however, cited no AAO precedent cases in the subsequent brief, but cited a non-precedent 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.

The regulation at 8 C.F.R. § 204.5(g)(2), set out above,

> 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.

[Emphasis provided.]

In the instant case, the petitioner employs an unknown number of workers,[4] but apparently 100 or more. The petitioner, however, has petitioned for approximately 140 alien workers. Counsel urged that the petitioner will not ultimately employ all of the beneficiaries for whom petitions are approved. Counsel stated that some of those aliens are the beneficiaries of more than one petition filed by more than one petitioner. As such, more than one petition may be approved and the beneficiary will select, from the approved petitions, which employment to pursue.

Counsel asserted, but provided no evidence to demonstrate, that 58 of the beneficiaries for whom petitions were approved did not accept employment with the petitioner. 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. Further, the record does not demonstrate that the petitioner withdrew any of those 58 petitions.

As support for that proposition counsel provided a letter that appears to indicate that, for whatever reason, one of the beneficiary's approved beneficiaries is apparently not pursuing an immigrant visa through the approved petition. This does not demonstrate that any appreciable percentage of the aliens for whom petitions are approved will not subsequently work for the petitioner. Further, the petitioner did not provide any evidence that it withdrew any of its alien worker petitions. The record does not demonstrate that the petitioner now has fewer than 140 pending and recently approved alien worker petitions,[5] or that it had fewer during any of the salient years.[6]

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[4] According to information submitted by the petitioner and counsel the number of workers the petitioner employed dwindled from 2,045 during 2001 to "over 1,100 employees" during 2006. The number now remaining is unknown to this office.

[5] If counsel can demonstrate that substantially less than 140 alien worker petitions are either pending or recently approved, and that this prejudiced the petitioner's case, counsel may present evidence and argument on motion.

[6] If during a given year the petitioner had fewer than 140 pending and recently approved petitions, then it would only be obliged to show the ability to pay the proffered wage to the lesser number of beneficiaries during that year.

Further, counsel stated that many of the beneficiaries for whom the petitioner has petitioned are now employees of the petitioner, and that the petitioner is already paying them wages. The petitioner provided no evidence, however, to demonstrate that it has less than 140 pending and recently approved beneficiaries. The mere assertion that the petitioner now employs some of its previous beneficiaries is insufficient to show that it now has less than 140 beneficiaries of pending and recently approved petitions.

In this case, in which the petitioner apparently has approximately 140 pending and recently approved petitions, this office finds that the director was correct in discounting the statement of the petitioner's president, in his November 15, 2004 letter, that the petitioner is able to pay the proffered wage. The petitioner is not entitled to rely on the self-certifying clause of 8 C.F.R. § 204.5(g)(2), but must 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 urges that, even if the petitioner employed an additional 140 employees it would have no difficulty paying wages to them, as each of its employees earns a profit when placed and employed. Counsel's assertion rests on several assumptions that should be explored.

That the petitioner's business will be successful depends upon the ability not only to bill clients for more than it pays its employees, but also to cover various overhead items with the difference. The petitioner's business will incur various expenses that will vary with the number of employees it recruits. Those expenses may include, for instance, airfare and expenses for health insurance. The petitioner's gross receipts must also be sufficient to cover those expenses. If the petitioner were to hire the beneficiary, the petitioner's overhead would offset, at least in part, whatever amount of gross income the beneficiary would generate.

Counsel implied that a 30% markup is the "industry standard,"[7] but provided no evidence in support of that implication. Counsel asserted that a markup of 30% is sufficient to guarantee a profit but provided no evidence to support that assertion.[8] That the petitioner would reap a profit from employing the beneficiary has not been demonstrated.

In stating that the petitioner would be profitable even if obliged to employ and pay all of the alien workers for whom it has petitioned, counsel appears to assume that, however many of its petitions are approved, and however, many beneficiaries become its new employees, the petitioner' will place them with end users in a timely manner. The record contains no reliable evidence that the petitioner is able to place an unlimited number or new employees, or 140 new employees. Further, the record contains very little evidence that the petitioner is able to place the beneficiary or the rate at which it may place her.

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[7] Further, counsel did not state to what industry that markup is standard. That such a markup is readily requested and received in the context of placing registered nurses, for instance, does not demonstrate that such a markup can be commanded in placing a quality assurance coordinator. Even if counsel had demonstrated, rather than implied, that a 30% markup is typical of placement services, or typical of the petitioner's operations, that would not have demonstrated that the petitioner is likely to receive a 30% markup in placing the beneficiary.

[8] If counsel is able to demonstrate that the petitioner can command a 30% markup for the beneficiary's employment this office will consider that showing on motion.

The number of employees compared to its total wage expense should provide some indication of whether the petitioner's employees are fully employed. The number of workers the petitioner employs, however, has either been misstated or fluctuates wildly.

On the Form I-140, submitted during 2001, the petitioner stated that it had 2,045 employees. The petitioner's 2002 annual report stated that the petitioner then had approximately 1,500 workers. In the appeal brief, submitted during 2006, counsel stated that the petitioner has "over 1,100 employees," as did the March 21, 2006 letter from the petitioner's CFO and a CPA.

The unaudited financials submitted state that the petitioner's wage expense was $11,026,249 during 2001 and $10,320,698 during 2002. The petitioner's tax return states that it was $10,017,564 during 2003. Even using the lowest figure of 1,100 during each of the three salient years, division shows that the petitioner paid average annual wages of just over $10,000 to its employees during 2001 and somewhat less than $10,000 during 2002 and 2003. This does not support the proposition that the petitioner is able to fully employ its workers.

Counsel asserts that the petitioner has demonstrated its ability to pay the proffered wage pursuant to the Yates memorandum of May 4, 2004 both because its net profits exceeded the annual amount of the wage proffered to the beneficiary in this case and because petitioner's net current assets also exceeded that proffered wage.

The computation of net current assets is explained in detail below. Counsel is incorrect in stating that the petitioner's net current assets show its ability to pay the proffered wage. According to the compiled, unaudited, financial statements submitted with the petitioner's 2002 annual report, the petitioner had positive end-of-year 2002 net current assets, but negative net current assets at the end of 2001. Even if the unaudited financial statement were deemed reliable, the end-of-year net current assets would not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Further, 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form.

Counsel, referring to the unaudited financial statements as "discretionary evidence," notes that 8 C.F.R. § 204.5(g)(2) allows a petitioner to submit additional evidence in appropriate cases. Additional submissions, however, do not excuse a petitioner from providing copies of annual reports, federal tax returns, or audited financial statements. The petitioner provided no 2001 annual report, federal tax return, or audited financial statement and no explanation of that omission.

Further, although 8 C.F.R. § 204.5(g)(2) permits additional submissions in appropriate cases,[9] this office must accord them evidentiary weight based on their reliability. Unaudited financial statements are the

[9] Further still, while 8 C.F.R. § 204.5(g)(2) allows additional material "in appropriate cases," the petitioner

representations of management. The unsupported representations of management are not a suitable substitute for audited financial statements. They are therefore accorded little evidentiary weight and are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

Further still, in implying that a petitioner need only show the ability to pay the wage proffered in a particular case, the Yates memorandum does not contemplate a case in which the petitioner filed multiple petitions. The regulations require the petitioner to show the ability to pay the proffered wage. If CIS is aware of other pending petitions, CIS must, in order to determine the petitioner's ability to pay the instant beneficiary's wages, take into account any and all other wage obligations that could possibly result from the other pending petitions in order to determine whether the job offer is credible. As an example, a petitioner with $25,000 in net profits cannot show the ability to pay the wages of an infinite number of workers at $25,000 each per annum nor, in fact, more than one. Thus the regulations require CIS to take notice of other pending petitions when evaluating the petitioner's ability to pay the proffered wage.

Counsel's reliance on the petitioner's gross receipts and its total annual wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, and has previously had no difficulty paying its obligations to its employees, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[10] or otherwise increased its net income,[11] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R.

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has not demonstrated that the evidence required by the governing regulation is inapplicable, or unavailable, or that it paints an inaccurate financial picture of the petitioner. Whether this is an appropriate case in which to consider evidence other than copies of annual reports, federal tax returns, or audited financial statements in the instant case is unclear.

[10] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

[11] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

§ 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

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 did not establish that it employed and paid 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 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). 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[12] 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 $57,200 per year. The priority date is April 30, 2001.

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[12] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner submitted none of the regulatory-prescribed evidence of its ability to pay the proffered wage during 2001. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

Other than its 2002 annual report, the petitioner submitted none of the regulatory-prescribed evidence of its ability to pay the proffered wage during 2002. That annual report indicates that the petitioner had net income of $910,000 during that year. As was noted above, that amount exceeds the wage proffered in the instant case, but the petitioner has filed approximately 140 alien worker petitions.

The cumulative amount proffered to the other beneficiaries unknown. This office notes, however, that the minimum wage in California is $7.50,[13] which, annualized, equals $15,600. If the petitioner hired an additional 140 employees at $15,600 per year each, the additional wage expense would be over $2 million.[14] The petitioner's net income was insufficient to pay that amount. The annual report does not indicate the amount of the petitioner's end-of-year net current assets. The petitioner submitted no other reliable evidence pertinent to its ability to pay the proffered wage during 2002. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner declared Schedule L, Line 23 Income of $910,384. At the end of that year the petitioner's current assets exceeded its current liabilities. That amount is insufficient to pay the sum of the wages that would be due to the 140 alien workers for whom the petitioner has submitted visa petitions. At the end of 2003 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 provided no other reliable evidence of funds available to it 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.

The petition in this matter was submitted on December 14, 2004. On that date the petitioner's 2004 tax return was unavailable. On May 19, 2005, however, 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, and specifically requesting a copy of the petitioner's 2004 tax return. On that date the petitioner's 2004 tax return should have been available. Counsel did not provide the requested 2004 return or any reason for that omission. Counsel did not provide any other reliable evidence of the petitioner's ability to pay the proffered wage during 2004. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

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[13] The minimum wage in California will increase to $8 on January 1, 2008, which, annualized, equals $16,640 for a full-time position. Information pertinent to the minimum wage in California was obtained from a website operated by the state of California at <http://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm>.

[14] No reason exists to believe that the petitioner is hiring all, or any, of its new employees at minimum wage. This office would not have approved the petition based on the petitioner showing the ability to pay minimum wage to all of its employees. This office merely demonstrates that, even pursuant to an absurdly low estimate of the wage commitment represented by 140 immigrant worker petitions, the petitioner is unable to demonstrate the ability to pay the proffered wage during the salient years.

Counsel asserts, however, that even if the petitioner's copies of annual reports, federal tax returns, or audited financial statements do not, in themselves, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the petition may still be approved pursuant to the holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) based on the "totality of circumstances" test. In connection with that argument counsel stated that the petitioner's annual increase in revenues and assets demonstrates that it has a reasonable expectation of increased profits.

A taxpayer's total assets, or an increase in them, are almost entirely unrelated to future profitability of increased profit, although counsel appears to cite it as an index of future profitability. This office will not address that specious index further.

An increase in volume, expressed as gross receipts, is not necessarily a harbinger of increased net profits. If the sales are high but the gross profit margin is low, it will not translate into high gross profit, let alone net profit.[15] If the profit margin is acceptable but the administration of the business is inefficiently handled and operating expenses are high, then it will result in good gross profits, but low net profits or even losses. The record contains no indication that, an increase in the petitioner's volume would result in a greater net profit.

Further, the record does not point to the rising gross receipts to which counsel alludes. The petitioner's unaudited financial statements show that the petitioner had gross receipts of $17,445,744 during 2001 and $17,334,690 during 2002. The petitioner's 2003 tax return shows gross receipts of $16,527,334. The available evidence shows a decrease in gross receipts during all of the salient years. Even if the petitioner's compiled financial statements were considered reliable evidence, and even if a rise in gross receipts invariably presaged an increase in profits, the evidence does not support the rise in volume counsel describes.

Counsel is correct that pursuant to *Matter of Sonegawa*, a petition may be approved notwithstanding that the petitioner had losses or low profits and insufficient net current assets to pay the proffered wage during a given year. *Sonegawa*, 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 *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

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[15] To illustrate the concept with an extreme, a company might sell products below cost. In that event it would likely generate very high gross receipts, but would be unable to generate either gross or net profit.

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 contains no evidence that temporary forces uncharacteristically depressed the petitioner's profits and net current assets during the salient years. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, 2003 and 2004 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Therefore, the petitioner has not established that it has 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 record suggests an additional issue that was not addressed in the decision of denial.

In the May 19, 2005 letter the service center requested copies of the petitioner's 2001, 2002, 2003, and 2004 tax returns. The record contains only the petitioner's 2003 tax return. The petitioner failed to submit the requested 2001, 2002, and 2004 tax returns and did not explain that omission.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further still, information from the website of the California Secretary of State indicates that, as of June 8, 2007, the petitioner's corporate status was suspended. If the petitioner pursues this matter further it should provide evidence demonstrating the cause of that suspension, the date of that suspension, whether the petitioner's corporate status has been reinstated, the date of any reinstatement, and the petitioner's current corporate status.

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 appeal is dismissed.